OPINION

OF

JUDGE N. K. HALL,

OF THE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK,

ON

HABEAS CORPUS

IN THE CASE OF

REV. JUDSON D. BENEDICT,

AND

DOCUMENTS AND STATEMENT OF FACTS RELATING THERETO. WITH NOTES AND ADDITIONAL AUTHORITIES; WITH

AN APPENDIX,

CONTAINING A COLLECTION OF AUTHORITIES AND MANY USEFUL SUGGESTIONS UPON THE SUBJECT OF MARTIAL LAW, AND THE EXERCISE OF ARBITRARY POWER.

BUFFALO:
JOSEPH WARREN & CO., PRINTERS, COURIER OFFICE, 178 WASHINGTON STREET.

1863.

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INTRODUCTION.

The following opinion, upon the application of Rev. Judson D. Benedict, for a Writ of *Habeas Corpus*, was first published in the *Buffalo Commercial Advertiser* of this city, on the 24th day of September, 1862. It was published in the *Buffalo Courier*, the next morning; and in the afternoon, in the *Courier and Republic*. It was also published in the weekly papers issued from the same offices: and, afterwards, in THE WORLD AND MORNING COURIER AND NEW YORK INQUIRER.

The counsel and friends of Mr. Benedict desiring to give it a still wider circulation, an edition of 10,000 copies of the opinion, and of a statement of the facts of the case, prepared by A. Sawin Esq., the counsel for Mr. Benedict, was published in pamphlet form, at Buffalo.

Subsequently an edition of 8000 copies of the opinion was published in New York City. In that edition the opinion was preceded by an introductory statement, signed by many of the leading members of the bar of that city; which statement is now re-printed on the opposite page.

These editions having been exhausted, and further copies of the opinion having been called for, it is now re-printed, with useful notes by the judge who delivered the opinion, assisted by gentlemen of the bar.

A copy of the opinion of JUDGE HALL on the motion to commit the U. S. Marshal for a contempt, in disobeying the Writ of *Habeas Corpus*, issued upon the re-arrest of Mr. Benedict immediately after his discharge under the first writ, is also annexed: together with a statement of the facts connected with such second arrest, as furnished by the reporter of the *Courier*.

In the APPENDIX, following the first opinion, will be found (besides other notes) a note containing extended quotations from many of the most accurate and reliable military and legal writers, and other distinguished persons, who have discussed the subject of MARTIAL LAW; and also a few suggestions in regard to the term *Martial* Law, its true signification and force, and the exercise of arbitrary power, in England and the United States, under pretence of its authority.

There have also been added extracts from charges to the Grand Jury, by Judges Leavitt and Hall, and a decision of Mr. Justice Swayne, upon the law of treason: Also an extract from an Act of Congress providing for the punishment of conspiracies to resist the laws of the United States.

JUDGE HALL'S OPINION.

The opinion of Judge Hall, now printed, is on a topic popular in its nature, and of an interest personal, political and universal.

Military power, in exclusion of all existing civil process of law, is now claimed throughout the loyal States to be exercised by Provost Marshals. To those who enforce it, their friends and supporters, this may seem harmless or trifling; not so to those who are, or may be, its victims.

To be arrested, for one knows not what; to be confined, no one entitled to ask where; to be tried, no one can say when,—by a law nowhere known or established; or to linger out life in a cell, without trial, presents a body of tyranny which cannot be enlarged.

To prevent this is the office of the Writ of *Habeas Corpus*.

It would not seem wisdom, in those who established our liberty, to have conferred on the Executive, who was to exercise it, the right of determining when he should put forth the power of suspending the laws protecting the liberties of the people. The uniform opinion until lately, has been that it was in the power only of Congress, whose office it is to make and repeal laws, to suspend our lawful liberty. Its members are speedily and directly responsible to the people, and are themselves subject to the irresponsible power which they may invoke. In this there may be some security. In mere Executive legislation, supported by military force, there is none.

On this vital matter, Judge Hall's decision is clear, forcible and convincing. The Opinion is called forth in the regular course of his duty, by a case arising in the ordinary progress of life.—It is not an opinion volunteered. It is not written to uphold a power on which he is dependent. It is not purchased by hope of promotion. It is the calm judgment of a learned magistrate, deciding for law and liberty. Its principles equally touch property and life. No person can be insensible to its importance, and there is no one whom it does not concern.

As members of a profession whose highest office and gravest duty it is to protect, preserve and defend the liberty of the citizens, we ask the universal perusal of this judgment.

New York, October, 1862.

ALEXANDER HAMILTON, Jr.,
EDWARD H. OWEN,
WILLIAM BETTS,
C. O'CONOR,
F. F. MARBURY,
J. E. BURRILL,
W. C. PRIME,
WASHINGTON Q. MORTON.
THOMAS H. RODMAN,
JEREMIAH LAROCQUE,
WALTER L. LIVINGSTON,
E. J. WILSON,
BEVERLY ROBINSON,
CLARKSON N. POTTER,
GEORGE A. HALSEY,
J. A STOUTENBURGH,
RICHARD O'GORMAN,
SAMUEL L. M. BARLOW,
G. M. SPEIR,
DANIEL LORD,
JAMES T. BRADY,
E. W. STOUGHTON,
GREENE C. BRONSON,
G. R. J. BOWDOIN,
W. C. WETMORE,
NELSON CHASE,
JOHN N. WHITING,
L. S. CHATFIELD,
JOSEPH LAROCQUE.
JOHN McKEON,
A. MANN, Jr.,
GEORGE BUCKHAM,
GILBERT DEAN,
C. DONOHUE.
F. F. STALLKNECHT,
WILLIAM C. BARRETT
HAMILTON MORTON

JUDGE HALL'S OPINION ON HABEAS CORPUS

IN THE CASE OF JUDSON D. BENEDICT.

IN THE MATTER OF
JUDSON D. BENEDICT.

HALL, DISTRICT JUDGE.—The application for the writ of *habeas corpus*, in this case, was made while I was engaged in other duties; and although I retained the petition and gave the questions presented a hasty examination, before I allowed the writ, I had no time to prepare an opinion upon the questions which then occurred to me as necessary to be considered before granting the petitioner's application. I therefore simply made a note of the authorities examined; and, as the case is one of importance, I shall now state my opinion upon the questions considered at the time the petition for the *habeas corpus* was under consideration;—and shall refer to the authorities then examined, and some others, which appear to me to require the exercise of the jurisdiction and authority invoked by the petitioner.

The Act of Congress of Sept. 24, 1789, (the Judiciary Act,) declares that "either of the Justices of the Supreme Court, as well as Judges of the District Courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment:—Provided that writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

It appears by the petition and affidavits annexed, that the petitioner is confined in gaol, and that the only cause of his detention rendered by the gaoler, is a paper delivered to him by A. G. Stevens, Deputy U. S. Marshal, of which the following is a copy:

"Marshal's Office, Buffalo,
September 2d, 1862.

David M. Grant will take from Fort Porter, Thomas Cummings, James Parker, Antoine Quantent, Noah B. Clark, and Jared Benedict, prisoners confined there, committed under orders of the War Department, and remove them to the Erie County Jail for safe keeping, and there detain them until further order, and the Sheriff or Jailor of said County will keep them until further order, in said Jail.

[Signed] A. G. STEVENS,
U. S. Dep. Marshal."

"To Col. E. P. Chapin, and the Sheriff and Jailor of Erie County."

From this it clearly appears that the petitioner is in custody by color of the authority of the United States, either under the orders of the War Department, or of the Deputy Marshal, who is an officer, deriving his authority, as such, from the United States.

The petition further shows that when the Deputy Marshal was applied to by the counsel for the petitioner, and asked "if he arrested the petitioner by virtue of any order, process, or paper," that officer said he did not, but showed the counsel a slip, cut from a newspaper, purporting to contain a copy of an order of the War Department, in the following words:

"WAR DEPARTMENT,
Washington, August 8th, 1862.

Ordered First—That all United States Marshals and Superintendents, and Chiefs of Police, of any town, city, or district, be and they are hereby authorized and directed to arrest and

imprison any person or persons who may be engaged, by act, speech, or writing, in discouraging volunteer enlistments, or in any way giving aid and comfort to the enemy, or in any other *disloyal practice* against the United States.

Second—That immediate report be made to Major L. C. Turner, Judge Advocate, *in order that such persons may be tried before a military commission.**

Third—That the expenses of such arrest and imprisonment will be certified to the Chief Clerk of the War Department, for settlement and payment.

[Signed] EDWIN M. STANTON,
Secretary of War."

The affidavit of the counsel also states that the Deputy Marshal, at the same time, said, "*that* printed slip was his *only* authority for the arrest of said Benedict."

The petitioner states in his petition that he "is not committed or detained by virtue of any process issued by any Court of the United States, or any Judge thereof, or by virtue of the final judgment, or decree of any Court, or by virtue of any process of any kind or description; that he has neither by act or speech been disloyal to the Constitution or laws of the United States, or been guilty of any violation of any order of the War Department, or of the President of the United States, or been guilty of any offence or act subjecting him to arrest;" and this petition is verified by the oath of the petitioner.

On the case thus made by the petitioner, I should have granted a *habeas corpus* at once, on the first reading of his petition and the accompanying affidavits, had I not seen a newspaper copy of an order of the War Department assuming to suspend, in certain cases, the privilege of the writ of *habeas corpus*.

This order bears the same date as that referred to by the Deputy Marshal, and is in the following words:

"WAR DEPARTMENT,
Washington, August 8th, 1862.

Order to prevent evasion of military duty and for suppression of disloyal practices.

First—By direction of the President of the United States, it is hereby ordered that until further order, no citizen liable to be drafted into the militia shall be allowed to go to a foreign country, and all Marshals, Deputy Marshals, and military officers of the United States, are directed and all police authorities, especially at the ports of the United States on the seaboard and on the frontier, are requested to see that this order is faithfully carried into effect. And they are hereby authorized and directed to arrest and detain any person or persons about to depart from the United States in violation of this order, and report to L. C. Turner, Judge Advocate, at Washington City, for further instruction respecting the person or persons so arrested or detained.

Second—Any person liable to draft, who shall absent himself from his County or State, before such draft is made, will be arrested by any Provost Marshal *or other United States or State officer*, wherever he may be found within the jurisdiction of the United States, and conveyed to the nearest military post or depot, *and placed on military duty for the term of the draft;* and the expenses of his own arrest and conveyance to such post or depot, and also *the sum of five dollars as a reward to the officer* who shall make such arrest shall be deducted from his pay.

Third—The writ of *habeas corpus* is hereby suspended in respect to all prisoners so arrested and detained, and in respect to all persons arrested for disloyal practices.

[Signed] EDWIN M. STANTON,
Secretary of War."

These two orders of the War Department, bearing the same date, may properly be considered together, and as relating to the same general subject. Whether issued separately or together; whether, if issued separately, the one referred to by the Deputy Marshal was first issued or not, it may not be very material to inquire; but, as that declares that "All United States Marshals, and Superintendents, and Chiefs of Police of any town, city or district, be and they are hereby authorized and directed to *arrest and imprison* any person or persons who may be engaged, by act, speech or writing, in discouraging volunteer enlistments, or in any way giving aid and comfort to the enemy, *or in any other disloyal practice against the United States*," and the other order assumes to suspend the writ of *habeas corpus* in respect not only to all persons arrested and detained by virtue thereof, but also "in respect to all persons arrested for disloyal practices," (a term not otherwise contained in that order,) it may be presumed that the order referred to by

*See Note B, Appendix.

the Deputy Marshal was first issued, and that the other order was intended to suspend the writ of *habeas corpus* in respect to persons arrested under that order, or under the order referred to by the Deputy Marshal.

If the order declaring the writ of *habeas corpus* to be suspended can be considered as legal and valid it is necessary to consider its scope and effect, and, as both questions are therefore properly before me, I shall consider both in their order.

It is to be observed that the order first recited, confines the power of arrest to United States Marshals, and Superintendents, and Chiefs of Police, while the second order, in respect to the cases within it, extends the power to all Deputy Marshals and all military officers of the United States, and to all police authorities. These officers, many thousands in number, and of every grade of intelligence, are scattered over every portion of our country. To all of these this arbitrary power of arrest, without warrant, without any prior legal inquiry, and without the slightest preliminary proof of guilt, is assumed to be given.* Was it intended, then, that every policeman and every military officer throughout the loyal States, and in localities far removed from the seat of military operations, should be authorized to arrest and imprison any citizen, and that if, on taking the party into custody, or afterwards, such officer should declare that he made the arrest by virtue of the orders of the War Department of August 8, 1862, or for disloyal practices, he could keep him in prison, or in his own custody, or compel him to enter the military service, and also require all judicial officers, when the prisoner or his friends applied for a writ of *habeas corpus*, that the facts of the case might be judicially ascertained and the question of the legality of his arrest and detention considered, to say "The privilege of the writ of *habeas corpus* is suspended, and you can have no relief?" Is every man supposed to be subject to militia duty, who has left or shall leave his county since the 8th of August last, and prior to the unknown day in the future when a draft is to be made, no matter under what circumstances, to be punished by being forced into the military service for nine months, without any hearing, without any opportunity to show that he is exempt from militia duty, when the Constitution provides that "no person shall be deprived of life, *liberty* or property, without due process of law!" I am aware that these restraints upon travel have been removed, but was that the original intention of the order?

My personal confidence in the integrity, patriotism and good sense of the President, as well as the respect due to the high office he holds, compels me to require the most conclusive evidence upon the point before adopting the conclusion that he has ever deliberately sanctioned so palpable a violation of the constitutional rights of the citizens of the loyal States as the order of the War Department, thus construed, would justify and require.

Here, and throughout most of the loyal States, we are far removed from the several fields of military operations. All the arts and occupations of peace can be and are pursued in entire security, and all the laws of the State and Union can be administered by the ordinary Courts of justice as freely, as fully, and as efficiently, as in time of profound peace. The execution of the laws of the land has not been resisted by our people. On the contrary, they have responded to the calls of the general Government with unexampled unanimity and alacrity, and have offered their blood and their treasure, without stint, to maintain the authority of Constitutional Government.—They have waited for no conscription, but have sent hundreds of thousands of volun-

* The second article of this order seems to extend the power of arbitrary arrest, in the cases provided for in that article, to every officer, civil or military—of whatever rank, designation or authority—elected or appointed, under the laws of any State or of the United States, who is willing to become the instrument of its execution.

Whatever may be the ultimate decision upon the question of the power of the President, legally to suspend the writ of *habeas corpus*, there can be no doubt that these arrests upon mere suspicion, without complaint on oath, and without judicial warrant, are clear violations of the Constitution;—violations which should not be forgotten or overlooked, in the, perhaps, too earnest, discussion of the question of the President's authority.—Without a previous violation of the Constitution, by these arrests without warrant, or any legal process, the question of the President's power in this respect would become comparatively unimportant.

teers into the field, to meet, without complaint, all the exposures, all the vicissitudes and all the dangers of the camp and the battle field. Without waiting for the taxgatherer they have voluntarily and freely contributed untold millions to hasten the departure of these volunteers and strengthen the arm of the Government established under the Constitution of the Union. Is it possible that such orders as those above copied were intended to operate upon such a people, in the loyal States, and place their liberties at the mercy of every military officer, every officer of police, and every policeman, and then to suspend the writ of *habeas corpus* in such manner as to prevent a judicial inquiry into the question whether the facts of the case would justify an arrest, even under such orders? Can a man not liable to do military duty be arrested under such order and be detained by force, in the military service, without the privilege of showing his exemption and procuring his discharge from such illegal restraint? Could it have been intended that military officers, of every grade, and policemen of every class, throughout the loyal States, acting upon their own suspicions, or upon any representation which political prejudice, personal malignity, or other motives might suggest, or in the mere wantonness of unusual and arbitrary power, should be authorized to arrest and imprison any citizen, without the possibility of a judicial investigation? Is every official to whom these orders are addressed to determine for himself what shall constitute *disloyal practices;* —a term not known to the law, which has no fixed or reasonably certain definition, and which every arresting officer is left to interpret as his prejudices, his passions or his interest may incline?* And is such interpretation to be subject to no revision, except by a Judge Advocate at the seat of Government, acting upon extrajudicial, if not entirely *ex parte* testimony, in the absence of the accused? Such a construction of the order would place the liberty of every citizen at the mercy of any of these officials, one of whom might conclude that to speak disparagingly of the military ability and military conduct of General McClellan was a disloyal practice, and tended to discourage volunteer enlistments; while another might consider the abuse of McClellan a virtue, and hold the expression of a doubt of the superlative ability of Fremont as a disloyal practice of the deepest dye; and yet another might suppose that any person who should read aloud the newspaper accounts of the retreat of Gen. Pope's army from the Rapid Ann to the Potomac, and express a doubt of the competency of that General, was discouraging enlistments and giving aid and comfort to the enemy.

I confess, nevertheless, that there is some reason for assuming that the fair construction of the language of the order of the War Department, if it could properly be considered without reference to the provisions of the Constitution of the United States, would lead us to conclude that the privilege of the writ of *habeas corpus* was intended to be suspended in all the cases supposed.—And I understand such a construction has been sometimes insisted upon; but when I consider that the Constitution has imposed restraints upon the arbitrary exercise of military power, (at least beyond the lines of military operations,) I am unwilling to adopt that construction without strong evidence that such was the intention of the orders referred to. Such a construction of these orders, if their validity can be established, would go far towards making our government a despotic instead of a constitutional government.

Even in the midst of our present struggle, we should not forget the teachings and history of the past, and regard as trivial and unimportant, constitutional principles, the persistent violation of which has led to the dethronement of kings, and the overthrow of long established forms of government. We should not forget the *lettres de cachet*† of the French Monarchs, or the illegal imprisonments under Charles the First. In our efforts to read aright and profit by the terrible lesson which the present condition of our unhappy country pre-

* See Note F, in Appendix.

† A "lettre de cachet" was an arbitrary order of the Kings of France, in the form of a letter, addressed to a person in order to banish or imprison him. An arbitrary warrant of imprisonment without legal accusation or trial.

sents. we should not forget what Hume, and Hallam, and Blackstone, and Marshall, and Story, and Kent, have taught us.* The language of Blackstone, [1 Blackstone's Com., 134, 135, 136,] has been often quoted and approved, and it states with accuracy the laws and constitution of England, and the practice of the French monarchy at the time he wrote. This, with the proceedings of the House of Commons upon the celebrated Petition of Right, shows the importance which the sore experience of the people of England had given to the questions involved in the present case.—Blackstone says, [vol. 1, p. 134,] "Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observations as upon the preceding article, that it is a right strictly natural; that the laws of England have never abridged it without sufficient cause, and that in this kingdom it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws. Here again the language of the great charter is, that no freeman shall be taken or imprisoned but by the lawful judgment of his equals, or by the law of the land.(†) And many subsequent old statutes expressly direct that no man shall be taken or imprisoned by suggestion or petition to the king or his counsel, unless it be by legal indictment, or the process of the common law. By the petition of right: [3, Car. I.,] It is enacted that no freeman shall be imprisoned or detained without cause shown, to which he make answer according to law. By 16, Car. I., c. 10. if any person be restrained of his liberty by order or decree of any illegal court, or by command of the king's majesty in person, or by warrant of the council

(*) Judge Curtis in his late publication of October, 1862, says: "Amidst the great dangers which encompass us, in our struggles to encounter them, in our natural eagerness to lay hold of efficient means to accomplish our vast labors, let us beware how we borrow weapons from the armory of arbitrary power They cannot be wielded by the hands of a free people. Their blows will finally fall upon themselves.

Distracted councils, divided strength are the very earliest effects of an attempt to use them. What lies beyond, no patriot is now willing to attempt to look upon."

(†) The third, fourth, fifth, sixth and eighth Articles of the Amendments to the Constitution of the United States were intended to give our people all the guaranties for the security of life, liberty and property which were accorded to the English people by *Magna Carta* and the *Petition of Right.*

These articles are as follows :

ART. 3. No soldier shall, in time of peace, be quartered in any house, without consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ART. 4. *The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly* describing the place to be searched, and the persons or things to be seized.

ART. 5. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself; *nor be deprived of life, liberty or property, without due process of law;* nor shall private property be taken for public use, without just compensation.

ART. 6. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and have the assistance of counsel in his defence.

ART. 8. Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*

And the Constitution, ART. 1, SEC. 9, provides: "No bill of attainder or *ex post facto* law shall be passed."

Notwithstanding these provisions of the Constitution—which every public officer is required to take an official oath to support—hundreds of our citizens, residents of loyal States, have been arrested hundreds of miles from the fields of military operations, without warrant; without any complaint on oath, or process of law; numbers have been taken out of their State and district and detained in prison for months, without trial, or any judicial or legal proceedings against them:—a newspaper copy of an order, or a telegram from the head of a department or other officer has been enough to cause their arrest and prevent an examination of their case on *habeas corpus;* all bail has been refused; communication with friends or counsel has been denied; until at length—perhaps after many months of imprisonment—they have been discharged without trial or any judicial inquiry, and with the acknowledgment that there was never the slightest pretence that they had been guilty of any crime. And for leaving one's own county, on lawful and necessary business, in violation of an arbitrary and illegal order, it has been assumed that any person, supposed to be liable to military duty, is to be punished by being compelled to serve for nine months in the army; a punishment which in many cases would be grossly *cruel*, and which is not only *unusual*, but was unheard of until *invented* by the present head of the War Department.

board, or of any of the privy council, he shall, upon demand of his counsel, have a writ of *habeas corpus*, to bring his body before the court of king's bench or common pleas, who shall determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain. And by 31, Car. II, c, 2, commonly called the *habeas corpus* act, the methods of obtaining this writ were so plainly pointed out and enforced, that so long as this statute remains unimpeached, no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer. And lest this act should be evaded by demanding unreasonable bail, or sureties, for the prisoner's appearance, it is declared by Ist W. and M. st. 2. c. 2., that excessive bail ought not to be required.

