CONSIDERATIONS OF THE CONSTITUTIONALITY
OF THE PRESIDENTS PROCLAMATIONS

BY: JOHN HENDERSON

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The history of nations teaches one universal truth, — namely, that administrative power in Government has an eternal tendency to augmentation.

The captivating bauble is ever being fondled and nursed into extension, and under pleas of necessity, the public good, or the bolder warrant of undisguised usurpation, its dimensions are enlarged, till, like the frog in the fable, its end is explosion. Deplore it as we may, the rule has no exception. Vigilance and integrity may do much to postpone the catastrophe, but the cankerous evil is never cured.

One of the most popular cheats by which power augments its pretensions, is by the plausible disguises of precedent. One bad precedent readily begets others, and all serve as standards for imitation. Whether originating in wily craft, blind zeal, or honest ignorance, they are equally potent for mischief, and the party who opposed them when initiated, too readily follow them as examples.

I do much regret that President Pierce has made his present demonstration in this line of bad precedents. For, though he has avoided the libellous vulgarities indulged in by the late Administration on a like occasion, and has perpetrated no such discreditable blunder as to affect to commission the military with the functions of the tip staff by virtue of a proclamation; and though his language is decently discreet, and his object, as expressed, seems to have been considerately studied — still it is submitted his views, policy and opinions, so published, are not timely and well advised, and the power asserted more than questionable.

I propose a brief inquiry into the authority for such a proclamation, and of its objects, and the policy and opinions therein expressed.

General Pierce says that it is "in virtue of the authority vested by the constitution in the President of the United States" that he issues this proclamation. Now, we have many laws of Congress which give the power or make it the duty of the President to issue proclamations in the particular cases which these laws have specified. Such is his duty by law in cases of domestic insurrections. But our neutrality laws have enjoined no such duty and given no such power. And to all who have read the constitution of the United States it is sufficient to say, it contains no express authority to the President to issue proclamations of this or any other description; and I maintain the authority is not fairly implied. What is a proclamation — an official proclamation? Is it not to declare some matter of state, not previously denoted, to the public? And must it not carry with it some inherent authority, or declare the establishment of some rule or authority not previously established? If less than this, it is a mere *brutum fulmen*, or simple notice, not of what the President will do, or will have done, as matter of official discretion, but that he expects that himself and his subordinates will do their duty as the laws enjoin. If this be all, it is not worth the ammunition so pompously expended; and if less or more than this, it is without authority. Now, where laws direct the President to make proclamation, it is for some purpose denoted by the law, or where the binding force of laws as made dependent upon the issuance of an official proclamation, or suspended laws are reanimated by proclamation, we perceive a practical use to such formal monition. But no such object or consequence is connected with the law of 1818.

"These proclamations," says Justice Blackstone, have then a binding force — when (as Sir Edward Coke observes) they are grounded upon and enforce the laws of the realm; for though the making of the laws is entirely the work of a distinct part, the legislative branch of the Sovereign Power, yet the manner, time and circumstances of putting those laws in execution, must frequently be left to the discretion of the Executive magistrate, and therefore his constitutions or edicts concerning these points, which we call proclamations, are binding upon the subject," &c.

Now, who will pretend President Pierce's proclamation is an "edict" of this description? But further, says the same author:

"From the same original, of the King's being the fountain of justice, we also deduce the prerogative of issuing proclamations, which is vested in the King alone."

Now, the Supreme Court of the United States has decided that the Government of the United States has no prerogative. How, then, has our President, independent of legislative grant, become invested with this Kingly prerogative?

When the first of these royal manifestoes was issued independent of law, by President Washington, in 1793, it was widely and violently denounced as a usurpation, by the whole democratic party. It devolved upon that great man — the great Ajax of executive power — Alexander Hamilton, to eviscerate from the Constitution a vindication of this act. The principal points of his argument were to this effect: A proclamation was "a usual and proper measure" on like occasions; and, to issue a proclamation was an executive act. And, as the Constitution of the United States vested the "Executive power" in the President of the United States, *ergo*, it was by constitutional authority the President issued this proclamation of neutrality.

Mr. Madison, a much abler expositor of the Constitution, in assailing this flimsy sophism, showed most conclusively that if the powers of the President were to be ascertained, by showing what were executive powers in the abstract, as known or defined in governments elsewhere, there was no difficulty in establishing for the President most of the powers of the English Sovereign. The democratic intelligence of that day was fully satisfied that President Washington's proclamation was without constitutional warrant. Yet it must be acknowledged that democrats have not since hesitated to follow his example. Under these circumstances, it may be admitted the President's transgression in this case is comparatively venial. Yet, who shall say it were not better it had the clear sanction of the Constitution?

It is presumed as probable, however, that President Pierce refers for his authority to that fascile and abounding source of Executive power, that the President "shall take care that the laws be faithfully executed." All remember how Amos Kendall pressed the omnipotence of this source of Executive power. The curt reply, and pointed exposition, of this text by the Supreme Court of the United States, may be seen in 12th vol. of Peter's Reports, pp. 612-613.

Time is not allowed me for the ample exposition of this clause of the constitution, of which it is susceptible. But a brief analysis will show it gives no warrant for this proclamation.

Now, in the first place, this proclamation is essentially preventive, and aims, by its counsel and monition, to dissuade the citizen from committing a breach of the law, which is supposed to be meditated. Such counsel may be very good in its way, whether coming from the President or from the private friendship of private citizens; and such advice may

be as properly given by one as the other. But the best wishes of the President to prevent a breach of the laws, cannot, by any logic, connect itself with his duty to take care that the laws be faithfully executed. Laws not broken cannot be executed by observance merely. All know that, in a legal sense, the execution of the law follows judgment. More liberally construed, it is the enforcement of the penalty of the law, after its infraction. And in this sense, all the duty of the President on this point is included. As supervisor of all ministerial officers, subject to his control, if they fail in duty and violate the law, they incur the penalty of removal from office, and such other penalties as the law has prescribed to be adjudged by the courts of justice.

But the President has no supervising power over the judiciary. He has no duty or responsibility for the manner in which the judges perform their duties. But when they have pronounced judgment it is then the duty of the President to take care that the laws be faithfully executed, as the court has adjudged. And for this responsible duty he is armed with all the military power of the government. If, therefore, we have examined the question rightly, the authority for this proclamation is not found in the constitution, — and, being without law, is unwarranted.

Next, as to the matter of this proclamation, and what it threatens to perform.

The President recites that information "has been received that sundry persons, citizens of the United States, and others residing therein, are engaged in organizing and fitting out a military expedition for the invasion of the Island of Cuba."

Where this expedition is being organized and fitted out, and from whence it is intended to move for the invasion of Cuba, is not indicated. And without these two important facts are fixed, and without its being charged and imputed that the expedition is being organized and fitted out, within the United States, and to be carried on therefrom, the President has made no case, which, if consummated, would violate either our treaty with Spain, or the neutrality act of 1818. That a citizen of the United States may, within the United States, use his means and money to promote an expedition to be organized out of the United States, and to be carried on from without the United States against Cuba, and not involve this Government in any breach of its treaty with Spain, or involve the neutrality of the Government in violation of the act of 1818, are propositions too plain, and too well established by the decision of our courts, and our diplomatic correspondence, to be plausibly questioned; and such was the obvious understanding of Congress when they passed the temporary act of 10th March, 1838, to meet the exigency of carrying on a military expedition in Canada, as sections two and five of that act clearly show.

But the President, perhaps, would be understood that the supposed expedition was so fitting out, and so intended to be carried on, as to violate both the treaty and law, as he charges it would. I answer then to the fact, that so far as I have any information on the subject referred to, no intention of infracting either the law or treaty is meditated by any one; and that no act violative of either, nor act involving the neutrality of the Government of the United States, will be perpetrated.

But why should there be in any quarter a disposition to pervert or misrepresent the truth as to the sentiments, feelings and opinions of what we suppose to be those of the great mass of the people of Cuba, and of many citizens of the United States who concur with them in these sentiments and opinions?

The Cuban believes the tyranny under which he suffers is lawless, insatiate, and cruel in the last degree, and that he is deprived of all participation in self-government. Who doubts the fact? The fact admitted, the power then which controls him is a sheer wicked despotism. May the Cuban rightfully conspire and struggle to overthrow this despotism, and may he rightfully invoke assistance to this end? To deny this is to repudiate the integrity of our own independence, for we so struggled, and sought, and obtained private, secret aid from the French people. And it will not do for hypocrisy, cant, and falsehood to assail the purity of motive and action as to assistance so sought and so to be given.