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 whomever he or his officers thought proper, (as in France it is daily practiced by the Crown), there would soon be an end of all other rights and immunities. Some have thought that unjust attacks, even upon life and property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth than such as are made upon the personal liberty of the subject. 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. And yet, sometimes when the State is in danger, even this 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 it is the parliament only, or legislative power, that, 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; as the Senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the Republic in any imminent danger."

Again Blackstone says, [vol. iii, pp. 133, 134 and 135:] "In a former part of these commentaries we expatiated at large on the personal liberty of the subject. This was shown to be a natural, inherent right, which could not be surrendered or forfeited unless by the commission of some great and atrocious crime, and which ought not to be abridged in any case without the special permission of law. A doctrine coeval with the first rudiments of the English constitution, and handed down to us from our Saxon ancestors, notwithstanding all their struggles with the Danes, and the violence of the Norman conquest; asserted afterwards and confirmed by the conqueror himself and his descendants and though sometimes a little impaired by the ferocity of the times, and the occasional despotism of jealous and usurping princes, yet established on the firmest basis by the provisions of *magna carta*, and a long succession of statutes enacted under Edward III. To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society; and in the end would destroy all civil liberty, by rendering its protection impossible; but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing upon every commitment the reason for which it is made, that the court, upon a *habeas corpus*, may examine into the validity; and, according to the circumstances of the case, may discharge, admit to bail, or remand the prisoner; and yet, early in the reign of Charles I, the court of king's bench, relying upon some arbitrary precedents, (and those perhaps misunderstood,) determined that they could not, upon a *habeas corpus*, either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the King, or by the Lords of the Privy Council. This drew on

a parliamentary inquiry, and produced the *petition of right,* [3 Car. I.,] which recites the illegal judgment and enacts that no freeman hereafter shall be so imprisoned or detained. But when, in the following year Mr. Selden and others were committed by the Lords of the Council, in pursuance of his Majesty's special command, under a general charge of "notable contempts and stirring up sedition against the King and Government," the judges delayed for two terms, (including also the long vacation,) to deliver an opinion how far such a charge was bailable. And when at length they agreed it was, they, however, annexed a condition of finding sureties for their good behavior, which still protracted their imprisonment, the Chief Justice, Sir Nicholas Hide, at the same time declaring that, "if they were again remanded for that cause, perhaps the court would not afterwards grant a *habeas corpus,* being already made acquainted with the cause of their imprisonment. But this was heard with indignation and astonishment by every lawyer present; according to Mr. Selden's own account of the matter, whose resentment was not cooled at the distance of four and twenty years.

These pitiful evasions gave rise to the statute (16 Car., I. C. 10, § 8,) whereby it is enacted, that if any person be committed by the King himself, in person, or by his privy council, or any of the members thereof, he shall have granted to him without delay, upon any pretense whatsoever, a *writ of habeas corpus,* upon demand or motion made to the Court of the King's Bench or *Common Pleas;* who shall thereupon, within three court days after the return is made, examine and determine the legality of such commitment, and do what to justice shall appertain, in delivering, bailing or remanding such prisoner. Yet, still in the case of Jenks, before alluded to, who, in 1676, was committed by the King in council, for a turbulent speech at Guildhall, new shifts and devices were made use of to prevent his enlargement by law, the Chief Justice, (as well as the Chancellor,) declining to award a writ of *habeas corpus ad subjiciendum,* in vacation, though at last he thought proper to award the usual writs *ad deliberandum,* &c., whereby the prisoner was discharged at the Old Bailey. Other abuses had also crept into daily practice, which had, in some measure, defeated the benefit of this great constitutional remedy. The party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and third, called an *alias* and *pluries* were issued, before he produced the party, and many other vexatious shifts were practiced to detain State prisoners in custody. But whoever will attentively consider the English history may observe that the flagrant abuse of any power, by the Crown or its ministers, has always been productive of struggle, which either discovers the exercise of that power to be contrary to law, or if legal, restrains it for the future. This was the case in the present instance; the oppression of an obscure individual gave birth to the famous *habeas corpus* act (31 Car. II.. § 2,) which is frequently considered as another *Magna Charta* of the Kingdom; and, by consequence and analogy, has also in subsequent times reduced the general method of proceeding on those writs (though not within the reach of that statute, but issuing merely at the common law,) to the true standard of law and liberty."

The complaint contained in the 3d, 4th and 5th articles of the Petition of Right, referred to by Mr. Justice Blackstone, and to which the reluctant consent of Charles the 1st, was enforced by the English House of Commons, (Hume's History of England, Chap. 51, and copy of petition in note; and see Hallam, Chap. 7,) related to illegal arrests and imprisonments, and the denial of relief upon Habeas Corpus. (*) These articles are as follows:

(*) Among the causes assigned by the Declaration of Independence, adopted in Congress, July 4th, 1776, as justifying the colonies in casting off their allegiance to the British Crown, were the following complaints against the exercise of arbitrary power by the King of Great Britain, viz:

"*He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers.*"

"HE HAS AFFECTED TO RENDER THE MILITARY INDEPENDENT OF AND SUPERIOR TO THE CIVIL POWER."

"HE HAS COMBINED WITH OTHERS TO SUBJECT US TO A JURISDICTION FOREIGN TO OUR CONSTITUTION, AND UNACKNOWLEDGED BY OUR LAWS; *giving his assent to their acts of pretended legislation*" * * * * * "FOR DEPRIVING US IN MANY CASES OF THE BENEFITS OF TRIAL BY JURY; for transporting us beyond seas, to be tried for pretended offences, &c."

It was doubtless the recollection of these acts, thus complained of, which led the people of the United States in adopting and amending their Constitution, to provide

"III. And whereas, also, by the statute called The great charter of the liberties of England, it is declared and enacted, That no freeman may be taken or imprisoned, or be disseized of his freehold or liberties, or his free customs, or be out-lawed or exiled, or in any manner destroyed, but by the lawful judgment of his peers, or by the law of the land.

IV. And in the eighth and twentieth year of the reign of King Edward III, it was declared and enacted, by authority of Parliament, That no man of what estate or condition that he be, should be put out of his land or tenements, nor taken, nor imprisoned, nor disherited, nor put to death, without being brought to answer by due process of law.

V. Nevertheless, against the tenor of the said statutes and other, the good laws and statutes of your realm to that end provided, divers of your subjects have of late been imprisoned without any cause showed; and when for their deliverance, they were brought before justice, by your Majesty's writs of *habeas corpus*, there to undergo and receive as the Court should order, and their keepers commanded to certify the cause of their detainer, no cause was certified, but that they were detained by your Majesty's special command, signified by the Lords of your privy council, and yet were returned back to several prisons, without being charged with anything to which they might make answer according to the law."

And by the tenth article of this Petition of Right, it was prayed among other things, "that no freeman, in any such manner as is before mentioned, be imprisoned or detained," and to this, Charles 1st, after much delay and a prior evasive answer, was at last compelled by the House of Commons to yield his assent in the customary form, "Let it be law as is desired;" and thereby, as Hume says, "gave full sanction and authority to the petition." (*) It is true, that he afterwards acted in violation of the rights thus solemnly recognized; but it is equally true, that his head was brought to the block by his oppressed and indignant people.

No further discussion can be necessary to show the importance of the principles involved in this case, (†) or the duty of every judicial officer to construe, with all reasonable strictness, the doubtful language of an executive order capable of being made the instrument of innumerable and gross encroachments upon the liberty of the citizen. There may be some ground for doubt in regard to the true construction of the orders of the War Department of August 8, 1862, but I am inclined to think they were not intended to have the operation and effect which it has, as I understand, been contended should be given to them, in accordance with what is alleged to be their literal meaning and effect.

However that may be, in the view that I have felt compelled to take in regard to another question arising in the case, I do not deem it necessary to say more in respect to the proper construction of this order.—The question referred to is, whether the privilege of the writ of *habeas corpus* has been, in any case, legally suspended?

In considering this question I shall not inquire whether the order under considera, tion was made, or purports to be made, by or under the authority of the President of the United States. The use of the words, "By direction of the President of the United States," in the first sub-division of the order and their omission in the second and third sub-divisions, may cast some doubt upon the point, but for the purpose of the present

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in express and positive terms, and in the most careful and perfect manner, for the trial by jury; for the independence and superiority of the civil power; for a judiciary, not subject to the executive will; for the administration of justice by that judiciary only, except in respect to persons actual employed in the military and naval service, and therefore subject to military, (not martial,) law; and for the speedy and public trial of all persons accused of crime, in the State and district where it is alleged to have been committed.

(*) See Hume's History of England, Chap. 51; and Stephens De Lolme on the Constitution of England, vol. 2 pp. 376, 377, 378.

(†) It may be useful to quote from the writings of the most distinguished political and philosophical writers and of the ablest and wisest statesmen of England and the United States, to show that the importance of these principles can hardly be overrated. Pertinent quotations of that kind are readily made; and enough to fill a volume might be given. A number of such quotations are given in the appendix, note G, to which the reader is referred.

question I shall assume that the first and second orders of the 8th of August, 1862, are, in fact and in law, the orders of the President of the United States.

Can the President then, without the authority of Congress, (*) suspend the privilege of the writ of *habeas corpus*.

When the counsel for the petitioner, some days since, suggested that he desired to apply for a *habeas corpus* to bring up the body of the petitioner, I had the impression that Congress, at its late session, had passed an act authorizing the President to suspend the privilege of the writ of *habeas corpus*, and that he had sanctioned the order of the War Department, under such authority.— If this had been the case, I should have held it to be my duty to refuse the writ, in a case within the scope of the law of Congress, and the order of the President:—but having, since that suggestion was made, received the acts of the last session, I find that I was mistaken, and that Congress has passed no law on this subject. The question of the power of the President to suspend the privilege of the *habeas corpus*, without the authority of Congress, is therefore presented in this case, if the order of the War Department is deemed to be the order of the President, and to extend to such a case as that now under consideration.

This question is one of constitutional law and constitutional construction, and was, I think, generally considered as no longer open to controversy, until it was brought prominently before the public by the case of Merryman, before the learned and venerable Chief Justice of the United States. In that case, (24 Boston Law Reporter, pages 78 and 79,) the highest judicial officer of the United States did not hesitate to declare, in respect to the claim that the President had the power to suspend the privilege of the writ of *habeas corpus*, that he "listened to it with some surprise, for I" [he] "had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands that the privilege of the writ could not be suspended, except, by act of Congress."

The clause upon which the question arises is found in the First Article of the Constitution of the United States, which treats of Congress and its powers, and is in these words: "*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,*" and the reasoning of the Chief Justice, in the case referred to, is sufficient, in my judgment, to show that the power of suspension is a legislative, and not an executive power, and must be exercised, or its exercise authorized by Congress.

But the question does not rest upon the reasoning or authority of the present Chief Justice. He properly cited the authority of Chief Justice Story, and of the Supreme Court of the United States when the Chief Justice's seat was filled by John Marshall, the ablest constitutional lawyer our country has produced. I cannot forbear now to quote that portion of the opinion of the Chief Justice which refers to the authority of Mr. Justice Story, and of the Supreme Court of the United States. The Chief Justice says: "But I am not left to form my judgment upon this great question from analogies between the English government and our own, or the commentaries of English jurists, or the decisions of English Courts, although upon this subject they are entitled to the highest respect, and are justly regarded as authoritative by our courts of justice. To guide me to a right conclusion, I have the commentaries on the Constitution of the United States, of the late Chief Justice Story, not only one of the most eminent jurists of the age, but for a long time one of the brightest ornaments of the Supreme Court of the United States, and

(*) By the first article—indeed by the very first provision—of the Constitution of the United States, it is provided that "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." A power to modify, suspend, or repeal a law, is clearly a legislative power; as much so, as the power to enact a law;—and therefore only the legislative power, (or Congress,) can suspend the operation of a law, or authorize the judges or courts of the United States to decline to discharge their duties under it. The Constitution, so far from authorizing the President to suspend the operation of a law, expressly provides [ART. 2, SEC. 3,] that it shall be the duty of the President, "to take care that the laws be faithfully executed." And it requires him to take an oath, "to the best of his ability to preserve, protect and defend the Constitution of the United States."

also the clear and authoritative decision of that Court itself, given more than a half century since, and conclusively establishing the principles I have above stated.

Mr. Justice Story, speaking in his commentaries of the *habeas corpus* clause in the Constitution, says, 'It is obvious that cases of a peculiar emergency may arise, which may justify, nay, even require the temporary suspension of any right to the writ. But as it has frequently happened in foreign countries, and even in England, that the writ has, upon various pretexts and occasions, been suspended, whereby persons apprehended upon suspicion have suffered a long imprisonment, sometimes from design and sometimes because they were forgotten, the right to suspend it is expressly confined to cases of rebellion or invasion, where the public safety may require it. A very just and wholesome restraint, which cuts down at a blow a fruitful means of oppression, capable of being abused in bad times to the worst of purposes. Hitherto, no suspension of the writ has ever been authorized by Congress since the establishment of the Constitution. It would seem, as the power is given to Congress to suspend the writ of *habeas corpus* in the cases of rebellion or invasion, that the right to judge whether the exigency had arisen, must exclusively belong to that body.' [3 Story's Com. on the Constitution, section 1836.]

And Chief Justice Marshall, in delivering the opinion of the Supreme Court in the case of *ex parte* Bollman and Swartwout, uses this decisive language in 4 Cranch, 95:

'It may be worthy of remark that this act (speaking of the one under which I am proceeding,) was passed by the first Congress of the United States sitting under a Constitution which had declared '*that the privilege of the writ of habeas corpus should not be suspended unless when in cases of rebellion or invasion the public safety might require it.*' Acting under the immediate influence of this injunction, they must have felt, with a peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they gave to all the Courts the power of awarding writs of *habeas corpus.*' And again, in page 101:

'If at any time the public safety should require the suspension of the powers vested by this act in the Courts of the United States, it is for the Legislature to say so. The question depends upon political considerations, on which the Legislature is to decide. Until the Legislative will be expressed, this Court can only see its duty and obey the laws.'

I can add nothing to these clear and emphatic words of my great predecessor."

In the course of his elaborate and well considered opinion, Mr. Chief Justice Taney states his views at length, and I shall make several extracts from other parts of his opinion to show the manner in which the question came before him, the conclusions to which he arrived, and a portion of the argument by which his views are sustained. He says: "The case, then, is simply this, A military officer residing in Pennsylvania, issues an order to arrest a citizen of Maryland upon vague and indefinite charges, without any proof, so far as appears. Under this order his house is entered in the night: he is seized as a prisoner, and conveyed to Fort McHenry, and there kept in close confinement. And when a *habeas corpus* is served on the commanding officer, requiring him to produce the prisoner before a Justice of the Supreme Court, in order that he may examine into the legality of the imprisonment, the answer of the officer is, that he is authorized by the President to suspend the writ of *habeas corpus* at his discretion, and, in the exercise of that discretion, suspends it in this case, and on that ground refuses obedience to the writ.

As the case comes before me, therefore, I understand that the President not only claims the right to suspend the writ of *habeas corpus* himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him.

No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the President claimed this power, and had exercised it in the manner stated in the return. And I certainly listened to it with some surprise, for I had supposed it to be one of those points of Constitutional law upon which there was no difference of opinion, and that it was admitted on all hands that the privilege of the writ could not be suspended except by act of Congress.

When the conspiracy of which Aaron Burr was the head, became so formidable, and was so extensively ramified as to justify, in Mr. Jefferson's opinion, the suspension of the writ, he claimed on his part, no power to suspend it, but communicated his opinion to Congress, with all the proofs in his possession, in order that Congress might exercise its discretion upon the subject, and determine whether the public safety required it. And in the debate which took place upon the subject, no one suggested that Mr. Jefferson might exercise the power himself, if, in his opinion, the public safety demanded it.

Having therefore regarded the question as too plain and too well settled to be open to dispute, if the commanding officer had stated that upon his own responsibility and in the exercise of his own discretion, he refused obedience to the writ, I should have contented myself with referring to the clause in the Constitution, and to the construction it received from every jurist and statesman of that day, when the case of Burr was before them. But being thus officially notified that the privilege of the writ has been suspended under the orders and by the authority of the President, and, believing as I do, that the President has exercised a power which he does not possess under the Constitution, a proper respect for the high office he fills requires me to state plainly and fully the grounds of my opinion, in order to show that I have not ventured to question the legality of his act without a careful and deliberate examination of the whole subject.

The clause in the Constitution which authorizes the suspension of the privilege of the writ of *habeas corpus*, (*) is in the ninth section of the first article.

This article is devoted to the legislative department of the United States, and has not the slightest reference to the executive department. It begins by providing 'that all legislative powers therein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.' And after prescribing the manner in which these two branches of the legislative department shall be chosen, it proceeds to enumerate specifically the legislative powers which it thereby grants, and legislative powers which it expressly prohibits, and at the conclusion of this specification a clause is inserted giving Congress the power 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution, in the Government of the United States, or in any department or office thereof.'

The power of legislation granted by this latter clause is by its words carefully confined to the specific objects before enumerated. But as this limitation was unavoidably somewhat indefinite, it was deemed necessary to guard more effectually certain great cardinal principles, essential to the liberty of the citizen, and to the rights and equality of the States, by denying to Congress, in express terms, any power of legislating over them. It was apprehended, it seems, that such legislation might be attempted under the pretext that it was necessary and proper to carry into execution the powers granted, and it was determined that there should be no room to doubt, where rights of such vital importance were concerned, and, accordingly, this clause was immediately followed by an enumeration of

(*) It is not, perhaps, strictly correct to speak of the provision of the Constitution here referred to, as *authorizing* the suspension of the privilege of the writ of *habeas corpus*. The general provision of the clause is clearly and wholly restrictive and prohibitory; and the special exception, which limits the effect of the general provision, though generally spoken of as *authorizing* the suspension, in the excepted cases, does not, in fact, *authorize* it, but only leaves untouched, in such excepted cases, the authority which Congress would have had, in all cases, if this general restrictive provision had not been introduced The special exception, however, was necessary to the continued existence of such authority; and may therefore, in one sense, be said to authorize or allow its exercise. And this has probably led to the use of the language, found in the text.

certain subjects to which the powers of legislation shall not extend; and the great importance which the framers of the Constitution attached to the privilege of the writ of *habeas corpus* to protect the liberty of the citizen, is proved by the fact that its suspension, except in cases of invasion and rebellion, is first in the list of prohibited powers; and even in these cases, the power is denied, and its exercise prohibited, unless the public safety may require it. It is true that in the cases mentioned Congress is, of necessity, the judge of whether the public safety does or does not require it, and its judgment is conclusive. But the introduction of these words is a standing admonition to the legislative body of the danger of suspending it, and of the extreme caution they should exercise before they give the government of the United States such power over the liberty of a citizen.

It is the second article of the Constitution that provides for the organization of the executive department, and enumerates the powers conferred on it, and prescribes its duties. And if the high power over the liberty of the citizen now claimed was intended to be conferred on the President, it would undoubtedly be found in plain words in this article. But there is not a word in it that can furnish the slightest ground to justify the exercise of the power.

The article begins by declaring that the executive power shall be vested in a President of the United States of America, to hold his office during the term of four years; and then proceeds to prescribe the mode of election, and to specify in precise and plain words the powers delegated to him, and the duties imposed upon him.

* * * * * *

He is not empowered to arrest any one charged with an offence against the United States, (*) and whom he may, from the evidence before him, believe to be guilty, nor can he authorize any officer, civil or military, to exercise this power, for the fifth article of the amendments to the Constitution expressly provides that no person shall be deprived of life, liberty, or property, without due process of law—that is, judicial process. And even if the privilege of the writ of *habeas corpus* was suspended by act of Congress, and a party not subject to the rules and articles of war, was afterwards arrested and imprisoned by regular judicial process, he could not be detained in prison or brought to trial before a military tribunal, for the article in the amendments to the Constitution, immediately following the one referred to, that is, the sixth article, provides that, in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

And the only power, therefore, which the President possesses, where the 'life, liberty. or property,' of a private citizen is concerned, is the power and duty prescribed in the third section of the second article, which requires 'that he shall take care that the laws be faithfully executed.' * * * With such provisions in the Constitution, expressed in language too clear to be misunderstood by any one, I can see no ground, whatever, for supposing that the President, in any emergency, or in any state of things, can authorize the suspeusion of the privi-

(*) The following extract from an official opinion of Hon. Wm. Wirt. Attorney-General of the United States, under President Monroe, dated September 8, 1815, [vol. 1. of Opinions of Attorneys-General of United States, p. 229] is instructive on this point:—"Arrest for trial is a proceeding which belongs to the judicial, not to the executive branch of the government; and the warrant of arrest is always preceded by evidence—*ex parte*, to be sure, but still evidence—to wit, information on oath. Can the President of the United States order an arrest either by proclamation, or by instruction to marshals? Would not such proclamation or instructions be, in effect, a warrant to arrest? It is very clear to me, that they would, and that either of them would be a violation of the sixth article of the amendments of the Constitution of the United States which provides that 'the right of the people to be secure in their *persons*, houses, papers and effects, against unreasonable searches and *seizures*, shall not be violated; and *no warrant shall issue except upon probable cause, supported* by oath or affirmation, and particularly describing the place to be searched and the persons to be seized.' It was one of the strong grounds of objection to the celebrated alien law, that it gave to the President power to arrest; 'a power,' says Judge Tucker, 'which it was presumed did not exist either in the executive of the State or of the Federal Government,' 4 TUCKER'S BLACKSTONE, 290."

lege of the writ of *habeas corpus*, or arrest a citizen except in aid of the judicial power. He certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of *habeas corpus*, and the judicial power also, by arresting and imprisoning a person without due process of law. Nor can any argument be drawn from the nature of sovereignty, or the necessities of government, for self-defence, in times of tumult and danger. The government of the United States is one of delegated and limited powers. It derived its existence and authority altogether from the Constitution, and neither of its branches, executive, legislative, or judicial, can exercise any of the powers of government beyond those specified and granted; for the tenth article of the amendment to the Constitution, in express terms, provides 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.'

* * * * While the value set upon this writ of *habeas corpus* in England has been so great that the removal of the abuses which embarrassed its enjoyment has been looked upon as almost a new grant of liberty to the subject, it is not to be wondered at that the continuance of the writ thus made effective should have been the object of the most jealous care. Accordingly, no power in England short of that of parliament, can suspend or authorize the suspension of the writ of *habeas corpus*. I quote again from Blackstone: [1 Com. 136.] 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. It is the parliament only, or legislative power, that, whenever it sees proper, can authorize the Crown to suspend the *habeas corpus* for a short and limited time, to imprison suspected persons without giving any reason for so doing.' And if the President of the United States may suspend the writ, then the Constitution of the United States has conferred upon him, more regal and absolute power over the liberty of the citizen than the people of England have thought it safe to entrust to the Crown, a power which the Queen of England cannot exercise at this day, and, which could not have been lawfully exercised by the sovereign, even in the reign of Charles the First." (*)

The Chief Justice, in his opinion in the case of Merryman, referred to the action of Congress at the time of Burr's conspiracy, in 1807, and to the fact that it was not then claimed that the President had power to suspend the privilege of the *habeas corpus*. There appears to have been no report of the debate in the Senate on the bill there introduced in consequence of a special message from President Jefferson, (as it was considered in secret session,) but in the House the bill was openly and ably discussed by several members; and, though the bill only proposed to suspend the privilege "for three months and no longer," in "all cases where any person or persons *charged on oath* with treason, misprision of treason, or other high crime or misdemeanor, endangering the peace, safety or neutrality of the United States, have been, or shall be arrested and imprisoned by virtue of any warrant or authority of the President of the United States, or from the chief executive magistrate of any State or Territorial government, or of any person acting under the direction or authority of the President of the United States," the House, by a vote of 113 to 19, rejected the bill, on the unususal motion 'that the bill be rejected:' which is considered a motion of indignity, indicating that the bill is not worthy

(*) The President of the United States and the King of England may pardon an offense already committed, and to that extent may grant immunity to an offender against the laws. A pardon is somewhat in the nature of a dispensation, in some particular case, but differs from it in being always and necessarily granted after the offense pardoned has been committed. But "a dispensation and the *suspension* of a law are very different acts." ANSTEY, (LAWS AND CONSTITUTIONS OF ENGLAND, p. 336.), says, "A suspension is general, and needs no lesser grounds than such as are required for an act of Parliament. Consequently, it is no more in the power of the Monarch to supend laws without the concurrence of the estates of the legislature, than it is in his power to make them."

And DE LOLME, (STEPHEN'S DE LOLME, Vol. 2, Chap. 4 p. 531) says "The basis of the English Constitution, the capital principle, on which all others depend, is, that the legislative power belongs to Parliament alone; that is to say, the power of establishing laws, and of abrogating, changing, or explaining them." And see post note S, Appendix.

of deliberate discussion and consideration in the usual form. [Hurd on *Habeas Corpus*, 135.] (*)

In the case of Johnson vs Duncan, &c, [3 Martin's La. Rep. 531,] this question was brought under consideration; and, though Chief Justice Martin referred to the decision of the Supreme Court, in the case cited by Chief Justice Taney, as conclusive authority, he nevertheless proceeded to examine the question as though it had not been authoritatively decided. The whole opinion is remarkable for its vigor and clearness, and will repay the most careful examination; and I shall extract a portion of it which directly relates to the question now under consideration. After referring to the argument that all the functions of the civil magistrate had been suspended by a proclamation of martial law, by the officer commanding the military district, the Chief Justice proceeded as follows: "This bold and novel assertion is said to be supported by the ninth section of the first article of the Constitution of the United States, in which are detailed the limitations of the power of the Legislature of the Union. It is there provided, '*that the privilege of the writ of habeas corpus shall not be suspended, unless, when in cases of invasion or rebellion, the public safety may require it.*' We are told that the commander of the military district is the person to suspend the writ, and is to do so whenever, *in his judgment,* the public safety appears to require it; that, as he may thus paralyze the arm of the justice of his country in the most important case, the protection of the personal liberty of the citizen, it follows that as he who can do the *more* can do the *less,* he can also suspend all other functions of the civil magistrate, which he does by his proclamation of martial law.

This mode of reasoning varies *toto coelo*(†) from the decision of the Supreme Court of the United States, in the case of Swartwout and Bollman, arrested in this city in 1806, by General Wilkinson. The Court there declared that the Constitution had exclusively vested in Congress the right of suspending the privilege of the writ of *habeas corpus*, and that body was the sole judge of the necessity which called for the suspension. 'If, at any time,' said the Chief Justice, 'the public safety shall require the suspension of the powers vested in the Courts of the United States by this act, (the *habeas corpus* act,*) it is for the Legislature* to say so. This question depends on political considerations. on which the Legislature is to decide. Till the Legislative will be expressed, this Court can only see its duties and must obey the law.' 4th Cranch, 101.

The high authority of this decision seems, however, to be disregarded, and a contrary opinion is said to have been lately acted upon, to the distress and terror of the good people of this State; it is therefore meet to dispel the clouds which designing men endeavour to cast on this article of the Constitution, that the people should know that their rights, thus defined, are neither doubtful nor insecure, but supported on the clearest principles of our laws.

Approaching, therefore, the question as if I were without the above conclusive authority, I find it provided by the Constitution of this State that 'no power of suspending the laws of this State shall be exercised unless by the Legislature, or under its authority.' The proclamation of martial law, therefore, if intended to suspend the functions of the Courts, or its members, is an attempt to exercise powers thus exclusively vested in the Legislature—I therefore cannot hesitate in saying that it is in this respect null and void. If, however, there be aught in the Constitution or laws of the United States that really authorizes the commanding officer of a military district to suspend the laws of this State, as that Constitution and these laws are paramount to those of the State, they must regulate the decision of this Court.

This leads me to the examination of the power of suspending the writ of *habeas*

(*) And see Benton's Abridgement of Congressional Debates, Vol. 3. p. 504, note.

(†) *Toto coelo* By the whole heavens—as widely as the whole extent of the heavens—signifying the greatest possible difference.

corpus, and that which it is said to include, of proclaiming *martial law*, as noticed in the Constitution of the United States. As in the whole article cited, no mention is made of the power of any other branch of Government but the Legislative, it cannot be said that any of the limitations which it contains extend to any of the other branches. *Iniquum est perimi de pacto, id de quo cogitatum non est.* If therefore, this suspending power exist in the executive, (under whose authority it has been endeavored to exercise it,) it exists without any limitation; then the President possesses, without a limitation, a power which the Legislature cannot exercise without a limitation. Thus he possesses a greater power *alone*, than the House of Representatives, the Senate and himself *jointly*.

Again, the power of repealing a law, and that of suspending it, (which is a partial, repeal,) are Legislative powers. For *eodem modo quo quid constituitur, eodem modo destruitur.* (*) As every legislative power that may be exercised under the Constitution of the United States is exclusively vested in Con gress, all others are retained by the people of the several States.

In England, at the time of the invasion of the Pretender, assisted by the forces of hostile nations, the *Habeas Corpus* act was suspended; but the executive did not thus of itself stretch its own authority; the precaution was deliberated upon and taken by the representatives of the people. De Lolme, 409. And there the power is safely lodged, without the danger of its being abused. Parliament may repeal the law on which the safety of the people depends; but it is not their own caprices and arbitrary humors, but the caprices and arbitrary humors of other men which they will have gratified when they shall have thus overthrown the columns of public liberty. [Id. 275.]

If it be said that the laws of war, being the laws of the United States, authorize the proclamation of martial law, I answer that in peace or war, no law can be enacted but by the legislative power. In England, from whence the American Jurist derives his principles in this respect, 'martial law cannot be used without the authority of Parliament.' 5 Comyns, 229. The authority of the monarch himself is insufficient. In the case of Grant vs. Sir C. Gould, 2d. Hen. Bl., 69, which was on a prohibition applied for in the Court of Common Pleas, to the defendant, as Judge Advocate of a Court Martial, to prevent the execution of the sentence of that military tribunal, the counsel who resisted the motion, said it was not to be disputed that martial law can only be exercised in England, so far as it is authorized by the mutiny act and the articles of war, all which are established by Parliament, or its authority, and the court declared it totally inaccurate to state any other martial law, as having any place whatever within the realm of England."

In the same case, Mr. Justice Derbigny, in delivering his opinion, said: "To have a correct idea of *martial law* in a free county, (†) examples must not be sought in the arbitrary conduct of absolute governments. The monarch who unites in his hands all the powers, may delegate to his generals an authority unbounded as his own. But in a Republic, where the Constitution has fixed the extent and limits of every branch of government, in time of war, as well as of peace, there can exist nothing vague, uncertain or arbitrary, in the exercise of any authority.

The Constitution of the United States, in which everything necessary to the general and individual security has been foreseen, does not provide, that in times of public danger, the executive power shall reign, to the exclusion of all others. It does not trust into the hands of a dictator the reins of the government. The framers of that charter were too well aware of the hazards to which they would have exposed the fate of the Republic by such a provision, and had they done it, the States would have rejected a Constitution stained with a clause so threatening to their liberties. In the meantime,

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(*) A judicious friend has very properly suggested that, as the publication is very likely to be read with interest by many non-professional persons, a translation of the Latin phrases should be given. Adopting his suggestion, this has been done where ever it appeared to be necessary for the benefit of the general reader.

The phrase in the text may be rendered thus:—"In the same manner in which anything is established, in the same way it may be overthrown or destroyed.'

(†) See Note on MARTIAL LAW, Appendix, Note H.

conscious of the necessity of removing all impediments to the exercise of the executive power, in cases of rebellion or invasion, they have permitted Congress to suspend the privilege of the writ of *habeas corpus* in those circumstances, if the public safety should require it. Thus far, and no further goes the Constitution. Congress has not hitherto thought it necessary to authorize that suspension. Should the case ever happen, it is to be supposed it would be accompanied with such restrictions as would prevent any wanton abuse of power. In England, (says the author of a justly celebrated work on the Constitution of that country,) at the time of the invasion of the Pretender, assisted by the forces of hostile nations, the *habeas corpus* act was indeed suspended; but the executive power did not thus of itself stretch its own authority; the precaution was deliberated upon and taken by the representatives of the people; and the detaining of individuals in consequence of the suspension of the act, was limited to a fixed time. Notwithstanding the just fears of internal and hidden enemies, which the circumstances of the times might raise, the deviation from the former course of the law was carried no further than the single point we have mentioned. Persons detained by order of the Government, were to be dealt with in the same manner as those arrested at the suit of private individuals; the proceedings against them were to be carried on in no other than a public place; they were to be tried by their peers, and have all the usual legal means of defence allowed them, such as calling of witnesses, peremptory challenges of jurors, &c.; and can it be asserted that while British subjects are thus secured against oppression in the worst of times, American citizens are left at the mercy of the will of an individual, who may, in certain cases, *the necessity of which is to be judged of by himself*, assume a supreme, overbearing, unbounded power! The idea is not only repugnant to the principles of a free Government, but subversive of the very fonndations of our own.

Under the Constitution and laws of the United States, the President has a right to call, or cause to be called into the service of the United States, even the whole militia of any part of the Union, in case of invasion. This power, exercised by his delegate, has placed all the citizens subject to military duty, under military authority and military law. (*)

(*) The meaning of this is that *all* the militia of that particular district or section of country had been called into active service by direction of the President, under the authority conferred by an act of Congress, and that therefore, all citizens liable to military duty, and thus called into active service, thereby became subject to actual and active military duty, to military authority, and to military law. But this military law, as will be hereafter shewn, is very different from what is more usually and more properly denomintaed *martial law.*

Sec. 8 of the 1st article of the Constitution of the United States expressly authorizes Congress, (not the President.) to declare war, to raise and support armies, provide and maintain a navy, make rules for the government and regulation of the land and naval forces, *and provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.*" Congress has exercised this authority, and has passed several acts under it, and among them one enacting "Rules and Articles of War."

The following extract from Scott's Military Dictionary, published in 1862, (title, ARTICLES OF WAR, p.p. 59-60,) may not be uninteresting in this connection.

"Under the Constitution of the United States, Congress only can make rules of government for the land and naval forces, and those rules, commonly called ARTICLES OF WAR, were originally borrowed jointly from the English Mutiny Act, annually passed by Parliament, and their articles of war established by the King. The existing articles for the government of the army of the United States, enacted April 10, 1806, are substantially the same as those originally borrowed July 30, 1775, and enlarged by the old Congress, from the same source, Sep. 20, 1776. The act consists of but three sections. The first declares, the following shall be the rules and articles by which the armies of the United States shall be governed, and gives 101 articles, all noticed in these pages. Each article is confined in express terms to the persons composing the army. The second section contains the only exception in the cases as follows: In time of war, all persons *not citizens of, or owing allegiance to the United States of America, who shall be found lurking as spies*, in or about the fortifications or encampments of the armies of the United States, or any of them, shall suffer death, *according to the law and usages of nations*, by sentence of a general court martial." The third act merely repeals the previous act for governing the army.

The articles of war therefore are, and under the Constitution of the United States, can be nothing more than a code for the government and regulation of the army, or, in other words, within the United States these articles are a system of rules superadded to the common law, for regulating the citizen in his capacity as a soldier, and applicable to no other citizens.

Beyond the United States another code is essential, for, although armies take with them the rules and articles of war, and the custom of war in like cases, in a foreign country a soldier must be tried by some tribunal, for offences which at home would be punishable by the ordinary courts of law. It is impossible to subject him to any foreign dominion, and hence, in the absence of rules made by Congress for the government of the army under such circumstances, the *will* of the Commander of the troops, *ex necessitate rei*, ["from the necessity of the case,"] the place of law, and the declaration of his will is martial law."

Until the militia called into service are mustered or called together, they are not subject to the articles of war—in other words, to military law. Mr. Justice Woodbury, in Luther vs. Burden; 7 Howard, 60; 5 Wheaton, 20; Story on Con., vol. 3, sec. 120.

That I conceive to be the extent of the *martial law*, beyond which, all is usurpation of power. In that state of things the course of judicial proceedings is certainly much shackled, but the judicial authority exists, and ought to be exercised whenever it is practicable. Even where circumstances have made it necessary to suspend the privilege of the *habeas corpus*, and such suspension has been pronounced by the competent authority, there is no reason why the administration of justice, generally, should be stopped. For, because the citizens are deprived temporarily of the protection of the tribunals as to the safety of their persons, it does by no means follow that they cannot have recourse to them in all other cases.

The proclamation of *martial law*, therefore, cannot have had any other effect than that of placing under military authority, all the citizens subject to military service. It is in that sense alone that the vague expression of martial law ought to be understood among us. To give it any larger extent would be trampling upon the Constitution and Laws of our country. (*)

That the doctrines of these decisions in regard to the exercise of the power of suspending the privilege of the *habeas corpus* have been almost universally considered as incontrovertible, is fully established, by reference to the works of many elementary writers, and by the fact that no evidence of the dissent of other jurists or of the profession has been recorded. Hurd, in his work on *Habeas Corpus*, in reference to the constitutional provision before referred to, says: "Rebellion and invasion are eminently matters of national concern; and charged as Congress is, with the duty of preserving the United States from both these evils, it is fit that it should possess the power to make effectual such measures as it may deem expedient to adopt for their suppression." p. 133. And (p. 134,) "This power has never been exercised by Congress."—And again, (p. 149,) "The provision" (of the Constitution,) "relating to the writ of *habeas corpus*, limits the Legislative power."

Smith, in his commentaries, also considers this provision of the Constitution under the head of "Constitutional restrictions upon Legislative power." Smith's Coms. chap. 8, sec. 229. And Curtis, in his History of the Constitution, also refers to it as one of the restrictions upon the powers of Congress. 2 Curtis Hist. Con., p. 359.

In Sheppard's Constitutional Text-book, at page 142, this is given as a restriction upon the power of Congress. And in the conclusion of the article, HABEAS CORPUS, in Appleton's New Cyclopedia it is said, "It has been solemnly decided that the *habeas corpus act can be suspended only by the Legislature*, and that the proclamation of martial law, by a military officer, is not sufficient."

The article on MARTIAL LAW in the same work contains the following: "The Constitution, by implication, at least, (†) also permits its proclamation, by that clause which provides that the privileges of the writ of *habeas corpus* shall not be suspended," &c.

"*The right to judge whether the exigency has arisen belongs, it seems, exclusively to Congress.* So in England, martial law and its incident, the suspension of the writ of *habeas corpus*, required the authority of Parliamentary acts to give them a constitutional existence."(‡)

When the question of the adoption of the Federal Constitution was under consideration in the Massachusetts Convention, the constitutional restriction upon the power of

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(*) The following additional extract from this opinion of Mr. Justice Derbigny is worthy of attention. He says:—"But the counsel for the appellant to support his assertion that in the circumstances then existing, the Court could not administer justice, went further and said, that the city of New Orleans had become a camp, since it had pleased the General of the seventh military district to declare it so; that within the precincts of a camp there can exist no other authority than that of the commanding officer. If the premises were true, the consequences would certainly follow. But the abuse of words cannot change the situation of things. A camp is a space of ground occupied by an army for their temporary habitation while they keep the field. That space has limits; it does not extend beyond the ground actually occupied by the army. The camp of the American army during the invasion of our territory by the British was placed at the distance of four miles below the city. During the time the city might be considered as a besieged place, having an entrenched camp in front. *But the transformation of the city itself into a camp by the mere declaration of the General is no more to be conceived than would the transformation of a camp into a city by the same means.*"

(†) Very doubtful: See note on *Martial Law*, in appendix, at the end of this opinion.

(‡) See note S, Appendix.

suspending the privilege of the *habeas corpus* was discussed by Judges Dana and Sumner, in the presence doubtless of Nathaniel Gorham and Rufus King, members of that Convention as well as of the one that framed the Constitution of the United States, and both Judges evidently regarded it as certain that Congress only could suspend the privilege.—2 Elliott's Debates on the Constitution, 108 and 109. Hurd on *Habeas Corpus*, 126 and 127. (*)

And during Shay's rebellion it was the Legislature of Massachusetts, and not her Governor, that suspended the privilege of this writ.—Hurd, on *Habeas Corpus*, 136.

Against these authorities, and the general sentiment of elementary writers, (†) there stands opposed the practice of the War Department, first inaugurated in a period of great excitement and alarm, and the official opinion of the learned and venerable gentleman who now holds the office of Attorney General of the United States.—For that gentleman I entertain the highest respect. His purity of motive and character, his great legal acquirements and his undoubted patriotism and ability are unquestioned; but, even in these respects, that excellent gentleman would not wish his friends to claim more than that he was the equal of the learned Chief Justice of the United States. Placing their opinions upon the same footing, they would only neutralize each other, and then the deliberate opinions of Marshal, and Story, and Martin, and of the other Justices of the Supreme Court, who concurred in the opinion of their Chief, in the case of Bollman and Swartwout, (4th Cranch, 75,) supported, as they are, in my judgment, by unanswerable argument, are decisive of the question, and constrain me to decide that the President, without the authority of Congress, has no constitutional power to suspend the privilege of the writ of *habeas corpus* in the United States. The prisoner is therefore in any view which I have been able to take of this case entitled to the benefits of the writ of *habeas corpus*, and to be discharged unless some reason for detaining him, beyond that set out in his petition, is shown. But other reasons, besides those set forth in his petition, or in any warrant or order of commitment under which he may be now held, may be shown. The District Attorney of the United States will have notice of the allowance of the *habeas corpus*, and if, on its return, or at any time, he, or the Marshal of the United States, or his deputy, or any other citizen can show that the petitioner has been guilty of any offence against the laws of the United States, or has in any way subjected himself to legal arrest and imprisonment, it will be my duty, (a duty which I certainly shall not hesitate to perform,) to commit him to prison by a proper and sufficient order or warrant.

I have thus hastily, though with some labor, written out an opinion in this matter, though the application for a *habeas coupus* was *ex parte;* and was decided without the benefit of an argument, for or against the application. I have done so because the duty of deciding upon the application was a delicate and responsible, as well as an imperative one; and being compelled to decide a question of such importance, under such circumstances, it was but respectful to those high officials, whose legal opinions, opposed to mine, have led to the arrest of the petitioner and the denial of the privilege of the writ of *habeas corpus*, that I should state, at some length, the reasons for my conclusions, and the authority on which I relied. I have preferred, however, even in expressing my own decided opinions, to adopt the deliberate and elo-

(*) In the debate referred to in the text, Mr. Adams said, "That *this power given to the general Government* to suspend this privilege in cases of rebellion and invasion did not take away the power of the several States to suspend it if they shall see fit." In saying this he of course referred to a suspension of the privileges of the writ as authorized to be issued by State Judges and Courts under the laws of their State; for it is clear that no State has the power to suspend the privilege under acts of Congress authorizing the Judges and Courts of the United States to issue the writ.

In the same debate Judge Dana, referring to the provision in the Massachusetts Constitution, said, * * * "As our own Legislature can, so might *Congress* continue the suspension of the writ from year to year. The safest and best restriction, therefore, arises from the nature of the cases in which *Congress* are authorized to exercise that power at all, namely, in those of rebellion or invasion."

Judge Sumner said: "*That this was a restriction on Congress*; that the writ of *habeas corpus* should not be supended except in cases of rebellion or invasion.