The mock morality taught from high places in censure of such conduct, the agreement among the minions or apologists of arbitrary power to call such aid piracy, robbery, and plunder, will not change the facts. This quarrel, all know, is essentially the cause of the Cuban against an unmitigated tyranny; and no American citizen was ever justly chargeable with the folly or the wrong of claiming a right of invasion or of conquest of the island of Cuba. The right of revolution is the Cuban's; the right of an American citizen is to aid them if he pleases, so he does not violate the laws of his country in doing so. The American citizen is not the property of his government. It is his right to peril himself in any war or popular strife abroad he sees it to hazard. And he well knows, if the enterprise is one unprotected by the flag of his country, the peril is his own. Shall we, who encourage the people of every nation to a renunciation of their natal allegiance, question this right?

Be it known, therefore, that we — at whom, it is supposed, the denunciations of this proclamation are aimed — profess to believe ourselves as pious, moral and patriotic as any of our fellow-citizens who would lecture or censure us. And the more so, that we have never received any such lectures or censures that have not been conceived in misapprehension or misrepresentation, or otherwise marked by a depravity and corruption of principles of which we conceive ourselves incapable. If the cause of Cuba be right, we feel how pointless and exaggerated the efforts to brand us with either moral or political wrong, in giving it our countenance and support.

"If," says Mr. Madison, "there be a principle that ought not to be questioned within the United States, it is, that every nation has a right to abolish an old government and establish a new one. This principle is not only recorded in every public archive, written in every American heart, and sealed with the blood of a host of American martyrs; but is the only lawful tenure by which the United States hold their existence as a nation."

These were the sentiments of young America. There is yet enough of the spirit of young America extant, to frown at the fogyism that would obliterate the precious record from our memories.

In regard to Cuba, then, grant the rule of international law, "that every government de facto is to be taken prima facie as the government of the people's choice"; yet the prima facie evidence may be rebutted. And where is there mendacity bold enough to assert that the power which throttles Cuba like a night-mare is not a sheer despotism?

All law writers admit there may be a naked tyranny that has no right of protection, or respect from the laws of nations. Nor can the tyrant claim any legal protection even for his personal security. Mr. Madison says:

"It is not denied that there may be cases in which a respect to the general principles of liberty — the essential right of the people, or the overruling sentiments of humanity might require a government, whether new or old, to be treated as an illegitimate despotism."

Now, I challenge any one to cite me to a single element in the power which crushes Cuba, that entitles that power to be respected as the legitimate government of the people of Cuba. The Cubans then have good cause to revolt. But this power, too, in the wantonness of violence, is now being exerted to an end, dangerous to the interests of our Southern citizens. And these, together, make augmented grounds of our sympathy, and excite many, it is presumed, to such lawful and legitimate action as may relieve the oppressed Cubans, and insure our own domestic security. Now, with these motives and purposes candidly avowed, are the facts intended to be controverted by this proclamation? or if admitted to be those aimed at, arraigned and censured by the proclamation, then it may become a graver inquiry, how far the President shall be successful in his efforts by proclamation, to traduce these motives and sentiments, — or traduce those citizens who avow them.

When it was fashionable at Washington, in 1825, to sympathize with the oppressed Greeks, there were no presidential threats of prosecuting John Q. Adams, Henry Clay, Daniel Webster, Mr. Forsythe, Gen. Lafayette and others, for giving Felix Huston, Esq., the most flattering letters to the great unnamed of Europe, commending his gallantry, and the cause he was to engage in, — being to aid the Greeks in revolt against their Turkish oppressors. And it was well known to all of these gentlemen, that he was openly to take men and material aid from the Port of New York in furtherance of his military enterprise. The act of 1818 was then in force, and our country was at peace with the Turks. And I shall not pretend, but the act so meditated, was in violation of that law. But I allude to the fact to show that even the conservative Intelligencer did not accuse these persons as instigating robbery or piracy — or of entertaining sentiments and wishes derogatory to them as gentlemen, patriots and good citizens. And, as giving special *eclat* to the preparations for that expedition, Mr. Adams, then just elected to office, gave to the same Greek filibuster a regular passport under the great seal of the State. If such, then, were the honors of such an enterprize, and such its advocates and promoters, can it be that the aspersions of the proclamation against those who are supposed to sympathize in an equally meritorious cause, can be well deserved?

Much might be said of the President's imputations of lawlessly complicating the question of peace and war. Having said there was no intention entertained by any, so far as known or believed by me, of compromising the neutrality of the Government of the United States, the question of peace or war by the United States cannot be involved. It is well known there are already a considerable number of American citizens engaged in the Russian and Turkish service, and the wars waged by them. But is it supposed this makes our Government in any way party to those wars, or complicate our peaceful relations with those Powers?

The threats in the proclamation of a legal prosecution is in bad taste, if not impotent of any legitimate end.