(†) See Note W in Appendix for several other authorities on this point.

quent language of departed jurists, of world-wide reputation;—(language used by them in deciding cases which had been fully argued, and used, too, after they had had the benefit of a full consultation with their learned associates on the bench)—rather than the less forcible and less authoritative language in which I might have expressed my own opinions. The decisions referred to have been before the profession and the country for more than forty years, and, so far as I know, they had not, until a very recent period, been questioned, or their doctrines assailed by any respectable jurist. I cannot but endeavor to follow, though with feeble and unsteady steps, in the paths of constitutional duty clearly and distinctly marked with the ineffaceable footprints of Marshall, of Story, of Washington, of Livingston, of Martin, and of Taney; and guided by the serene and steady light of their recorded opinions, I may certainly hope not to go far astray.

I have endorsed the proper allowance upon the petition presented, and upon the writ prepared by the Clerk.

DOCUMENTS

AND STATEMENT OF FACTS IN THE CASE.

Judson D. Benedict, whose arrest caused the foregoing opinion, is a regularly ordained Minister of the Gospel—was born in the State of Vermont—always lived in the Northern States—is fifty-five years of age—has six highly cultivated and intelligent children, sons and daughters, some of whom are married, all residing in this County—has not voted but once (and that at Town meeting) for the last fifteen years—and the peace doctrines of the sermon that occasioned his arrest, have, in public and private, for many years before this rebellion broke out, been advocated.

No more loyal man lives—and few men have a deeper interest in the crushing out of this rebellion. Being a man of thorough religious convictions, he deemed it his duty, at this time, to present to his brethren the doctrines of "Christ's Sermon on the Mount."

On Sunday, the 31st of August, Rev. Mr. Benedict preached a Farewell Sermon to his congregation at Aurora, numbering some three or four hundred persons. The theme of the discourse was the duty of his church in all the relations of life, and, particularly, in relation to the war. Among other things, he gave it as his opinion that the command of the New Testament was explicit that christians shall not engage in war of any kind. He referred to the Constitution of the State of New York which grants military exemptions to Quakers, and said he saw no reason why his brethren should not obtain like immunity. If such were not granted, in the case of a draft, he advised his brethren not to resist it, but rather, as law abiding cititizens, to submit cheerfully to any penalty the law might impose. He said, also, that there was no binding rule of the church; that a majority of its members held a different opinion; and that the subject was one for every man to decide for himself according to his understanding of the word of God.

On Monday, a complaint was made to Deputy Marshal Stevens, that Rev. Mr. Benedict had uttered seditious language tending to discourage enlistments, and requesting him to come to Aurora and obtain the proof. Mr. Stevens went to Aurora Monday night, and at a private house, and that night, and the next morning, took the affidavits of four persons, neither of whom are members of his church, the contents of which are to this day unknown, the Marshal having repeatedly refused to furnish the prisoner or his counsel with copies of them. On the strength of these documents, as is supposed, Mr. Stevens arrested the "Elder" at his own house before breakfast on Tuesday morning, September 2d. He brought him to this city, and conveyed him to Fort Porter, where he was confined in a room with four other political prisoners, and was suffered to remain until Wednesday morning at 11 o'clock, without having food or drink offered him. About noon on Wednesday, he was transferred to the Jail, by the order of the Marshal.

Last winter, the Rev. George B. Cheever preached a sermon at the Church of the Pilgrims, in New York, to two thousand people, and I believe, the same was published—in which he insisted that the policy

of the President in prosecuting the war, was to restore the Union as it was; that, if successful, would leave slavery as it is.—That, therefore, no christian, in any way, could give aid to the administration in the prosecution of the war against the rebels without sinning against God. One of the best citizens of this city heard the sermon.—Nobody believed Dr. Cheever should be arrested for that, and, although undoubtedly many supporters of the administration heard it and disapproved of it, they well knew it would be bad policy to arrest him, inasmuch as he preached as he did from a *strong conviction of religious duty*.

On the third day of September, at the request of the friends of Mr. Benedict, I applied to several Federal officers, citizens, meeting them together, for letters to the Secretary of War, recommending his release. I talked with them fifteen minutes, pointing out to them the injudiciousness of his arrest, the excitement it had produced, how it weakened instead of strengthened the government in this county. Every man of them refused to advise his release.

I believe that if two or three of those worthy gentlemen had delivered me such a letter, I could have obtained, by telegraph, an order for his dicharge that afternoon.

I then, the same day, applied to Deputy United States Marshal Stevens, for a letter from him recommending his discharge.

He refused to do it, saying, he had a discretion to exercise in arresting, but, he had no power to discharge. I said to him, "But the War Department upon being advised by you that the government would be strengthened by his discharge, would undoubtedly be governed by your opinion and order his release?"

His reply was, "I shall make no such recommendation."

The following statement, signed, as it will be seen, by a large number of the prominent citizens of Aurora, was also presented to Marshal Stevens, the loyalty and integrity of the subscribers being certified to by Judges Hall and Sheldon:(*)

We, the undersigned would respectfully represent to the proper authorities, if they can be reached, that we are pained to learn that Rev. J. D. Benedict was arrested on Tuesday morning, for preaching a sermon in Aurora, Sunday last, which sermon it is alleged, was calculated to discourage enlistments. We, the undersigned, attentively listened to said sermon and can put no such construction on it.

AURORA, Sept. 3d, 1862.

Gen. Aaron Riley,	Robert Person,
Horace Hoyt,	Wm. D. Jones,
Daniel D. Stiles,	Timothy Paine,
Sabina Potter,	Wm. B. Paine,
Alonzo Havens,	Isaiah Phillips,
Harry H. Persons,	Reynolds Cole,
Nehemiah Smith,	John P. Wilson,
Ephraim Woodruff,	Horace Prentice,
Dorr Spooner,	N. A. Turner,
Whipple Spooner,	Jonathan Smith,
Edward Spooner,	Hugh Minton,

together with numerous ladies, members of the Church and congregation.

I said, "Will you certify to the good character of the people of Aurora who have signed that statement." He refused to do that.

Then, for the first time, I looked at the order by which jailer Best held him.

Having no doubt that the General Term of the Supreme Court, then in session, would release him, I presented a petition for a *habeas corpus* to them.

The petition and affidavits are substantially like those presented to Judge Hall afterwards.

There were but three judges on the bench: Martin Grover of Angelica, James G. Hoyt of Buffalo, and Noah Davis of Albion.

Judges Hoyt and Davis refused the allowance of the writ of *habeas corpus*, on the sole ground, that the writ of *habeas corpus* was suspended all over the Union. I told them there was not a copy of the laws of last session of Congress in the city. I had not seen any proclamation of the President suspending the writ. And, on so grave a matter, I suggested the expediency of allowing the writ: and, then, when a return was made, counsel on both sides being prepared and heard, the right of the President to suspend the writ, (and by that time the acts of Congress, if any, being obtained) could be deliberately determined.

Judges Davis and Hoyt said they would take judicial notice the writ was suspended.

Neither of them intimated there was, by the order of Stanton, and the action of

(*) Hon. James Sheldon, County Judge of Erie County.

Deputy Marshal Stevens, any legal cause for the arrest of Benedict shown.

Martin Grover dissented, declaring that the writ ought to be allowed; that he had no knowledge or information upon which he could judicially act, of the suspension of the writ. When a return was made, and only then, could it be determined whether or not any order for the suspension of the writ was applicable to the case in hand; and if, when such return was made it appeared there was no reasonable cause shown for his arrest, he should be in favor of discharging the prisoner.

But the majority of the Court denied the application of the writ, and such denial was entered in the minutes of the General Term.

I then had, on the same day of such denial, requested Deputy Marshal Stevens to informally consent to or not oppose an allowance of a writ of *habeas corpus* by Judge Hall, for the sole purpose of enabling Mr. Benedict to give bail. That he could give bail to the amount of $50,000 to comply with any condition the federal officers might impose.

Stevens replied, he would consent to no such thing, and *he would disobey any order for his release on bail which Judge Hall might make.* And yet in the case of Mr. Barker of Gowanda, such bail with the consent of a Deputy Marshal of Buffalo, had been given given, and Barker released.

I soon after had an interview with Marshal Chase, and he proposed that on a future day, witnesses should be examined on both sides, before a federal Commissioner in the regular way, by examination and cross-examination in public, and he would forward their depositions to Washington.

This I agreed to, and on the day fixed several men and women who heard the sermon that occasioned his arrest, appeared as witnesses. But instead of being examined publicly, Marshal Chase insisted I should draw the affidavits in private, bring each witness to his private room, when he would cross-examine them in private, which I might write down as a part of their deposition. I spent five hours in this kind of work, and when finished Marshal Chase said I might forward the papers, and he would write to the Department recommending the restoration of the prisoner to liberty.

I took those affidavits with the consent of Marshal Chase, drawn by him, every witness being produced by the friends of Benedict, to my office. I directed my student, Mr. Miller to copy them; and within fifteen minutes after Mr. Miller commenced copying them, in my absence, Mr. Grant, a Deputy Marshal, said to Mr. Miller, "the Marshal had sent him for those depositions." Miller replied, "I am copying them."—Grant took them from the table, and Mr. Miller went with Grant to the Marshal's office. Miller said to Stevens, "I am copying the papers." Stevens replied, "there was no use in copying them, and Sawin knew it, and Sawin could not make any damned political capital out of it. I want the papers to send off immediately, and if Sawin wants to make a copy of them, he can take them and go to hell with them." They were left with Stevens.

The family and friends of Benedict waited one week after this, and no order came from Washington.

The papers for Noah B. Clark committed for the same offence and by the same person, were forwarded two days later and he was released.

After Clark was released and being unable to learn that there was any prospect of any *voluntary* action on the part of the Marshal or the Secretary of War, for his discharge, at the request of the family and friends of Benedict I presented the papers to Judge Hall for a writ of *habeas corpus.*

The following are copies of such papers together with the Writ and proof of service; and return of Best and Stevens, and order of Judge Hall on Chase; the second Writ of *habeas corpus* and the proof of service; also the first Petition for a writ of *habeas corpus* and papers accompanying:—

To the Hon. Nathan K. Hall, United States District Judge for the Northern District of New York.

The petition of Judson D. Benedict shows;

That he is now confined and restrained of his liberty in the common jail, of the County of Erie, by William F. Best, the keeper of said jail.

That your petitioner is not committed or detained by virtue of any process issued by any Court of the United States or any Judge thereof, or by virtue of the final judgment or decree of any Court, or by virtue of any process of any kind or description.

That the only cause of such detention rendered by said jailor is a paper delivered to him by A. G. Stevens, Deputy United States Marshal, a copy of which is hereto annexed, marked schedule (A.)

That A. G. Stevens arrested your petitioner at Aurora, Tuesday morning, the 2d day of September, inst. All he said to your petitioner at time of arrest, was "I have an unpleasant duty to perform, I have come to arrest you. I suppose you are willing to go with me without opposition?" Your petitioner replied, "most certainly." Said Stevens then took deponent to Fort Porter, and left him there where your petitioner stayed until removed to jail.

Said Stevens showed no paper to your petitioner nor did he state any cause for such arrest.

Your petitioner has neither by act or speech, been disloyal to the Constitution or laws of the United States, or been guilty of any violation of any order of the War Department, or of the President of the United States, or been guilty of any offence or act subjecting him to arrest.

That your petitioner alleges, That such arrest and imprisonment are illegal for the reason that he has not been charged with any offence known to the laws, no process has been issued by any Court or magistrate for his arrest—and deponent refers to annexed affidavit of Albert Sawin, his counsel, for the only pretense for his arrest given by the United States Deputy Marshal.

Your petitioner therefore prays your Honor to direct and authorize the issuing of a writ of *habeas corpus* to be directed to said A. G. Stevens, such Deputy Marshal of the United States, and William F. Best, aforesaid, jailor of the County of Erie, directing and requiring said Deputy U. S. Marshal and said jailor to produce the body of your petitioner before your Honor, that the cause of such imprisonment may be enquired into and your petitioner may be set at liberty.

(Signed,) J. D. BENEDICT.

THE UNITED STATES OF AMERICA,
THE NORTHERN DISTRICT OF NEW YORK, } ss.
COUNTY OF ERIE,

Judson D. Benedict being duly sworn says that he has heard the foregoing petition signed by him, read and knows the contents thereof, and the same is true of his own knowledge.

J. D. BENEDICT.

Sworn to before me, this 15th day of September, 1862. P. G. PARKER,
U. S. Commissioner for Erie Co.

("A")

MARSHAL'S OFFICE,
BUFFALO, Sept'r 2d, 1862.

David M. Grant will take from Fort Porter, Thomas Cummings, James Parker, Antoine Quanliet, Noah B. Clark and Jared Benedict, prisoners confined there, committed under orders of the War Department, and remove them to the Erie County Jail for safe keeping, and there detain them until further order, and the sheriff or jailor of said county will keep them until further order in said jail.

(Signed,) A. G. STEVENS,
U. S. Dep. Marshal.

To Col. E. P. CHAPIN, and the
SHERIFF and JAILOR of Erie County.

WAR DEPARTMENT,
Aug. 8, 1862.

ORDERED—

First. That all United States Marshals, and Superintendents and Chiefs of Police of any town, city or district, be and they are hereby authorized and directed to arrest and imprison any person or persons who may be engaged by act, speech, or writing, in discouraging volunteer enlistments, or in any way giving aid and comfort to the enemy, or for any other disloyal practice against the United States.

Second. That immediate report be made to Major L. C. Turner, Judge Advocate, in order that such persons may be tried before a military commission.

Third. The expense of such arrest and imprisonment will be certified to the Chief Clerk of the War Department for settlement and payment.

EDWIN M. STANON.
Secretary of War.

UNITED STATES OF AMERICA }
NORTHERN DISTRICT OF NEW YORK, } ss.
COUNTY OF ERIE, }

Albert Sawin, counsellor-at-law, being duly sworn says, that at the request of above named Judson D. Benedict, on the 3d day of September inst., he enquired personally of Deputy U. S. Marshal Stevens, at his office in Buffalo, if he arrested said Benedict by virtue of any order, process or paper. He said, he did not, but he showed deponent a slip cut from a newspaper printed, a copy of which is hereto annexed, and said that printed slip was his only authority for the arrest of said Benedict.

ALBERT SAWIN.

Sworn this 15th day of September, 1862.
P. G. PARKER, U. S. Commissioner.

(*Endorsed.*)

NORTHERN DISTRICT OF NEW YORK, SS:

On the within petition I allow a writ of *habeas corpus* to be directed to Albert G. Stevens, U. S. Deputy Marshal and William F. Best, the keeper of Erie County Gaol, and made returnable on the 18th day of September inst., at 10 A. M., before me, and I direct the Clerk of the District Court to prepare the writ that I may endorse an allowance thereon.

(Signed) N. K. HALL,
U. S. District Judge.

Dated Sept. 15, 1862.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

TO

ALBERT G. STEVENS, DEPUTY MARSHAL OF THE UNITED STATES, AND WILLIAM F BEST, THE KEEPER OF THE ERIE COUNTY JAIL, *Greeting:*

{L. S.}

You are hereby commanded, that you have the body of Judson D. Benedict, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said Judson D. Benedict shall be called or charged, before the Honorable Nathan K. Hall, District Judge of the United States for the Northern District of New York, at the United States Court Room, at the corner of Washington and Seneca Streets in the City of Buffalo, in said Northern District of New York, at ten o'clock in the forenoon of the eighteenth day of September, in the year of our Lord one thousand eight hundred and sixty-two, to do and receive what shall then and there be considered concerning the said Judson D. Benedict.

And have you then and there this writ.

Witness, the Hon. Nathan K. Hall, Judge of the District Court of the United States for the Northern District of New York, at the City of Buffalo, the sixteenth day of September, in the year of our Lord one thousand eight hundred and sixty-two.

GEO. GORHAM, Clerk.

(*Endorsed.*)

NORTHERN DISTRICT OF NEW YORK, SS:

The within writ, on petition of the within named Judson D. Benedict, has been allowed, and hereby is allowed by me in pursuance of the Statute in such case made and provided.

Sept. 16, 1862.

N. K. HALL,
District Judge of the United States,
for the Northern District of New York

TO THE HON. NATHAN K. HALL, JUDGE OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK:

The statement of William F. Best respectfully showeth:

That he is now, and since the first day of September instant, has been the keeper of Erie County Jail. That on or about the third day of September instant, he received into said jail one Judson D. Benedict, by the name of Jared Benedict. That he received him under and by virtue of a written order signed by A. G. Stevens, as a Deputy Marshal of the United States, of which a copy is hereto annexed, and not otherwise. That since he so received the said Benedict he has held and now holds him by virtue of said order, and on no other order or process; that he has held and so holds him as the bailee or custodian of said Deputy Marshal and his principal and not otherwise. That on or about the sixteenth day of September instant, he was served with a writ of *habeas corpus*, issued by your Honor, directed to

the said A. G. Stevens, and to him the said William F. Best, as keeper of the Erie County jail, commanding them among other things, to bring and have the body of the said Judson D. Benedict and said writ before your Honor as such Judge, on the eighteenth day of September instanta t 10 o'clock A. M., at the United States Court room, in Buffalo. That in obedience to said writ it was the intention of me, the said William F. Best, in good faith, to bring and have the body of said Benedict before your Honor at the time and place last aforesaid, as by the said writ commanded, and to that end I, the said William F. Best, had made and annexed to said writ, my return thereto, which return comprised a copy of the order under which said Benedict was held by me, and a statement that it was by virtue of that alone that I held him, and that I produced the body of said Benedict before your Honor, as by the said writ commanded. That this morning, at about the hour of half-past nine o'clock, in the office of Edward I. Chase, the Marshal of the United States for the Northern District of New York, in Buffalo, the said Edward I. Chase, asked me to take and look at said writ and return. That not suspecting bad faith on his part, and believing that he would return the same to me, and at the suggestion of Asher P. Nichols, my counsel, I handed the same to him. That after examining the same he said that it was his writ and refused to return it to me. That thereupon, I made a formal demand on him for the same, which demand he refused to comply with. That having no writ, I cannot have here the said writ or make a formal return thereto, as by the said writ I was commanded; nor can I have the body of the said Judson D. Benedict here as commanded by said writ for the reasons above stated.

Dated, September 18th, 1862.

(Signed) WILLIAM F. BEST.

NORTHERN DISTRICT OF NEW YORK—ss.

William F. Best being sworn, says he is the person described in and who signed the within statement; that he has heard the same read and knows the contents thereof, and the same is in all respects true, as he verily believes.

WILLIAM F. BEST.

Subscribed and sworn, this 18th day of September, 1862, before me,

N. K. HALL, U. S. District Judge.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF NEW YORK, } ss:
COUNTY OF ERIE,

Albert Sawin being duly sworn, says he is counsel for Judson D. Benedict, named in a writ of *habeas corpus*, a copy of which is hereto annexed, and also a copy of original order of allowance endorsed thereon.

That on the sixteenth day of September inst., he served the said writ of *habeas corpus* with said copy order upon Albert G. Stevens, the Deputy Marshal therein named, by delivering a copy of the same and of said order of allowance so endorsed personally to said Stevens personally, at the City of Buffalo, and at the same time showing to him the said original writ and said original order endorsed thereon. That on the same day he delivered to said William F. Best, keeper of the common jail of the County of Erie, personally, said original writ, with said order endorsed thereon.—That this morning about the hour of eight o'clock, deponent paid to said William F. Best two dollars and fifty cents, being the fees named by him allowed by law for the return to and execution of said writ, who received the same.

That on the morning of the 17th day of September inst., deponent was present at an interview between said Stevens and said Best, in which said Stevens told said Best he had received instructions from the War Department to resist said writ, and he, said Stevens, directed said Best not to obey it, such being the order of the War Department. Deponent said, "of course Mr. Best will obey the writ and bring Benedict before Judge Hall." Said Stevens said he would have a force to prevent it. Deponent said, " Mr. Best, I will be present to-morrow morning as one to assist you in obeying said writ. though at the peril of being shot." Said Stevens replied, "then you will be shot, and I will report you to the War Department."

Deponent further says, that this forenoon he enquired of said Stevens what fees he demanded for making return to said writ of *habeas corpus*, and informed him he, depo-

nent, was ready to pay the same; the only reply he made was, "no matter."

ALBERT SAWIN.

Sworn and subscribed this 18th day of September, 1862.
A. P. Nichols, U. S. Com'r.

To the Hon. Nathan K. Hall, District Judge of the United, States for the Northern District of New York:

The annexed paper was delivered to me. It purports to be a writ of *habeas corpus*. It is not under the seal of the Court; the signature to the same is not the hand writing of the Clerk, nor is the signature to the allowance endorsed on the same in the hand writing of your Honor, nor is it certified to be a copy of an original process. I understand that an original writ was served upon and is in the hands of William F. Best, one of the prisoners [*persons?*] to whom the same is directed; the said Best refuses to allow me to have said writ, or recognise any authority on my part to the prisoner therein named, or to allow me to have the custody and control of the prisoner, and claims that he alone should make return to said writ.

I would further state that said prisoner was legally arrested by me by authority of the President of the United States, and delivered by me in custody under such authority in the jail of Erie County where I placed him for safe keeping merely, and where he now is, and that I still have lawful right to said prisoner, but the jailor of said Erie County jail on demand of said prisoner this day made by me of him for said prisoner refused to deliver said prisoner to me as he rightfully and lawfully should do. I further state that no return made by said Best to said writ can present the true facts of the case, or the cause of the detention of said prisoner.

ALBERT G. STEVENS,
U. S. Deputy Marshal.

ON HABEAS CORPUS.

In the matter of Judson D. Benedict:

It appearing to my satisfaction, by the affidavit of William F. Best, that Edward I. Chase, now present, has received from him, on request, and detained from him against his will, the writ of *habeas corpus* heretofore issued in this matter, (and directed and delivered to said William F. Best,) and thereby prevented his obedience to said writ; I hereby order and direct the said Edward I. Chase to deliver the said writ to the said Best, or to the undersigned, or show cause, before me, at the U. S. Court Room in Buffalo, at half-past two o'clock this afternoon, why he shall not be committed for a contempt.

N. K. HALL,
U. S. Dist. Judge.

Sept. 18, 1862.

Albert G. Stevens, the Deputy Marshal, was made a party as well as the jailor, who had his actual custody. The return of Stevens is a curiosity. The object of making Stevens a party was to enable him to produce any evidence showing Benedict had done anything worthy of bonds. He declined to do this. Marshals Chase and Stevens had declared beforehand that jailor Best should not take Benedict from the jail to Judge Hall's court room, and they would use force to prevent it.

Accordingly in the absence of the Colonel of the Regiment, Marshal Chase procured from Camp Morgan a company of soldiers, placed them in the vicinity of the jail for the purpose of executing that threat. The friends of jailor Best were likewise in the vicinity in sufficient numbers to enable him to obey the writ, no matter how much force the Marshal might have obtained.—However, without opposition, the loyal jailor was permitted to obey the writ.

[From Buffalo Courier, Sept. 19th.]

U. S. District Court—Judge Hall, presiding.
September 18th.

The case of the writ of *habeas corpus* commanding A. G. Stevens, Deputy U. S. Marshal, and Wm. F. Best, jailor of Erie county, to produce the body of Rev. Judson D. Benedict, in court, was before the court.

A. Sawin made a statement of the service of the writ of *habeas corpus* upon the jailor of the Erie County Jail.

A. P. Nichols, Esq., the attorney for the jailor, made a return stating that the jailor

had handed the writ of *habeas corpus* to U. S. Marshal Chase, by the advice of his attorney, and that Mr. Chase had refused to return it to him, and that it was impossible to return either the writ or the prisoner.

U. S. Marshal Chase claimed that the prisoner was in his custody, having been arrested by order of the President, through the Secretary of War; that the jailor was simply a machine, and that he was the proper custodian of the prisoner.

This was the position taken by U. S. District Attorney Dart.

Mr. Nichols claimed that the prisoner was now held by the jailor by virtue of the writ of *habeas corpus*, and that he could not surrender him until that writ was vacated.

After a somewhat extended argument, Judge Hall made an order that Marshal Chase return the writ to the jailor; and that he make a return at 2½ o'clock, &c. The Court adjourned till that hour.

During the recess of the Court, Marshal Chase offered to deliver up the writ of *habeas corpus*, which he had withheld from Jailor Best, on the condition that the jailor would deliver the prisoner into his custody. This the jailor refused; and before 2 o'clock Marshal Chase surrendered the writ, evidently not wishing to disobey the order of the Court. The jailor now being in possession of the writ, took the prisoner, in company with Sheriff Best, and escorted him to the Court Room, where he was cordially greeted by many of his friends from the country.

AFTERNOON SESSION—2½ O'CLOCK.

U. S. Marshal Chase came into Court and delivered to the Judge a return to the writ of *habeas corpus*, setting forth by what authority his Deputy had arrested the prisoner, and that the writ of *habeas corpus* having been suspended, and he ordered to resist any attempt to execute it, he could not obey the order of the Court. This we understood to be the substance of the return.

Marshal Chase requested the jailor to give him a copy of the order of the Court compelling him to return the writ.

The Judge said a copy would be furnished him.

A. P. Nichols, Esq., then made the proper return to the writ, and produced Rev. J. D. Benedict in Court.

U. S. District Attorney Dart said, that a turnkey had, in some way, obtained possession of a United States prisoner, arrested by order of the President of the United States, through the Secretary of War, for uttering seditious language, or language calculated to weaken the confidence of the people in the Government. In such cases, the President has suspended the writ of *habeas corpus*, and ordered that forcible resistance be made to its execution. He hoped that the occasion for arrests under this order had ceased, and that there would be no conflict of jurisdiction in this case. He asked the suspension of proceedings until Tuesday next, trusting that the matter might be satisfactorily arranged before that time.

Albert Sawin opposed the postponement. It was important that the great question of personal liberty in connection with the arbitrary arrests should be disposed of by a legal tribunal.

Judge Hall said the real question at issue was, whether the President had the power to suspend the writ of *habeas corpus*, and if this was the question to be argued the time asked was not unreasonable. He was anxious that the matter should be fairly canvassed, and a conflict of authority avoided. He would, therefore, grant the request of the United States District Attorney, and adjourned the case to Tuesday next, at 11 A. M., meanwhile the prisoner to remain in the custody of the jailor to be again produced in court at the time named.

The District Attorney desired the Judge simply to remand the prisoner, without naming the custodian.

Mr. Sawin opposed this. The Marshal wished to gain possession of the prisoner for the purpose of placing him in military custody, and beyond the jurisdiction of this Court. The rights of the prisoner were in jeopardy, and he appealed to the protection of the Court.

A. P. Nichols, Esq., asked the Court to make an order stating by what authority the jailor held the prisoner whether by or-

der of the Marshal, or under the writ of *habeas corpus* and the order of this Court. He wished the duty and the authority of the jailor clearly defined.

Mr. Dart desired that the Court would make no such order, but simply remand the prisoner. He thought the Court ought to have confidence in the Marshals, and believe they would respect the Court.

Judge Hall said the custody of the prisoner will continue with the jailor as it is now. The prisoner is now held by virtue of the writ of *habeas corpus*. He is removed from the custody of the marshal or deputy marshals, and neither of them can interfere with him until the hearing and determination of this writ.

Marshal Chase wished to know whether his authority in this case was at an end.

The Judge replied that he had as much and no more to do with it than any other citizen. If he, or any other man, knew of any crime the prisoner had committed, it was his duty to inform against him, that he might be punished according to law. It was especially the duty of the U. S. District Attorney to ascertain the facts and proceed against him, if he had been guilty of any violation of the laws of the land.

The following is a copy of the order of Judge Hall in the case:—

"ON HABEAS CORPUS,

IN THE MATTER OF JUDSON D. BENEDICT:

The said Judson D. Benedict having this day been brought before me by W. F. Best, the keeper of the common jail of the county of Erie, in obedience to the annexed writ of *habeas corpus*, and the hearing under the said writ, and the return made thereto having, at the request of Hon. Wm. A. Dart, U. S. District Attorney, been adjourned until Tuesday, the 23d day of September, at 11 o'clock in the forenoon, it is hereby ordered, on motion of the counsel for the defendant, that the said Judson D. Benedict be and he is hereby remanded and committed to the custody of Wm. F. Best, as such jailor, to be kept and detained by him under the authority of such writ of *habeas corpus* and this order, until the time to which said hearing is so adjourned; and that said Wm. F. Best produce and bring the body of the said Judson D. Benedict and the said writ of *habeas corpus* before the undersigned at the U, S. Court Room in the City of Buffalo, on the said 23d day of September inst., at 11 o'clock A. M., then and there to do and receive what shall then and there be considered in that behalf.

N. K. HALL,
U. S. District Judge.

Sept. 18, 1862."

The Marshal betrayed some uneasiness at the decision of the Judge, but remarked that he was a loyal man, and should respect the Court.

After the necessary papers were made out, Rev. Mr. Benedict walked, in company with Mr. Best, back to his apartments at the jail. It was rumored that the Marshal would attempt the rescue of the prisoner, but this was unfounded.

It is understood that the Marshal and District Attorney will send a statement of the facts and copies of the papers to Washington, and await instructions from the War Department or the President. Meanwhile the prisoner is in the custody of the highest Court known to the people of the United States. (*)

[From the Buffalo Courier, Sept. 24.]

U. S. DISTRICT COURT,
Buffalo, Sept. 23, 1862.

As it was extensively known that the hearing in the case of Rev. Judson D. Benedict, arrested for alleged seditious language, and taken out of the custody of the United States Marshals by a writ of *habeas corpus*, would take place at 11 o'clock this morning, the court room was well filled with residents of the towns where the prisoner is well known. We noticed citizens from half a dozen different towns, and some twenty ladies from the country were also present, all manifesting the most intense interest in the disposition of the case. These people testify to their high regard for the "Elder," as they call him, and feel indignant that he

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(*) This is, of course, a mistake. The writ of *habeas corpus* was issued, not by the Supreme Court of the United States, but by JUDGE HALL, as Judge of the U. S. District Court.

should be subjected even to suspicion of his loyalty.

Shortly before 11 o'clock, the prisoner appeared in Court, in company with the jailor, Wm. F. Best. A. P. Nichols, Esq., attorney for the jailor, handed up the original writ of *habeas corpus*, with the order of the Judge, remanding the prisoner to jail, engrossed upon it.

The Court said he did not understand that any demurrer had been made to the writ as returned, or issue taken on the facts stated in the return.

A. Sawin claimed that the return as made stated in what manner the prisoner was arrested and was held, sufficiently clearly to enable the Court to determine that the arrest is illegal, and that the prisoner should be discharged.

The Court inquired if the United States District Attorney was to be present, and directed the officer of the Court to inquire if the District Attorney desired to be heard in this case.

Marshal Chase soon appeared in Court, and held conversation with Judge Hall which was not audible.

After the close of the interview, the Court announced that the United States District Attorney did not propose to appear or to make any further statements to the Court or furnish any proofs in the case; that neither the Marshal or his deputy, Stevens, would appear; and that, so far as they were concerned, the case was left to the Court in its present condition.

The Court said that the parties might file such statements and papers as they saw fit, and the case would come up for further consideration.

Thereupon, Mr. Sawin proposed to interpose a demurrer to the return as made, and thereby present the question of the legality of the arrest and imprisonment.

Mr. Sawin proceeded to draw up the demurrer, and having completed the paper, read it.

Mr. Sawin said he had prepared certain propositions and a form of order in this case which he wished to submit.

The Court desired to say to any person and to all persons present, that if they knew of any crime that the prisoner had committed against the laws of the United States, or any cause of arrest, other than that set forth in the return, they should make it known.—He had prepared an opinion in the case, embodying its legal bearings which he should publish as his justification. He should make an order discharging the prisoner from arrest, no cause having been shown why he should be detained. The following is a copy of his order:

"ON HABEAS CORPUS.

IN THE MATTER OF JUDSON D. BENEDICT.

The said Judson D. Benedict having this day been again brought before me in pursuance of the annexed writ of *habeas corpus* and order, and the counsel of the said petitioner having filed a demurrer to the return to the said writ made by W. F. Best, jailor, and to the statement heretofore made by A. G. Stevens, deputy marshal, and (no one appearing to oppose the discharge,) I having proceeded *ex parte* to hear and consider the case as now presented, and determined that no legal cause for the arrest, imprisonment and detention of the said Benedict is shown by said return or said statement and return, and having invited all persons present to make proof, if any could be made, that the said Benedict had been guilty of any offense against the laws of the United States, or was subject to arrest for any cause other than that appearing on said return, and no such proof being offered, I do hereby order and direct that the said Judson D. Benedict be and he is hereby discharged from custody.

N. K. HALL,
U. S. District Judge."

While a copy of this order was being made, the reporter of the *Courier* had an interview with Marshal Chase, in which he desired him to state that previous to the issuing of the writ of *habeas corpus* by Judge Hall, he had written to the War Department recommending the release of Mr. Benedict, and that he would have been released before this, had it not been for the attempt of Mr. Sawin and others to raise an issue with the

United States Government. We make the statement for the benefit of the Marshal.

It was now evident that Mr. Benedict, who had been discharged from arrest by the order of the highest Court known to the Constitution, (*) was again to be arrested by the United States Marshals, although his release had been recommended by Mr. Chase. Several members of the police force were seen to enter and dispose themselves about the room, while Marshal Chase and Deputy Tyler, of Lockport, sought positions near the now free citizen of the United States, standing in the Temple of Justice, and waiting for a copy of the proclamation of emancipation just issued by the Judge.

As soon as the copy of the order was handed him, officer Tyler was observed to speak to the "Elder," and the Reverend gentlemen, with his free papers in his hand, demanded to be shown the authority for his arrest. He said he did not propose to resist the arrest, but wished to know by whose orders he was seized. We did not hear the reply, but are informed that it was "*We will show you the authority when we get you where we want you.*" He was hurried, Marshal Chase on one side of him and officer Tyler on the other, down the stairs and to a carriage in waiting, in which deputy marshal Stevens sat. A large crowd gathered about the carriage, and much feeling was exhibited, but no attempt was made to rescue the prisoner. The carriage was driven off, Marshal Chase on the box with the driver, and the prisoner inside with officers Tyler and Stevens. It is understood that this was done by special orders from the War Department. (†)

Judge Hall soon after, on the application of Mr. Sawin, issued another writ of *habeas corpus,* addressed to Marshal Chase, which was served upon him at the depot as he was about leaving for Lockport. We are informed that he said that the prisoner was not in his custody, but was on his way to Washington.

The following is a copy, of petition, with the proof of serving of said writ:

"TO THE HON. NATHAN K. HALL, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF NEW YORK:

The Petition of Albert Sawin of the City of Buffalo, counsellor at law, shows that heretofore proceedings were instituted before your Honor, in behalf of Judson D. Benedict, then confined in the jail of the County of Erie, the jailor of which was and is William F. Best, under the directions of Albert G. Stevens, then and now United States Deputy Marshal—and such proceedings were had before your Honor, a writ of *Habeas Corpus* was issued and this morning said imprisonment was declared illegal by your Honor, and an order was made and delivered for his discharge.

That after such order was delivered and said Benedict was discharged from imprisonment, the same having all been done in the United States Court Room, your petitioner walked in company with said Benedict, from said Court Room down to the outer steps of said building, and Edward I. Chase, who is the United States Marshal for the Northern District of New York, took hold of the arm of the said Benedict, and said in substance to him, "I arrest you by authority of the Secretary of War," hurried him, with the aid of divers persons, into a carriage drawn by two horses, and drove away with said Benedict, said Chase leaving said carriage after riding a short distance.

Your petitioner, at the time said Chase first arrested said Benedict, and at said Benedict's request, enquired by virtue of what process said arrest was made, and requested a copy thereof. Said Chase informed your petitioner that he would soon let him know, and shortly afterwards he informed your petitioner said arrest was made by virtue of a telegraphic dispatch from the Secretary of War, the purport of which was that the writ of *habeas corpus* should be resisted, and in case he was discharged to arrest said Benedict, and that was the sole authority of him, said Marshal Chase, for said arrest, and that he was now in his custody, and that any writ of *habeas corpus* could be served on him.

(*) This was, of course, a misapprehension. The discharge was ordered by JUDGE HALL, as the United States District Judge of this district, and not by the Supreme Court of the United States, as the erroneous statement of the reporter of the *Courier* would seem to intimate.

(†) See Note X Appendix.

Your petitioner is further informed and believes, that said carriage, containing said Benedict, was driven on the road to Lockport; and said Albert G. Stevens was in said carriage with said Benedict, on the road to Lockport, about three miles from the Federal Court Room building.

That said Marshal Chase was in and about said Federal Court Room at the time the order was publicly announced by your Honor, made by you in the matter discharging said Benedict from said imprisonment.

Your petitioner further alleges, that he is informed and believes that said Benedict was so arrested for no other cause, or order, or process than that above stated; and that he was not arrested, and is not now restrained of his liberty by virtue of any judgment, process, decree, or order of any court or judge of civil or criminal jurisdiction.

Your petitioner alleges such arrest is illegal, inasmuch as any order made by the Secretary of War, by telegraph, or otherwise, is void. Martial law does not prevail, and has not been declared in the County of Erie; the provisions of the Federal Constitution, for the protection of the personal liberty of the citizen, are in full force; and said Stevens, and said Marshal Chase, have been guilty of a gross violation of law, and of a contempt of the judicial power, and of the authority of your Honor, in their disobedience of the order discharging said Benedict, made by your Honor.

Wherefore, your petitioner prays, said Chase, and said Stevens, may be punished for such contempt; and in behalf of said Benedict, your petitioner prays, that your Honor will grant a writ of *habeas corpus* to be directed to said Edward I. Chase commanding him to produce, before your Honor, at such time as may be named, the body of said Benedict, to the end that due inquiry may be made of the cause of such imprisonment, and he may be discharged therefrom.

(Signed,) ALBERT SAWIN.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF NEW YORK, } ss.
COUNTY OF ERIE,

Albert Sawin being duly sworn, says he has read the foregoing petition, signed by him, and knows the contents thereof, and the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters, he believes it to be true.

ALBERT SAWIN.

Sworn and subscribed, this 23d day of September, 1862, before me,

GEO. GORHAM,
United States Com'r.

(*Endorsed.*)

NORTHERN DISTRICT OF NEW YORK:

On the within petition and affidavit, I allow a writ of *habeas corpus* as prayed for to bring up the body of Judson D. Benedict, to be directed to Edward I. Chase, United States Marshal, and returnable before me, on the 25th of September inst., at 10 o'clock A. M., at the United States Court Room, in Buffalo. The Clerk will prepare the writ.

Sept. 22, 1862.

N. K. HALL,
U. S. Dist. Judge, N. Dist., of New York.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF NEW YORK. } ss.

Harvey B. Ransom being duly sworn, says: that he is well acquainted with Edward I. Chase, named in annexed copy writ of *habeas corpus*, That he served upon said Chase, at the City of Buffalo, on the 23d day of September inst., at about the hour of five o'clock P. M. of that day, an original writ of *habeas corpus*, with the original order of allowance signed by Judge Hall, endorsed thereon, copies of which writ and order are hereto annexed, by delivering the same at the time and place aforesaid to said Chase personally. That deponent and said Chase went yesterday afternoon on same train of cars to Lockport. Deponent saw after his arrival within named Benedict in front of said Chase's office, at Lockport, said Chase, as deponent was informed, being in his office at the time.

HARVEY B. RANSOM.

Sworn and subscribed before me this 24th day of September, 1862.

A. P. NICHOLS, U. S. Com'r.

From the Buffalo Courier, Sept. 26th.

"At 10 o'clock this (Thursday) morning, the second writ of *habeas corpus*, issued by Judge Hall, in the case of Judson D. Benedict, was returnable. The following is the return made by Marshal Chase to the writ:

"To the Hon. Nathan K. Hall, District Judge of the United States for the Northern District of New York:

The annexed writ was delivered to me between five and six o'clock in the afternoon of the 23d day of September last. Before that time and about noon of that day Judson D. Benedict, the person named in said writ, had been arrested by me for disloyal practice, by order of the President of the United States, and put in charge of Daniel G. Tucker, with direction to convey him to the Old Capitol Prison in the City of Washington, and said Tucker immediately left Buffalo with the prisoner for that purpose.

Under general orders made by the President, through the War Department, bearing date the 8th day of August, 1862, said Benedict had been, on September 2d, 1862, arrested by my deputy, A. G. Stevens, for such disloyal practice, and said deputy was ordered by the War Department to detain him in custody until the further order of said department. For safe keeping said Benedict was removed from Fort Porter to the jail of Erie county.

Afterwards, as is said, a writ of *habeas corpus*, directed to said Stevens and William F. Best, the jailor, was delivered to said jailor. The War Department was informed by said Stevens of the allowance of said writ, and said Stevens was directed by said Department not to regard said writ. But said William F. Best, the jailor, refused to allow me or my deputy, Mr. Stevens, to have any control of the prisoner, or of the writ, and avowed his intention to make return to said writ, and produce the prisoner before your Honor.

I informed the War Department of such refusal and avowal. In answer I received an order made by the Secretary of War, saying, in substance, "Your deputy, Mr. Stevens, was directed to disregard the writ of *habeas corpus*. If Stevens or the jailor permits Benedict to be discharged on *habeas corpus*, arrest him again and convey him to the Old Capitol Prison, at Washington."

The original order was delivered by me to Mr. Tucker, into whose charge I delivered the prisoner, and I have no perfect copy.—The above is a substantial copy, and in all essential particulars is correct.

In pursuance of such order, after said Benedict was, on the 23d inst., discharged from the custody of said Best, and said Benedict had left the U. S. Court Room, I arrested him and put him in charge of Mr. Tucker, with the directions above stated.

A formidable insurrection and rebellion is, as is well known, now in progress in this country, and the writ of *habeas corpus* suspended, and the President of the United States, by one of the orders above referred to, made on the 8th of August, declared the same to be suspended in case of disloyal practices. I would also refer your Honor to the Proclamation of the President of the United States of the 24th of Sept., inst.

I, therefore, understand, that the above arrests are military arrests, in relation to which the writ of *habeas corpus* is suspended.

I have, however, out of respect to your Honor, and the judicial authority of the country, thought it my duty to return to you the annexed writ of *habeas corpus*, and make the foregoing statement."

Very respectfully,
EDWARD I. CHASE,
U. S. Marshal.

Dated the 25th day of September, A. D. 1862.

Mr. Sawin moved, after reading the proof of service of the writ, and the above statement of Marshal Chase, that an order be made for the discharge of Judson D. Benedict from custody, on the ground that his Honor, from the previous proceedings as well as the present, knew his imprisonment was illegal. Mr. Sawin had no doubt such order would be obeyed by all loyal officers, military or civil, having his custody, inasmuch as the decrees and orders of the Judicial branch of the Government were binding not only upon every individual, but every officer of that Government, even the President himself.

Mr. Sawin also moved that an order be made that Marshal Chase show cause, on some day, why he should not be punished for disobedience of the writ, especially as it appears by his statement that he had directed officer Tucker to take Benedict to Washington, and that his pretence that the prisoner was not in his custody is proved to be false.

He said the petition, verified by the oath of the petitioner, shows that Marshal Chase asserted and informed the counsel for Benedict, after he had been put in the carriage, that he (Benedict) was in his (Chase's) custody, and that the writ of *habeas corpus* might be served on him; that the writ was so served about five o'clock in the afternoon of the 23d inst., and the same man who served the writ accompanied Mr. Chase to Lockport, and saw Mr. Benedict in front of Chase's office, Chase being inside. It is, therefore, proved that Mr. Chase's statement is false in the respect that he (Chase) had not the control of Benedict, *after* the service of the writ. And it further appears that after the service of the writ, he must have removed the prisoner from Lockport for the express purpose of preventing the order for his discharge from becoming operative.