Under the theory of our constitution, Government prosecutions, so specially distinguished, have no place. I mean by such, State prosecutions — those lawfully instituted and carried on by the king, his council and agents in England, and wrongfully imitated by Executive pretensions here, where no such legal authority is given.

Under our constitution, the judiciary is wholly separated and independent of executive power and action. Its duties are distinctly assigned, and its legal machinery for the performance of these duties are set apart with the distinct intention that its operations shall go on uninfluenced by executive control. The manner in which all infractions of the public law shall be redressed, how the accused shall be arrested, tried and condemned to punishment, is, by the constitution and laws, all provided for, and these duties exclusively assigned to the judicial department. That the courts will perform their duty with fidelity, in all cases, is a confidence which the theory of our constitution entertains without suspicion. In this respect, they are as much trusted as the President is.

If this be so, wherein has the constitution appointed that it may, nevertheless, specially become the President, in fancied matters of State, to work himself up to an energetic activity to have the courts to do something more or something better than they otherwise would do if left to the independent performance of their duty as entrusted to them by the constitution?

The theory of the English constitution expressly provides for such executive interference. The King is the fountain of justice. Theoretically, he sits in court as prosecutor, judge and advocate. But not presiding in court in fact, it is said the judges reflect the image of his majesty and justice. In the British constitution State trials are especially provided for. "The power of the Privy Council is to inquire into all offences against the government, and to commit the offenders to safe custody in order to take their trial in some of the courts of law." What Privy Council has our President on whom these duties are devolved? Nor will it do to say the President represents the commonwealth in such prosecutions. It is the judiciary only which is entrusted with this service, and the officious intermeddling of the executive is without constitutional warrant.

I can well understand that the Attorney of the United States, to whom the outside direction and management of any prosecution is exclusively committed, may often

require the attendance of witnesses from a distance, and aid from the Treasury to effect that object; but these exigencies may arise in any case, and should be conducted alike in all. I know, too, the President, guided by his personal anxieties (not to say prejudices), by use of his official influence, through subordinate agents, and his activity in court by the presence of these agents, and the thus marked manifestation of his zeal and wishes, may render a prosecution successful or oppressive, when it might not otherwise be so. But all such partial zeal and unequal interference, which may so effect the unequal administration of justice, is a perversion of justice, and grossly adverse to the genius of our Government and the equal rights of the citizen.

Our courts should not be so tampered with. If it is right the Judge should be impressed with the wishes of the Executive in a given case, — or right and proper he should be made to understand them, there should be some good reason for it. If to quicken his zeal in the prosecution, it is a corrupt influence. If to relax his zeal, it is alike corrupt. There is no legitimate way in which the threatened energies of the President are to have active scope in the prosecution meditated; that must not render the exercise of his powers gravely questionable, or that shall not reflect with some stain, or unnecessary shade of suspicion, upon the ermine of justice. How infinitely better, then, such rash threats, as to the manner in which justice shall be administered, should have been omitted in this proclamation. The penalties of the law carry with them their legitimate terrors to the intelligence and good sense of the American citizen. But in what way such threats have become a proper function of power, and what their tendency for good, is not readily perceived.

The independence, the uninfluenced independence of the judiciary, is the chief corner stone of the Temple of Liberty, and the surest guarantee of the equal rights and freedom of the citizen. Its wisdom is forcibly illustrated in the Federalist, and seconded and approved by Justice Story, in his commentaries.

Mr. Hamilton says: "That though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter. I mean, so long as the judiciary remain truly distinct from both the legislative and executive; for I agree that there is no liberty, if the power of judging be not separated from the legislative and executive powers."

Now, all these threats of the Executive to obtrude his zeal and his wishes, and even his presence, by subordinate agents, and his supernumerary attorneys, into the courts of justice, to effect a conviction, can have no proper, pure and good result. And, however modestly or truly disclaiming to seek an undue influence with the judge, yet such intrusions could not leave his infirm humanity as erect and self-poised as if his mind was not burdened with the Executive energies and anxieties so manifested and paraded before him.

Though having but slight participation in whatever of movement there is now being made for the redemption of Cuba, and the security of the South, I am willing to shoulder my share of the responsibility. Not wholly unknown to the American people, I have some

pride of reputation, and claim to entertain as high a respect for law, for truth, and for such virtues as are comprised in the character of a good citizen, as those may affect to have who can use official station as a license to propagate detraction. And before the American people I thus defend myself against all disparaging charges and insinuations contained in the President's proclamation, so far as I am concerned.

JOHN HENDERSON.
NEW ORLEANS, La., June 10, 1854.