The Judge said that, for the present, he would not make the first order moved for, as it could not hasten the release of the prisoner from illegal custody, and that owing to the absence of Marshal Chase, for which some explanation had been made by his deputy, Mr. Stevens, he would postpone the further hearing of the case until Tuesday of next week, to which time the Court stood adjourned."

I submit this narrative without note or comment, to the people of this State, and especially to the bar, to enable them better to determine what action is necessary to ward off a threatened military despotism.

I give no advice, but being thoroughly convinced that there cannot be found twenty real disloyal persons among the fourteen thousand voters residing within the County of Erie; that there is no military necessity for declaring or executing martial law in this County or State; that it has not been constitutionally declared and is not now even in force; that the laws are not *here* silent, but alive and speaking; that the orders and decrees of Courts upon all judicial questions of which they have jurisdiction in this locality are binding until reversed, upon Marshals, Cabinet Officers, the Government, and the President, for myself, I propose to abide by the principles contained in the opinion of Judge Hall, help enforce obedience to his order until reversed, and resist by all legal ways any arrest in the City of Buffalo that can not be justified by the Constitution and the laws.

At the same time I believe the acts of our military commanders or provost marshals at St. Louis, New Orleans and Baltimore, to be entirely justifiable, and were there any such dangerous conspirators against the Federal Government in this county, as is well known exists in those cities, neither as counsel or citizen, would I object to the establishment of a like despotic military government in this county.

ALBERT SAWIN.

Buffalo, Sept. 28, 1862.

P. S.—As soon as the above final decision was made, the son of Mr. Benedict requested Marshal Chase to write a statement of it to the Secretary of War, and recommend his release. The Marshal refused so to do.

APPENDIX.

NOTE B.

This portion of the order of the Secretary of War, which declares his purpose to provide for the trial of citizens of the United States, not in the military or naval service, by military commission, for offences not known to the laws—that is for acts which have not been declared criminal by any act of Congress—is so palpably in violation of more than one provision of the Constitution of the United States, that little more than a bare statement of the fact seems to be necessary. The passage of "*Ex post-facto*"(*) laws is forbidden by the Constitution—but the trial by military commission, and the infliction of unauthorized and illegal punishment, for an act which Congress has not declared to be a crime, would produce all the evils thus provided against, without even the security afforded by *ex post-facto* legislation:—trial by jury is secured by the Constitution to all citizens not in the military and naval service, but this mode of trial takes it away:—the judicial authority of the Government is by the Constitution vested in permanent courts, established by Congress and held by judges appointed with the advice and consent of the Senate—while this order contemplates their trial by a military commission, appointed by the President or Secretary of War:—the constitution and acts of Congress provide that all such citizens shall only be tried after indictment by a grand jury, and shall enjoy the right to a speedy and public trial *by an impartial jury* of the state or district in which the offence shall have been committed:—but this order proposes to dispense with that form of proceeding, and to violate that right; and also, to establish an extraordinary tribunal, and a new form of proceeding, without authority of law. For the constitutional provisions referred to, see the extracts from the constitution contained in this note, and in note (†) *ante. p.* 9.

The advantages and importance of *trial by jury*, are forcibly stated by DeLolme, (a native of Geneva, in Switzerland, and a very celebrated and discriminating writer,) in his commentaries on the Constitution of England, (STEPHENS' DE LOLME, vol. 2, p. 799,) as follows: "It constitutes the strongest security to the liberties of the people that human sagacity can devise; for, in effect, it confides the keeping and guardianship of their liberties to those whose interests it is to preserve them inviolable; and any temptation to misapply so great an authority for unworthy purposes, which might sway a permanent tribunal, can have no influence when entrusted to the mass of the people, to be exercised by particular individuals but occasionally."

And Mr. Webster declared, (Webster's Works, vol. 4, p. 394,) "There can be no better tribunal than the people brought together in the jury box, under the solemn sanction of an oath, and acting under the instructions of enlightened judges." And he added—"I am attached to this mode of trial and will never consent to give it up."

The 3d Article of the Constitution provides, (SEC. 1,) that "The *judicial power* of the United States shall be vested in one Supreme Court, and in such inferior courts as the congress may, from time, ordain and establish. The judges, both of the Supreme

(*)*Ex post-facto* laws, are laws which make an act committed before the passage of the law, and not then criminal, punishable as a crime: or which renders an act punishable in a manner in which it was not punishable when committed. 3 Dallas' Rep., 386; 3 Cranch's Rep., 87; The Federalist, No. 84: 1 Kent's Com., 409 1 Blackstone's Com., 46.

and inferior courts, shall hold their offices during good behavior; and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office;" and (SEC 2,)—"The *judicial power* shall extend to *all cases*, in law and equity, arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority," &c,, and, "the trial of all crimes, except in cases of impeachment, shall be *by jury*; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may, by law, have directed."

These provisions, and the other provisions of the 3d Article of the Constitution, prove beyond controversy, that it was not the intention of the framers of the Constitution to allow the Secretary of War to establish a department, court, or tribunal at the seat of government,—under the name of a Judge Advocate, or Military Commission,—which should have unlimited control over the liberties of the citizen. They intended that all authority for the trial and punishment of persons accused of crime, should be vested in independent judges and impartial jurors;—jurors drawn from the people, and judges not removable by the Executive,—judges whose salaries could not even be reduced, (in order to destroy their independence,) during their continuance in office. The patriots and sages of the revolution,—to whose efforts and sacrifices we are indebted for the Constitution and the amendments thereto, (adopted in order to afford additional guaranties for the personal liberty of the citizen,) were well acquainted with the history and character of the English Constitution. They were familiar with the history of the struggles,—between arbitrary power and constitutional liberty,—which had given to the people of England that security to their persons which had been denied in the American colonies;—which denial was one of the chief causes which led to the revolution. They understood the vital force and inestimable benefits of the laws of England,—and especially of the law of *habeas corpus*—as administered by independent judges. They had doubtless read DE LOLME and they desired to secure for themselves and their posterity all the liberties and privileges which he and other distinguished writers have attributed to the just administration of the laws by independent and permanent judicial tribunals. See The Federalist Letters 78 to 84. In the last, it is said, in reference to the restraints imposed by the Constitution of the United States upon the legislative power:—"The establishment of the writ of *habeas corpus*, the prohibition of *ex post facto* laws, and of titles of nobility, to which we have no corresponding provisions in our Constitution," (the old Constitution of the State of New York is here referred to,) "are perhaps greater securities to liberty than any it contains. The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things, which, when they were done, were no breaches of law; and the practice of arbitrary imprisonments, have been in all ages, the favorite and most formidable instruments of tyranny."

DE LOLME says, (STEPHENS' DE LOLME, vol. 2, p. 969,) "If we cast our eyes on the strict and universal impartiality with which justice is administered in England we shall soon become convinced that some onward essential difference exists between the English government and those of other countries, and that its power is founded on causes of a distinct nature. Individuals of the most exalted rank do not entertain so much as the thought to raise the smallest direct opposition to the operation of the law. The complaint of the meanest subject, if preferred and supported in the usual way, immediately meets with a serious regard. The oppressor of the most extensive influence, though in the midst of a train of retainers, nay, though in the fullest flight of his career and pride, and surrounded by thousands of applauders and partizans, is stopped short at the sight of the legal paper which is delivered into his hands; and a tip-staff is sufficient to bring him away, and produce him before the bench.

Such is the greatness, and such is the uninterrupted *prevalence* of the law; such is in short, the continuity of omnipotence, of resistless superiority, it exhibits, that the extent of its effects at length ceases to be a subject of observation to the public.

Nor are great or wealthy men to seek for redress or satisfaction of any kind, by any other means than such as are open to all; even the sovereign has bound himself to resort to no other; and experience has shown that he may, without danger, trust the protection of his person, and of the places of his residence, to the slow and litigious assistance of the law."

NOTE F.

The following extracts from a New York paper, of October 30, 1862, will show what a much respected and ordinarily discreet general officer of the Army of the United States has considered *"disloyal practices"* in a clergyman and others. If a veteran general officer, of high character and pure intentions—long accustomed to exercise command over his own prejudices and, passions, as well as over the conduct and will of others—can be betrayed by his resentments into the indiscretion of thus exciting arbitrary military power for the redress or punishment of grievances personal to himself, what may we not expect from the bad temper and evil passions of inexperienced petty officers and ignorant and irresponsible policemen?

Perhaps the correspondence between S. M. L. Barlow, Esq., and Provost Marshal General Draper, which immediately follows the extract alluded to in the commencement of this note, may afford a partial answer to this inquiry:

"IMPORTANT ACTION OF GEN. WOOL—UNION CITIZENS OF BALTIMORE ARRESTED AND SENT DOWN THE BAY—PROTEST OF GOV. BRADFORD—PRESIDENT LINCOLN ORDERS THEM TO BE RELEASED—REV. C. A. HAY RELEASED.

Baltimore, Oct. 29.

The loyal citizens arrested last night were taken on board the steamer Baltimore, on which they proceeded down the bay to Seven-foot Knoll, where they now lay at anchor. At the wharf there was much excitement. The city police, who were at the boat, were recalled, but were forced to remain by a cavalry force.

Gov. Bradford reached the wharf before the departure of the boat, and was permitted to have aninterview with Col. Rich, one of the prisoners, who is an aid to the Governor. On returning from the wharf the Governor immediately telegraphed to the President, denouncing the arrest as an outrage, and demanding an unconditional release.

Judge Bond also adjourned the Criminal Court on account of the arrest of the clerk of the court, Mr. Gardiner, and declared his intention of proceeding to Washington to see the President.

Dr. Armitage and Peter Sauerwein, a committee appointed by the meeting last night, have just returned from Washington. They had an interview with the President, who informed them that he had sent an order to the War Department for their release; but, up to the present hour, (10 p. m.) no such order is known to have been received here. In the meantime, Judge Bond and Governor Bradford have gone to Washington, and the prisoners are spending the cold night on the steamboat in the bay.

There is much excitement and indignation exhibited here on the subject.

We reprint from the Baltimore papers their accounts of the military arrests in that city night before last. It will be noticed that the version of the affair, given by the *Sun*, differs very materially from that telegraphed to us by our correspondent.

[From the Baltimore Sun.]

For several days past a petition has been circulated in this city for signatures, making representations to the President in deroga. tion of the military capacity of Major Gen. John E. Wool, of the Eighth Army Corps,

and requesting his removal. The fact was made known to Gen. Wool, and he at once set about to procure one of the petitions with the signatures, and succeeded in possessing himself of one, to which a few names had been affixed. He determined at once to put a stop to proceedings which were not only disrespectful but in insubordination to the military authority. The following is a copy of the memorial:

'The undersigned, loyal citizens of the city of Baltimore and of the State of Maryland, for themselves, and for nearly all others within the State, who oppose the rebellion and sustain the government, with their whole heart, in its efforts to restore its full authority, respectfully memorialize you with the intention and for the purpose of causing the transfer of Major General Wool from the command of the Eighth Army Corps, or of so much thereof as is involved in his military control of this city and State.—Gen. Wool is an old officer of the United States Army, who has served his country long, and we do not wish publicly to assail him for imbecility, for total lack of judgment and discretion, in the administration of the affairs of his important office in these localities. His great age almost precludes the hope of vigorous, correct or better action in counteracting the influences which are constantly brought to bear upon him, to the detriment of the federal Union cause.

We respectfully suggest that the President earnestly consider the precarious position of the loyal portion of this community, and the questionable physical and mental competency of General Wool, and spare those who wish him well the mortification of being obliged to hear everywhere and at all times the rude things, true though they be, which are said of him.

We, therefore, beg leave to suggest his removal to some other point, where he may better subserve the great interests of the country, and where, at the same time, may be accorded to him the retirement which his condition of mind requires.'

General Wool pronounces the whole o the imputations false and groundless; and having learned that secret meetings were held by the parties who were instrumental in the circulation of the paper, concluded to arrest them. He learned that the meetings were held at Temperance Temple, on Gay street, and detailed a squad of cavalry, under command of Major William P. Jones, military provost marshal, to arrest the principal parties. One of the meetings took place last night, and about half-past eight o'clock Major Jones, with his squad, entered the building and the room where the meeting was held. Thomas H. Gardiner, clerk of the Criminal Court; Thomas Sewell, Jr.; Thomas R. Rich, one of the aids of Gov. Bradford; and Alexander D. Evans, were taken into custody. They were conducted to the office of Marshal Varnostrand, where there was some delay, after which they were transferred to the Central police station, and confined subject to the order of Gen. Wool. Gen. Wool states that he has been subject to false representations, to which he will no longer submit, but will promptly check all such proceedings.

[From the Baltimore American.]

Our readers will recollect that at the Union mass meeting held in Monument Square some months since, a committee was appointed to investigate alleged facts in regard to the disloyalty of certain parties. The Committee held several meetings, examined a number of witnesses, and placed the evidence they had gathered before the President of the United States, as they were authorized by the resolution under which they were appointed. Last evening the vice-presidents of the mass meeting were called together at the Temperance Temple to receive the report of the committee of investigation. A number of these gentlemen accordingly assembled, the meeting was organized and the committee proceeded to report the result of the investigation and of their action at Washington. Whilst these proceedings were in progress Major Jones, of General Wool's staff, accompanied by several other officers and a provost guard of soldiers, appeared and at once seized the papers of the committee, which comprised not only the evidence taken under the original resolution, but also some documents relating to the military government in this city.

Major Jones then ordered the arrest of the following persons, members of the Investigating Committee, who were present viz: Alfred D. Evans, Thomas H. Gardner, Col. T. R. Rich, and Thomas Sewell, Jr. He also called the names of Henry Stockdale, Amos McComas, John Woods and William Wysham, who were not present, and stated that he had orders for their arrest. The four persons arrested were taken to the Central police station and detained there.

The interference of the military authorities caused considerable excitement among the persons present, and a vigorous denunciation of the act as an outrage, from two or three. Those thus expressing themselves were also threatened with arrest, but were not finally molested. The arrests were made by order of Gen. Wool. The military force present belonged to the Thirteenth Pennsylvania and the Purnell, (Maryland) Cavalry.

About midnight some of the friends of the parties arrested procured a band of music and serenaded them at the police station, when one of them addressed those assembled, from the window, denouncing Gen. Wool in the strongest terms.

THE CASE OF REV. CHARLES A. HAY, D. D.

HARRISBURG, Oct. 29.

Rev. C. A. Hay, whose arrest by Gen. Wool was noticed in to-day's papers, had a hearing in Baltimore before that officer, and was discharged. He returned home last night. This arrest will be made the subject of investigation.

The Harrisburg [Pa.) correspondent of the Philadelphia *Inquirer*, under date of October 28, gives the following particulars concerning the arrest of Rev. Charles A. Hay, D. D.:

Rev. Dr. Charles A. Hay, of the First Lutheran Church, Harrisburg, was arrested at York yesterday, while on his way from Baltimore home, via the Northern Central Railway, by order of Major General John E. Wool, who has command of the military department embracing the States of Maryland, Pennsylvania, New York, and New England. The order, I learn, in general, charges Dr. Hay with having used disloyal language in a letter, the purport of which was that he had, while in Baltimore, held conversation with a lady of secession proclivities, who informed him that she had friends in the federal hospitals in Baltimore, taken prisoners by the Union army, whom she was privileged to care for at her own home.—After announcing this fact in very pointed language, the doctor significantly asked:—"Why is it that Union men, who are dying in our hospitals, are not allowed to be taken to their homes, that proper care and nursing may restore them, well and hearty to the army?"

The arrest of Dr. Hay has taken the citizens of Harrisburg by surprise, and I may say, has been received with a feeling of indignation. For many years has Dr. Hay served as a minister of the gospel in Harrisburg. None ever knew him but to love and honor him, His professional services have long been an ornament to the pulpit. Not only has he been an earnest disciple of Christ, but in his capacity of spiritual adviser, he has considered it his duty to urge obedience to the civil and military laws of land, and has on many occasions eloquently defended the Union against all her enemies, foreign or intesstine.

When the present unhappy national contest broke out, he nobly wrote, and spoke, and labored for the old flag; beneath which he first drew his breath, and in his daily labors of love has never ceased to speak words that have burned with the fire of patriotic devotion to the genius of liberty and the land of his birth.

He has always especially taken a lively interest in the welfare of the sick and wounded of the Union army. Almost ever since the war commenced has his house been a busy workshop, because of his earnest solictations to have the ladies of his flock assemble at his residence and employ their skillful hands in the manufacture of clothing, bandages, and lint for the sick and wounded. He has almost robbed himself

in the sustenance of the Union and her gallant soldiers. Many times has he journeyed South to where our gallant defenders even now are lying, neglected, sick and way-worn, with delicacies and comforts to satisfy the wants of those for whose welfare he has earnestly labored and prayed. It was on this mission of mercy that Dr. Hay went to the city of Baltimore. He saw there much suffering and pain, much wrong and neglect. He felt that this wrong and neglect was unworthy a great nation in its present throes of intestine feud and war, and he frankly expressed his regret.

Dr. Hay's congregation feel justly injured, and his imprisonment has called forth proper indignation on the part of his fellow-citizens of Harrisburg.

When the arrest was publicly announced the members of his congregation assembled at their church, in Fourth street, and selected a committee of the most substantial and influential members of their society and delegated to them the duty of effecting his release from confinement. This delegation left for Baltimore at noon to-day to consult with General Wool."

The following is the correspondence, in reference to the case of Mrs. Brinsmaide, above alluded to:

"*Office of Bowdoin, Laroques & Barlow*
No. 35 William street,
NEW YORK, Nov. 8, 1862.

Simeon Draper, Esq:

Dear Sir:—The friends of Mrs. Brinsmade, late of New Orleans, have requested me to ascertain the facts connected with her arrest and imprisonment. I believe they are substantially as follows:

About two months since Mrs. Brinsmade, the wife of Dr. Brinsmade, a young lady of about twenty years of age, having a pass from General Butler, arrived in this city from New Orleans, having been placed by her father, Theodore A. James, Esq., a highly respectable merchant of that city, in the charge of Dr. Phelps, one of the surgeons of the steamer upon which he had secured her passage.

She brought letters from her father to Messrs. J. D. Scott & Co., and other gentlemen of this city. Upon her arrival here she was accompanied to the Everett House by an invalid naval officer, who had been requested by Commodore Morris, at New Orleans, to protect and assist her.

Mrs. Brinsmade's object in visiting the North was to reside with her uncles, one of them in Washington, the other in Troy. She remained a few days in this city and Brooklyn, and then went to Washington, where, after remaining four days, she was arrested by Marshal Baker, who kept her a close prisoner for four days, carefully guarded.

Some ten days after she left this city for Washington, a hackman called on one of her friends in New York, and said that a lady was brought on in the train of the previous night by a detective from Washington, and conveyed to the 47th street police station, and that her name was Mrs. Brinsmade.

An immediate application was made to Mr. Kennedy for the cause of her arrest and for permission to see her. This was rudely refused by Mr. Kennedy, who threatened to lock up the applicant if the inquiry was repeated.

Another friend of Mrs. Brinsmade then saw a Deputy Marshal, and was informed that she could only be seen by permission of Mr. Kennedy. He stated that she was confined in the 47th street station-house; that she was a giddy, foolish, secesh woman, who had been singing secesh songs; that it was thought best to send her home to her father at New Orleans, and that she would sail in a day or two, but that no one would be allowed to see her.

With this assurance her friends were forced to be contented.

Thirty-five days afterwards a letter was received by one of her friends stating that she was still a close prisoner in the 47th street station house.

Application was at once made to you. Her friends were informed that you knew nothing of her case; that you would at once address the proper authority at Washington for information, and if in your power would release her.

Pending this correspondence, two ladies, the wives of two of our most reputable merchants, who had been for many years

the neighbors and friends of Mrs. Brinsmade, called upon Mr. Kennedy for permission to see her.

They asked, "What were the charges against her, and who were her accusers?"

Mr. Kennedy answered, "I, madame, am her accuser. She is a general spy. From the moment she set her foot in this city my presence overshadowed her. I did not leave her a moment. She went to Brooklyn to visit her friends. I watched her, and when she returned to the Everett House I watched her there. She went to Washington, and when I got her in the right place I arrested her and brought her back here and put her where she is."

In reply to the inquiry if there was no more proper place for the confinement of this lady than a police station, he said, "No, that was the place for her. That her whole conduct on board ship indicated that she was a spy, and that she ought to be hung—that a thoughtless, giddy thing like her and the one arrested a few days since in Washington, who was making a wagon of herself, carrying quinine to the rebels, were the very ones to be employed as spies, and that they all ought to be hung."

In reply to the inquiry as to whether she was to be kept shut up where she then was and had been for five weeks, and her friends unable to see her or know where she was, he replied. "That is with the Department."

Through your kind intervention, after this long confinement, this lady was on Monday restored to her friends.

I learn that she was arrested without the authority of any one in Washington; that the fact of her arrest was never reported by Mr. Kennedy to any department of the government; that no charges had ever been filed, and that even her name was unknown at the War Department; that so soon as you were enabled to learn the facts you obtained from Mr. Kennedy her release.

Will you be so kind as to examine the facts as I have related them, and inform me whether or not they are correctly stated, so far as they have come to your knowledge?

Yours, very truly,

SAM'L L. M. BARLOW."

"*Office of the Provost Marshal General of the War Department,*
NEW YORK, NOV. 10, 1862.

Samuel L. M. Barlow, Esq., New York:

Dear Sir:—In reply to yours of the 8th inst., I can only state that up to the 29th ult., I had no knowledge whatever with regard to Mrs. Brinsmade's case. On that day Mrs. Elliott called and informed me that she was under arrest and inquired what was the cause.

I on the same day wrote to Washington directing inquiry to be made of the Judge Advocate-General.

On the 1st instant, I was informed that the Judge Advocate-General knew nothing about the case.

Upon this, I asked Mr. Kennedy by what authority he held her as a prisoner; he replied that she was arrested and held by order of Col. Baker, the Provost Marshal of Washington. This I forwarded to Washington, and on the 3d inst. received from Col. Baker and the Assistant Secretary of War information by telegraph to the effect that the arrest had been made by one of Mr. Kennedy's officers, and Mrs. Brinsmade was detained by him without authority from the War Department.

I then called upon Mr. Kennedy, received from him an order directing Mrs. Brinsmade's release, and went with it to the station house, took her from it and placed her in charge of her friends.

The foregoing is all the information that I can give bearing on the subject.

Your obedient servant,

S. DRAPER, P. M. Gen."

NOTE G.

Mr Webster has spoken with his usual force and eloquence upon the importance of the principles considered in the text. He says: (2 Webster's Works, p.p. 392, 393) "The *Habeas Corpus Act, the Bill of Rights, the Trial by Jury,* are surer bulwarks of right and liberty than written constitutions. The establishment of our free institutions is the gradual work of time and experience, not the immediate result of any written instrument. English history and our colonial history are full of those experiments in representative government which heralded and led to our more perfect system. When our Revolution made us independent, we had not to frame government for ourselves, to hew it out of the original block of marble; our history and experience presented it ready-made and well proportioned to our hands. Our neighbor, the unfortunate, miserably governed Mexico, when she emerged from her revolution, had in her history nothing of representative government, *habeas corpus, or trial by jury*; no progressive experiments tending to a glorious consummation; nothing but a government calling itself free, with the least possible freedom in the world. She has collected, since her independence, $300,000,000 of revenue, and has unfortunately expended it all in putting up one revolution and putting down another, and in maintaining an army of forty thousand men in time of peace to keep the peace."

Again, (Vol. 4, p. 122), Mr. Webster says: "The first object of a people is the preservation of their liberty; and liberty is only to be preserved by maintaining constitutional restraints and just divisions of political power. Nothing is more deceptive or more dangerous than the pretence of a desire to simplify government. The simplest governments are despotisms; the next simplest, limited monarchies; but all republics, all governments of law, must impose numerous limitations and qualifications of authority, and give many positive and many qualified rights. In other words, they must be subject to rule and regulation. This is the very essence of free political institutions. The spirit of liberty is, indeed, a bold and fearless spirit; but it is also a sharp-sighted spirit; it is a cautious, sagacious, discriminating, far-seeing intelligence; it is jealous of encroachment, jealous of power, jealous of man. It demands checks; it seeks for guards; it insists on securities; it entrenches itsself behind strong defences, and fortifies itself with all possible care against the assaults of ambition and passion. It does not trust the amiable weaknesses of human nature, and therefore it will not permit power to overstep its prescribed limits, though benevolence, good intent, and patriotic purpose come along with it. Neither does it satisfy itself with flashy and temporary resistance to illegal authority. Far otherwise. It seeks for duration and permanence. It looks before and after; and, building on the experience of ages which are past, it labors diligently for the benefit of ages to come.

This is the nature of constitutional liberty; and this is *our* liberty, if we rightly understand and preserve it. Every free government is necessarily complicated, because all such governments establish restraints, as well on the power of government itself as on that of individuals.

If we will abolish the distinction of branches, and have but one branch; if we will abolish jury trials, and leave all to the judge; if we will then ordain that the legislator shall himself be that judge; and if we will place the executive power in the same hands, we may readily simplify government. We may easily bring it to the simplest of all possible forms, a pure despotism. But a separation of departments, so far as practicable, and the preservation of clear lines of division between them, is the fundamental idea in the creation of all our constitutions; and, doubtless, the continuance of regulated liberty depends on maintaining these boundaries."

Again, Mr. Webster says, [Works, Vol. 4, p.p. 109, 110] "It was strongly and forcibly urged, yesterday, by the honorable member from South Carolina that the true and only mode of preserving any balance of power in mixed governments is to keep an exact balance. This is very true, and to this end encroachment must be resisted at the first step. The question is, therefore, whether upon the true principles of the Constitution,

this exercise of power by the President can be justified. Whether the consequences be prejudicial or not, if there be an illegal exercise of power, it is to be resisted in the proper manner. Even if no harm or inconvenience result from transgressing the boundary, the intrusion is not to be suffered to pass unnoticed. Every encroachment, great or small, is important enough to awaken the attention of those who are intrusted with the preservation of a constitutional government. We are not to wait till great public mischiefs come, till the government is overthrown or liberty itself put into extreme jeopardy. We should not be worthy sons of our fathers were we so to regard great questions affecting the general freedom. Those fathers accomplished the Revolution on a strict question of principle. The Parliament of Great Britain asserted a right to tax the Colonies in all cases whatsoever, and it was precisely on this question that they made the Revolution turn. The amount of taxation was trifling, but the claim itself was inconsistent with liberty; and that was, in their eyes, enough. It was against the recital of an act of Parliament, rather than against any suffering under its enactments, that they took up arms. They went to war against a *preamble*. They fought seven years against a *declaration*.—They poured out their treasures and their blood like water, in a contest against an assertion which those less sagacious and not so well schooled in the principles of civil liberty would have regarded as barren phraseology, or mere parade of words. They saw in the claim of the British Parliament a seminal principle of mischief; the germ of unjust power; they detected it, dragged it forth from underneath its plausible disguises, struck at it; nor did it elude either their steady eye or their well-directed blow till they had extirpated and destroyed it to the smallest fibre. On this question of principle, while actual suffering was yet afar off, they raised their flag against a power, to which, for purpose of foreign conquest or subjugation, Rome in the height of her glory is not to be compared; a power which has dotted over the surface of the whole globe with her possessions and military posts, whose morning drum-beat, following the sun and keeping company with the hours, circles the earth with one continuous and unbroken strain of the martial airs of England."

Again, Mr. Webster says, [Works, Vol. 4, p.p. 133, 134, 135,] "Mr. President, the contest, for ages, has been to rescue Liberty from the grasp of executive power. Whoever has engaged in her sacred cause, from the days of the downfall of those great aristocracies which have stood between the king and the people, to the time of our independence, has struggled for the accomplishment of that single object On the long list of the champions of human freedom, there is not one name dimmed by the reproach of advocating the extension of executive authority; on the contrary the uniform and steady purpose of all such champions has been to limit and restrain it To this end the spirit of liberty, growing more and more enlightened and more and more vigorous from age to age, has been battering, for centuries, against the solid buttments of the feudal system. To this end, all that could be gained from the imprudence, snatched from the weakness, or wrung from the necessities of crowned heads, has been carefully gathered up, secured and hoarded, as the rich treasures, the very jewels of liberty. To this end, popular and representative right has kept up its warfare against prerogative, with various success; sometimes writing the history of a whole age in blood, sometimes witnessing the martyrdom of Sidneys and Russells, often baffled and repulsed, but still gaining on the whole, and holding what it gained with a grasp which nothing but the complete extinction of its own being could compel it to relinqulish. At length, the great conquest over executive power, in the leading Western States of Europe, has been accomplished. The feudal system, like other stupendous fabrics of past ages, is known only by the rubbish it has left behind it.—Crowned heads have been compelled to submit to the restraints of *law*, and the PEOPLE, with that intelligence and that spirit which make their voice resistless, have been able to say to prerogatives 'Thus far shalt thou come, and no farther.' I need hardly say, Sir, that into the full enjoyment

of all which Europe has reached only through such slow and painful steps, we sprang at once, by the Declaration of Independence, and by the establishment of free representative governments; governments borrowing more or less from the models of other free States, but strengthened, secured, improved in their symmetry, and deepened in their foundation, by those great men of our own country whose names will be as familiar to future times as if they were written on the arch of the sky.

Through all this history of the contest for liberty, executive power has been regarded as a lion which must be caged. So far from being the object of enlightened popular trust, so far from being considered the natural protector of popular right, it has been dreaded, uniformly, always dreaded, as the great source of its danger.

And now, Sir, who is he, so ignorant of the history of Liberty, at home and abroad; who is he, yet dwelling in his contemplations among the principles and dogmas of the Middle Ages; who is he, from whose bosom all original infusion of American spirit has become so entirely evaporated and exhaled, that he shall put into the mouth of the Pesident of the United States the doctrine that the defence of liberty *naturally results to* executive power, and is its peculiar duty? Who is he, that generous and confiding towards power where it is most dangerous, jealous only of those who can restrain it; who is he, that, reversing the order of the State and upheaving the base, would poise the pyramid of the political system upon it apex? Who is he, that, overlooking with contempt the guardianship of the representatives of the people, and, with equal contempt, the higher guardianship of the people themselves; who is he that declares to us, through the President's lips, that the security for freedom rests in executive authority? Who is he that belies the blood and libels the fame of his own ancestors, by declaring that *they*, with solemnity of form, and force of manner, have invoked the executive power to come to the protection of liberty? Who is he that thus charges them with the insanity or recklessness of putting the lamb beneath the lion's paw?—No, Sir, no Sir. Our security is in our watchfulness of executive power. It was the constitution of this department which was infinitely the most difficult part of the great work of creating our present government. To give to the executive department such power as should make it useful, and yet not such as should render it dangerous; to make it efficient, independent, and strong, and yet to prevent it from sweeping away everything, by its union of military and civil authority, by the influence of patronage, and office, and favor —this, indeed, was difficult. They who had the work to do saw the difficulty, and we see it; and if we would maintain our system we shall act wisely to that end, by preserving every restraint and every guard which the Constitution has provided. And when we, and those who come after us, have done all that we can do, it will be well for us and for them, if some popular executive, by the power of patronage and party, and the power, too, of that very popularity, shall not hereafter prove an over-match for all other branches of government.

I do not wish, Sir, to impair the power of the President, as it stands written down in the Constitution, and as great and good men have hitherto exercised it. In this, as in other respects, *I am for the Constitution as it is.* But I will not acquiesce in the reversal of all just ideas of government; I will not degrade the character of popular representation; I will not blindly confide where all experience admonishes me to be jealous; I will not trust executive power, vested in the hands of a single magistrate, to be the guardian of liberty."

Again, (Vol. 2, p. 602,) "The next fundamental principle in our system is, that the will of the majority, fairly expressed through the means of representation shall have the force of law; and it is quite evident that in a country without thrones or aristocracies, or privileged castes or classes, there can be no other foundation for law to stand upon; and, as the necessary result of this, the third element is, that *the law is the supreme rule for the government of all.* The great sentiment of Alcæus, so beautifully presented to us by Sir William Jones, is absolutely indispensable to the construction and maintenance of our political systems:—

'What constitutes a State?
Not high raised battlement or labored mound,
Thick wall or moated gate:
Not cities proud, with spires and turrets crowned;
Not bays and broad-armed ports,
Where, laughing at the storm, rich navies ride;
Not starred and spangled courts,
Where low-browed baseness wafts perfume to pride.
No! MEN, high-minded MEN,
With powers as far above dull brutes endued,
In forest, brake or den,
As beasts excel cold rocks and brambles rude;
Men who their duties know,
But know their rights, and, knowing, dare maintain;
Prevent the long aimed blow,
And crush the tyrant while they rend the chain:
These constitute a State;
And SOVEREIGN LAW, that State's collected will,
O'er thrones and globes elate
Sits empress, crowning good, repressing ill.'

And, finally, another most important part of the great fabric of American Liberty is, that there shall be WRITTEN CONSTITUTIONS, *founded on the immediate authority of the people themselves, and* REGULATING AND RESTRAINING ALL THE POWERS CONFERRED UPON GOVERNMENT, WHETHER LEGISLATIVE, EXECUTIVE OR JUDICIAL."

Alexander Hamilton (in the *Federalist*, No. 25) states very clearly the dangers consequent upon a violation of constitutional provisions on the plea of necessity.—He says, "Wise politicians" * * * * "know that every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers toward the Constitution of a country, and forms a precedent for other breaches when the same plea of necessity does not exist at all, or is less urgent and palpable."

Washington, in his Farewell Address, did not overlook the importance of preventing the consolidation of all the powers of government in a single department, for he said, "It is important likewise, that the habits of thinking, in a free country, should inspire caution in those intrusted with its administration, to confine themselves within their respective constitutional spheres—avoiding, in the exercise of the powers of one department, to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate of that love of power, and proneness to abuse it, which predominates in the human heart, is sufficient to satisfy us of the truth of this position. The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the guardian of the public weal, against invasions by the others, has been evinced by experiments, ancient and modern; some of them in our country and under our own eyes. To preserve them must be as necessary as to institute them. If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the constitution designates. *But let there be no change by usurpation; for, though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil, any partial or transient benefit, which the use can at any time yield.*"

In John Adams' "Defence of the Constitutions of Government of the United States of America," contained in the edition of his "WORKS," edited by his grandson, Charles F. Adams, the present Minister of the United States, at London:—He says: (vol, 4, p.401,) "To demonstrate the necessity of two assemblies in the legislature, as well as of a third branch in it, to defend the executive authority, it may be laid down as a first principle, that neither liberty nor justice can be secured to the individuals of a nation, nor its prosperity promoted, but by a fixed constitution of government, and stated laws, known and obeyed by all. M. Turgot, indeed, censures the 'falsity of the notion, so frequently repeated by almost all republican writers, that liberty consists in being subject only to the laws;' as if a man could be free while oppressed by an unjust law. This would not be true, even if we could suppose that all laws were the work of an assembly of the whole nation; for certainly every individual has his rights, of which the nation cannot deprive him, except by violence and an unlawful use of the general power." Again—"Our friend Dr. Price has distinguished very well concerning physical, moral, religious and civil liberty; and has defined the last to be 'the power of a civil society to govern itself by its own dis-

cretion, or by laws of its own making, by the majority in a collective body, or by fair representation. In every free state every man is his own legislator. Legislative government consists only in the dominion of *equal laws* made with *common consent*, and not in the dominion of any man over other men." Again, at p. 387 he quotes the following with approbation. "In order to preserve a balance in a mixed state, the limits of power deposited with each party ought to be ascertained and generally known. The defect of this is the cause that introduces those strugglings in a state about prerogative and liberty; about encroachments of the few upon the rights of the many, and of the many upon the privileges of the few; which ever did, and ever will conclude in a tyranny; first, either of the few or the many, but at last, infallibly, of *a single person*." Again, at page 403, he writes, "All other government than that of permanent known laws, is the government of mere will and pleasure, whether it be exercised by one, a few, or many. Republican writers in general, and those of England in particular, have maintained the same principle with Dr. Price, and have said that legitimate governments, or well ordered commonwealths, or well constituted governments were those where the laws prevailed," &c. Aristotle says, 'that a government where the laws *alone* should prevail would be the Kingdom of God."

"Aristotle says too, in another place, 'order is law, and it is more proper that law should govern, than any one of the citizens; upon the same principle, if it is advantageous to place the supreme power in some particular persons, they should be appointed to be only guardians and servants of the laws.' These too, are very just sentiments," &c.

"Sidney says, 'no sedition was hurtful to Rome, until through their prosperity, some men gained a power above the laws."

In another place he tells us that "no government was thought to be well constituted unless the laws prevailed against the commands of men"

Again at p. 405 he writes "Sidney says 'Liberty consists solely in an independency on the will of another; and, by a slave, we understand a man who can neither dispose of his person or goods, but enjoys all at the will of his master." And again, "as liberty consists only in being subject to no man's will, and nothing denotes a slave but a dependence upon the will of another; if there be no other law in a kingdom but the will of a prince, there is no such thing as liberty."

Again p. 403, Mr. Adams says, "no man will contend that a nation can be free that is not governed by fixed laws. All other government than that of permanent known laws, is the government of mere will and pleasure, whether it be exercised by one, a few, or many."

Again, (at page 409,) Mr. Adams—after having quoted from Montesquien, De Lolme, and other distinguished writers—says: "Even our amiable friends, those benevolent Christian Philosophers, Dr. Price and Dr. Priestley, acquaint us that they are constrained to believe human nature no better than it should be. The latter says, 'there is no power on earth but has grown exhorbitant when it has met with no control.' The former 'such are the principles that govern human nature; such the weakness and folly of men; such their love of domination, selfishness and depravity, that none of them can be raised to an elevation above others, without the utmost danger. The constant experience of the world has verified this, and proved that nothing intoxicates the human mind so much as power. In the establishment, therefore, of civil government, it would be preposterous to rely on the discretion of any man. A peopy will never oppress themselves or invade thele own rights; but if they trust the arbitrarir will of a body or a succession of men they trust enemies.'

Shall we say that all these philosophers were ignorant of human nature? With all my soul, I wish it were in my power to quote any passages in history or philosophy which might demonstrate all these satires on our species to be false. But the phenomena are all in their favor, and the only question to be raised with them is, whether the cause is wickedness, weakness or insanity."

The careful perusal of the several chapters in Mr. Adams' works, from which these

extracts have been taken will suggest many important considerations of deep interest to our people.

Chancellor Kent says, (Commentaries, vol. 2, 7 Edition, p. 638:)—The habeas corpus act has always been considered in England as a stable bulwark of civil liberty, and nothing similar to it can be found in any of the free commonwealths of antiquity. Its excellence consists in the easy, prompt and efficient remedy afforded for all unlawful imprisonment, and personal liberty is not left to rest for its security upon general and abstract declarations of right."

Judge Bouvier says, (Institutes vol. 1, p. 90, sec. 209) "It is of the greatest importance to the people that personal liberty should be religiously respected. If a man's property should be arbitrarily taken, the fact would alarm his fellow citizens and they would be prepared to resist. But to arrest a man, put him in an obscure and impenetrable prison, and there leave him, without any knowledge on the part of his family or friends as to his place of confinement, and perhaps forgotten by those who deprived him of his liberty, is an act which, being hidden, makes less sensation, and for that cause becomes more dangerous to public liberty. The Constitution has wisely provided that no person shall "be deprived of his life, liberty or property, without due process of law."

Judge Walker, (Introduction to American Law, Ed. of 1837, pp. 186 and 187, § 186,) after referring to the constitutional provision in regard to the suspension of the privilege of the writ of habeas corpus, and stating that the writ there meant is "that high and imperative writ which issues as a matter of peremptory right, in favor of any person who is in confinement or detention." Says, 'no comment can make the importance of this privilege more manifest than the bare statement of what it is. In fact it is universally regarded as the grand bulwark of corporal liberty; and hence the precaution to declare that it shall never be suspended except in cases of the most overpowering necessity,"

Stephens, in his edition of De Lolme, on the English Constitution, in treating of the English habeas corpus act—and after stating its general provisions, says:—(vol. 1, p. 455,) "It is impossible to question the wisdom of these enactments for where the liberty of the subject is concerned, the landmarks by which the discretion of the committing magistrate is to be regulated should be accurately defined, and positive in their nature; *for the arbitrary discretion of any man is the law of tyrants—it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper and passion; in the best it is oftentimes capricious; in the worst it is every vice, folly and passion to which human nature is liable.*"

And the same author, in respect to the conduct and pretensions of James II, says, (p. 462,) "It should have been remembered that power is to be watched in its very first encroachments, and that nothing is gained by timidity and submission; that every concession adds new force to usurpation, and at the same time, by discovering a dastardly spirit, inspires the enemy with new courage and enterprise."

Lord Bolingbroke says:—"In every kind of government some powers must be lodged in particular men, or bodies of men, for the good order and preservation of the whole community. The lines which circumscribe those powers, are the bounds of separation between the prerogatives of the prince, or other magistrate, and the privileges of the people. Every step which the prince or magistrate makes, beyond these bounds, is an encroachment on liberty, and every attempt towards making such a step is a danger to liberty." Bolingbroke's works, vol. 1, p. 296.

"The effects of a bare faced prerogative are not the most dangerous to liberty, for this reason; because they are open; because the alarm they give is commonly greater than the progress they make; and whilst a particular man or two is crushed by them, a whole nation is put on its guard. The most dangerous attacks on liberty are those which surprise or undermine; which are owing to powers given under pretense of some

urgent necessity; (*) to powers, popular and reasonable, perhaps, at first; but such as ought not to become settled and confirmed by a long exercise; and yet are rendered perpetual by art and management, and, in a great degree, by the nature of these powers themselves." Ibid, p. 370.

"Whenever the fundamentals of a free government are attacked, or any other schemes, ruinous to the general interest of a nation, are pursued, the best service that can be done to such a nation, and even to the prince, is to commence an early and vigorous opposition to them; for the event will always show, as we shall soon see in the present case, that those who form an opposition in this manner are the truest friends to both, however they may be stigmatized at first with odious names, which belong more properly to those who throw the dirt at them.

If an opposition begin late, or be carried on more faintly than the exigency requires, the evil will grow; nay, it will grow the more by such an opposition, till it becomes at length too inveterate for the ordinary methods of cure; and whenever that happens, whenever usurpations on natural liberty are grown too strong to be checked by these ordinary methods, the people are reduced to this alternative;—they must either submit to slavery and beggary, the worst of all political evils, or they must endeavor to prevent the impending mischief by open force and resistance, which is an evil but one degree less eligible than the other. *But when the opposition is begun early, and carried on vigorously, there is time to obtain redress of grievances, and put a stop to such usurpations by those gentle and safe methods which their constitution has provided*; methods which may, and have often proved fatal to wicked ministers, but can never prove fatal to the prince himself. He is never in danger but when those methods, which all arbitrary courts dislike, are too long delayed." Ibid, 428.

"The time serving flatterers of princes and ministers have no point, amongst all the nauseous drudgery imposed on them, which they are more obliged to labor than that of representing all the effects of a spirit of liberty as so many effects of a spirit of faction. Examples might be found, even without searching long, or looking far after them. &c." Ibid, 304.

(*) "And with necessity,
The tyrant's plea, excused his devilish deeds."
Milton.

Dr. Lieber, in his Civil Liberty and Self Government. (vol. 1, p. 128,) says:—There can be no liberty where every citizen is not subject to the law, and where he is subject to aught else than the law."

Edmund Burke, in his "Letter to the Sheriffs of Bristol, on American affairs," written in 1777, in respect to certain stattutes, intended to apply to the revolted colonies, said:—"Of the first of these statutes, (that for the letter of marque,) I shall say little." * * * * "The other, (for a partial suspension of the habeas corpus,) appears to me of a much deeper malignity."

Doctor Johnson, according to Boswell, said:—"The *Habeas Corpus* is the single advantage which our government has, over that of other countries"

Hume says:—"Arbitrary imprisonment is a grievance which, in some degree, has place in almost every government except in that of Great Britain, &c. * * * *

The Great Charter had laid the foundation of this valuable part of liberty. The petition of right had renewed and extended it; but some provisions were still wanting to render it complete, and prevent all evasion or delay from ministers and judges. The act of habeas corpus, which passed this session, served these purposes."

Macaulay, in speaking of James II, says: "One of his objects was to obtain a repeal of the *habeas corpus act*, which he hated, as it was natural a tyrant should hate the most stringent curb that ever legislation imposed on tyranny." * * * * * "It is indeed, not wonderful that this great law should be highly prized by Englishmen, without distinction of party, for it is a law which, not by circuitous, but by direct operation, adds to the security and happiness of every inhabitant of the realm." Chap. 6, vol. 2, p. 3.

Ferguson (Essay on Civil Society, p. 302.) says, in speaking of the habeas corpus act:—"We must admire, as the key-stone of civil liberty, the statute which forces the secrets of every prison to be revealed, the cause of every commitment to be declared, and the person of the accused to be produced, that he may claim his enlargement or his trial within a limited time. No wiser form was ever opposed to the abuses of power. But it requires a fabric no less than the whole political constitution of Great Britain, a spirit no less than the refractory and turbulent zeal of this fortunate people, to secure its effects."

Curran, the great Irish orator and patriot, in his pleading for Judge Johnson, speaking of the *habeas corpus act*, and other provisions intended to secure the personal liberty of the subject, said:—"Such were the bulwarks which our ancesters drew about the sacred temple of liberty—such the ramparts by which they sought to bar out the ever-toiling ocean of arbitrary power, and thought, (generous credulity!) that they had barred it out from their posterity forever. Little did they foresee the future race of vermin that would work their way through these mounds and let back the inundation."

Gen. John C. Fremont is reported, in the newspapers, as having, (in his apparently carefully prepared address at St. Louis, in November, 1862, upon the occasion of his reception in that city and the presentation of a sword by his German fellow citizens,) said, "But while you give the wealth and power of the nation to maintain the integrity of its territory, and while you stand by your constituted authorities with inviolable fidelity and hold them inflexibly in position, you must with equal determination maintain those safeguards which have been thrown around your personal liberties.—The strength of the nation to rise superior to every assault lies in the maintenance of individual liberty as it stood under the supremacy of the laws,—in the freedom of speech and freedom of the press. Every invasion of the laws is a usurpation, dangerous in revolution, and not to be justified by any plea of temporary expediency.—*Obsta principiis*—stop the beginnings, and stop them decisively, remembering that if you fail in this duty you surrender the sword and the people fall."

General Fremont could have cited the best authorities in support of these doctrines. One *quite* in point in reference to the dangerous advances of arbitrary power may be appropriately quoted. John Adams has written (Works vol. 3, 490,) "The spirit of liberty is and ought to be a jealous, a watchful spirit. *Obsta principiis* is her motto and maxim, knowing that her enemies are secret and cunning, making the earliest advances slowly, silently, and softly, and that according to her unerring oracle, Tacitus, 'the first advances of tyranny are steep and perilous, but when once you are entered parties and instruments are ready to espouse you.' It is one of these early advances, these first approaches of arbitrary power which are the most dangerous of all, and, if not prevented, but suffered to steal into precedents, will leave no hope of a remedy without recourse to nature, violence and war."

And President Hopkins, in his late work, published in October, 1862, (p. 275,) observes, perhaps without intending to present in striking contrast the present and the past of our nation's history,) "that this subject of rights regarded as a barrier against encroachment, and as involving duties, demands the especial attention of a free people. Among such a people there will always be a tendency to regard liberty as a right of unrestrained action, and rights as something to be enforced. It is those days when liberty was gained and rights enforced that nations celebrate. But it is easier to *gain* liberty and enforce rights than, having gained them, to practice the self-control that shall respect rights, and the self-denial and faithfulness and patient waiting required in performing the duties that our rights involve. *This is the turning point with us.* Can we use our freedom and enjoy our rights without encroaching upon the liberty and rights of others? Will parents and *magistrates* and *citizens* fulfil the duties that correspond to their rights? Will they see that individual and

unauthorized action is so restrained that all shall have their rights? *There is no grander sight than that of a great people, powerful and free, under the guidance of a comprehensive wisdom, always arresting its action at the point where it touches the rights of others, protecting those of the most feeble, and trusting calmly for its aggrandizement to the gradual but resistless power of intelligence, industry, and freedom under the guidance of justice. And there is no sadder sight than such a people governed by fraud and cunning, torn by faction, disintegrated by selfishness, denying to others what they claim for themselves, with no faith in the natural power of free institutions to perpetuate and extend themselves without force, and thus putting into the hands of others a cup, which, in the circuit and balance of God's retributions must be returned to their own lips, and which they must be compelled to drain to the very dregs.*"

When the State of New York had, in 1813, a Supreme Court, held by James Kent,* as Chief Justice, Smith Thompson,† Ambrose Spencer,‡ William W. Van Ness and Joseph C. Yates,§ as Associate Justices, that Court was not cowed into base submission to the arbitrary will of a Major General of the Army. In Stacy's case, (10 Johnson's Rep. 328,) a writ of *habeas corpus* had been issued, by a Supreme Court Commissioner, directed to "Isaac Chauncey, Commandant of the Navy of the United States on Lake Ontario, and to Morgan Lewis, commanding the troops of the United States at the station of Sackett's Harbor," commanding them to produce the body of said Stacy, &c. To this General Lewis, as General of Division in the Army of the United States, made an evasive return, and neglected to obey the writ. The Commissioner then submitted the case to the Supreme Court for advice and aid.

General Lewis had been a Justice of the Supreme Court and Governor of the State of New York, and he was then a Major General of the U. S. Army; but the Supreme Court was not inclined to allow him to place himself above the law. The views entertained by that Court, will appear by their unanimous opinion as delivered by the Chief Justice, in the following words:

"KENT C. J.—The return is insufficient and bad on the face of it. The writ was directed to Morgan Lewis, as commander of the troops of the United States at Sackett's Harbor; and under his title of 'General of Division in the Army of the United States,' he simply returns 'that the within named Samuel Stacy, jr., is not in my custody.' This was evidently an evasive return. He ought to have stated, if he meant to excuse himself for the non-production of the body of the party, that Stacy was not in his *possession or power.* The case of The King vs Winton (5 Term Rep. 89,) is to this point; and the observations and decision of the King's Bench in that case are entitled to our deepest attention. That was the case of a *habeas corpus* granted by a Judge in vacation, and returnable immediately before him. The return by the person to whom the writ was directed was, that he had not the body of the party 'detained in his custody;' and that return being filed in the King's Bench, an attachment, on a rule to show cause, was made absolute against the party for an insufficient return. Mr. Justice Grose, in giving his opinion, observed 'that the Courts always looked with a watchful eye at the returns to writs of *habeas corpus;* that the liberty of the subject essentially depended on a ready compliance with the requisitions of the writ, and the Courts were jealous whenever an attempt was made to deviate from the usual form of the return, that the party 'had not the person in his possession, custody or power,' and that it had not been adopted in that case, but an equivocal one substituted, and words 'power and possession omitted.' The accompanying return, in this case, of Torrey, the Provost Marshal, does, of itself, contradict the return of General Lewis; for he

* Afterwards Chancellor.

† Afterwards Chief Justice and subsequently Secretary of the Navy, and a Justice of the Supreme Court of the United States.

‡ Afterwards Chief Justice.

§ Afterwards Governor of New York.

admits that Stacy is detained in his custody, unde ran order issued from the Adjutant General's Office at Sackett's Harbor, so late as the 24th July last. This order, and the detention under it. we are bound to consider as the act of General Lewis, the commander at that station, and we are equally bound to consider the prisoner as being in his possession, custody and power.

Here is, then, appearing on the very face of the return, a contempt of the process.

But this is not all. The affidavit of Butterfield, who served the writ, proves not only the fact, that Stacy was then in custody, under the orders, and by the authority of General Lewis, but that the direction of the writ was intentionally disregarded.

The only question that can be made is, whether the motion for an attachment shall be granted, or whether there shall be only a rule upon the party offending to show cause by the first day of the next term, why an attachment shall not issue. After giving the case the best consideration which the pressure of the occasion admits, I am of opinion that the attachment ought to be immediately awarded. The attachment is but process to bring the party to answer for the alleged contempt, and upon the present motion, we must act, as the Courts have always, of necessity, acted, in like cases, upon the return itself, and the accompanying affidavits of the complainant. This is a case which concerns the personal liberty of the citizen. Stacy is now suffering the rigor of confinement in close custody, at this unhealthy season of the year, at a military camp, and under military power. He is a natural born citizen, residing in this State. He has a numerous family dependent upon him for their support. He is in bad health and the danger of a protracted confinement to his health, if not to his life, must be serious. The pretended charge of treason, (for upon the facts before us we must consider it as a pretext,) without being founded on oath, and without any specification of the matters of which it might consist, and without any color of authority in any military tribunal to try a citizen for that crime, is only aggravation of the oppression of the confinement. *It is the indispensable duty of the Court, and one to which every inferior consideration must be sacrificed, to act as a faithful guardian of the personal liberty of the citizen, and to give ready and effectual aid to the means provided by law for its security.* One of the most valuable of those means is the writ of *habeas corpus*, which has justly been deemed the glory of the *English* law; and the Parliament of England as well as the courts of justice, have on several occasions, and for the period, at least, of the two last centuries, shown the utmost solicitude, not only that the writ, when called for, should be issued without delay, but that it should be punctually obeyed. (See Brown's case, Cro. Jac. 343, and the Stat. of 16, Car. I, C. 10, 5, 8.) Nor can we hesitate in promptly enforcing a due return to the writ, when we recollect that in this country the law knows no superior; and that in England, their Courts have taught us, by a series of instructive examples, to exact the strictest obedience, to whatever extent the persons to whom the writ is directed may be clothed with power, or exalted in rank. On ordinary occasions, the attachment does not issue until after a rule to shew cause; but whether it shall or shall not issue in the first instance, must depend upon the sound discretion of the Court, under the circumstances of each particular case. It *may*, and it often does issue in the first instance, without a rule to shew cause, if the case be urgent or the contempt flagrant. On this point the authorities are sufficiently explicit. (Rex vs Jones, Stra. 185; Davies, Ex. dem. Povey vs Doe, 2 Bl. Rep. 892; Hawk. tit. Attachment b, 2, c 22, § 1.)

If ever a case called for the most prompt interposition of the Court to enforce obedience to its process this is one. A military commander is here assuming criminal jurisdiction over a private citizen, is holding him in the closest confinement, and contemning the civil authority of the State. The parties are, also, at so great a distance, that no rule to show cause could be made returnable at this term; and if no good cause was shown at the next term, an attachment could not probably be issued from the city

of New York, where the Court will then sit, and be returned the same term. Unless the attachment goes the injured party may not feel the benefit of our assistance until the ensuing winter. That delay would render the remedy alarming impotent. The case of Rex vs Earl Ferrers, (1 Burr. 631,) is a precedent in point for awarding the attachment in the first instance. In that case, a second writ of *habeas corpus* was issued, (the first writ not being obeyed without fault, as the party who sued out the writ, and who was the brother of Lady Ferrers, agreed not to prosecute it,) and not being obeyed, an attachment was moved for, without a rule to shew cause, and was granted. Lord Mansfield observed that 'the Court may enforce speedy obedience to the writ, and the circumstances of the case (where delay might be very dangerous) required it. And, therefore, the Court thought, under the extraordinary circumstances of that case, an attachment should issue to enforce obedience to that writ of *habeas corpus* which so much affected the preservation and security of that lady.'

I am, for these reasons, of opinion that an attachment ought to issue."

And, by the whole Court, the attachment was ordered to issue, but not to be served provided the command of the writ of *habeas corpus* was complied with by General Lewis, on his being informed of the decision of the Court.

NOTE H. ON MARTIAL LAW.

The term *Martial Law*, has, of late, been frequently used; but its proper signification does not appear to be generally understood.

It is important to our people, and especially important to the gallant officers and heroic soldiers who may be called upon to execute orders of the War Department--"likely to be as dangerous to them as to the safety of the citizen"—that the significance and force of the term, and the character and purpose of the authority—or rather power—ordinarily exercised where *martial law* prevails—should be deliberately considered;—and that the question, whether it can be constitutionally and legally declared by any officer of the government or of the army of the United States, should be freely and dispassionately discussed.

The citizen is interested in these questions, for the experience of the last eighteen months has taught us that no one is safe from injury, when, on the secret information of private or political enemies, or on the report of spies and informers, he may be arrested upon a telegram, or general order of the War Department, and *bastiled* in a remote section of the country;—and, without being allowed any of the privileges which it has been supposed, were, absolutely and adequately, secured to every citizen, by the constitution.

The officer and soldier are interested, because;—as was said by Chief Justice Shaw, in Commonwealth vs. Blodget, (12 Metcalf's Rep. 56,) a case arising under the act of the legislature of Rhode Island, declaring martial lay in that state during the Dorr rebellion,—"the sound rule is, that he who does acts injurious to the rights of others can excuse himself, as against the party injured, by pleading the *lawful commands only* of a superior, whom he is bound to obey. A man may be often so placed in civil life, and more especially in military life, as to be obliged to execute unlawful commands on pain of severe penal consequences. As against the party giving such command, he will be justified; *in foro conscientia* (*) he may be excusable; but towards the party injured, the act is done at his own peril, and he must stand responsible."

It is not the province of any single individual, or of any single officer of the executive, legislative, or judicial department of the government to assume to determine conclusively the questions which the present discussion may suggest. Their authorita-

(*) In the tribunal of conscience.

tive determination must necessarily rest with the Supreme Court of the United States, unless the Constitution of the United States; and the government established under it shall be overthrown. Until such authoritative determination can be had, every one must necessarily determine for himself, if occasion shall demand it, what opinions and what action it is his duty to adopt. It is therefore proper to bring together the opinions of the most respected and reliable military and legal writers, who have discussed these questions; and whose opinions will have great weight and authority in the august tribunal on whose decision such momentous interests depend. And a free and full discussion of these questions should be invited rather than repelled.

Martial law and *Military law* have been sometimes considered, and more frequently used, as convertible terms; and there is much reason to suppose that there can be no such thing as *martial law*, under the Constitution, or authority of the United States. To apply that term to that system or code of law which embraces the rules and articles of war, and the acts of Congress, relating to our army,—and which is more usually, and more appropriately denominated *Military Law*,—is manifestly improper.

Col. Scott, (the son-in-law and aid of Lieut. Gen'l Scott,) whose Military Dictionary, published in 1861, doubtless passed under the careful review and criticism of the General, gives in that work, his apparently well considered and carefully expressed views in regard to the proper signification of the term *martial law*, under the title LAW MARTIAL. He has also the other and proper title of LAW MILITARY,—or *military law*. A careful examination of these titles, in Col. Scott's Dictionary, will enable the reader to comprehend the force and signification of both these terms, and the proper distinction between them.

In the title "LAW MARTIAL," COL. SCOTT says:—"By *martial law* is understood, not laws passed for raising, supporting, governing and regulating troops; but *it is in truth and reality,* NO LAW, *but something indulged, rather than allowed as law.*" [HALE AND BLACKSTONE.] *The Constitution of the United States has guarded against the effects of any declaration of martial law within the United States,* (*) by providing 'no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war, or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.' *Art. 5, Amendments.* And further, 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.' *Art. 6, Amendments.*

Within the United States, therefore, the effect of a declaration of *martial law*, would not be to subject citizens to trial by court martial, but it would involve simply a suspension of the writ of *habeas corpus*, under the authority given in the 2d clause of Sec. 9, of the Constitution, viz: 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."

In the title LAW MILITARY, COL. SCOTT says: "Under the constitution of the United States Congress is entrusted with the creation, government, regulation and support of armies, and all laws passed by Congress for those purposes are *military laws*. Congress being also invested with power 'to make all laws which shall be necessary and proper for carrying into execution the foregoing

(*) See Bouvier's Institutes, vol. 1, p, 91. Sec. 211, 3d paragraph.

powers, and all other powers vested by that Constitution in the Government of the United States, or in any department or officer thereof,' is supreme in all military matters. The office of Commander-in-Chief, intrusted by the Constitution to the President, must have the functions first defined by Congress. Such military powers only as Congress confers upon him can be exercised, excepting that, being the Commander-in-Chief under the Constitution, he, of course, exercises all authority Congress may delegate to any military commander whatever, by reason of the axiom that the power of the greater includes that of the less.

Many of the functions thus devolved by the Constitution on Congress in most governments belong to the executive. The King of Great Britain makes rules and articles for the government of armies raised by him with the consent of Parliament.—Congress, with us, both raises and governs armies. An army raised in Great Britain is the King's army; with us it is the army of the United States."

No higher authority than that of Gen. Scott—the greatest living general and an accomplished constitutional lawyer—would, under ordinary circumstances, be deemed necessary to show what *martial law*, as it was formerly understood—and, indeed, is now understood, where there is no constitutional or legal restraint upon the arbitrary will of the military commander—really is; or to show that it cannot be legally proclaimed in the United States.

The following article, copied from "Notes and Queries" (vol. 6, London, 1852, p. 582,) shows that the Duke of Wellington, the highest military authority in England and the conqueror of Napoleon, had given an opinion on this topic, which concurs with that of our own great commander in reference to the character of *martial* law. The article is headed MARTIAL LAW, and is as follows: "Your correspondent J. M. A. asks: What is MARTIAL LAW: what its powers: its form, if any? and are all crimes cognizable by a military court when martial law is proclaimed? The latest authority on this head is that of Right Hon. Sir David Dundas, Judge Advocate General, under the government of Lord John Russell. He was examined as a witness by the Committee of the House of Commons, which in 1849 sat to enquire into the operation of martial law during the rebellion of the previous year in Ceylon. When asked if there was any definition of the powers given when martial law is proclaimed, he answered that he knew of none. In reply to a previous question he had stated that it was a common error to confound martial law with military law; the latter being the written code to be found in the mutiny act and the articles of war by which the land forces are regulated, whereas martial law is unwritten, and is only the exercise of authority by the controlling military force during the interval when, in the judgment of the executive, it becomes necessary to suspend the ordinary functions of the civil power. Military law applies to the army alone; martial law embraces all persons, civil as well as military:—it has no precedents or fixed practice, but adapts itself to the necessities of the moment as to form, whilst aiming to administer impartial justice. In a newly conquered country martial law is the discretion of the occupying force previous to the establishment of civil jurisdiction; in a disorganized country it is the substitute for a civil jurisdiction for the moment during which the functions of the latter are paralysed; and, being the only protection for life or property, it is an object of resort in civil as well as in military matters. Perhaps the most graphic description of martial law was that given by the Duke of Wellington in the House of Lords, in 1851, on the occasion of the defence of his government of Ceylon, made by Viscount Torrington, viz: that MARTIAL LAW MEANS NO LAW AT ALL *but the will of the general*, till the ordinary law can be either established or restored."

Blackstone, (1 Commentaries 413,) says, "For martial law, which is built upon no principles, but is entirely arbitrary in its decisions is, as SIR MATTHEW HALE observes, (Hist. Com. Law, C. 2,) *in truth and reality no law*, but something indulged rather than allowed as law. The necessity of order and discipline in an army is the only thing which can give it countenance; and

therefore it

ought not to be permitted in time of peace, when the King's courts are open for all persons to receive justice according to the laws of the land. Wherefore, Thomas, Earl of Lancaster, being condemned at Pontefract, 15 Edward 2., by martial law, his attainder was reversed by 1 Edward 3, because it was done in time of peace. And it is laid down that if a lieutenant or other that hath commission for martial authority, doth in time of peace hang or otherwise execute any man by color of martial law, this is murder; for it is against *magna carta*. The petition of right moreover enacts that no soldier shall be quartered on the subject without his own consent, *and that no commission shall issue to proceed within this land according to martial law*."

Hale, in his Pleas of the Crown, gives the record in the case of Thomas, Earl of Lancaster, above referred to, and says: "This notable record, even before the statute of 25 Ed. 3, gives us an account of these things, 1. That in time of peace no man ought to be adjudged to death for treason or any other offense without being arraigned and put to answer. 2. *That regularly, when the King's courts are open, it is a time of peace in judgment of law*. 3. That no man ought to be sentenced to death by the record of the king, without his legal trial *per pares*.(*) 4. That in this particular the Commons as well as the King and Lords, gave judgment of reversal." 1 Hale P. C. 347.

The provisions of Magna Carta and of the Petition of Right, thus referred to by Blackstone, are substantially contained in the amendments to the Constitution of the United States; and it may therefore be pertinently asked if Col. Scott is not correct in his conclusion that martial law, properly understood, *cannot exist* in this country, under the authority or order of any officer of the United States, or even by act of Congress, so long as the Constitution of the United States remains in force? Was it not intended to restrict the progress of government, in that direction, by the limits prescribed in the constitutional provision under which Congress has the power, when, in cases of rebellion or invasion, the public safety may require it, to suspend the privilege of the writ of *habeas corpus?*

The broad distinction between military law and martial law, so distinctly traced by Col. Scott, is fully acknowledged by most military writers. McArthur in his work on Courts Martial (4th edition, London. 1813, p. 34) says: "The broad line of distinction between military and martial law has been ably defined by the late Earl Roslyn, then Lord Chief Justice of the Common Pleas, and afterwards Lord High Chancellor of England, in the case of Sergeant Grant's motion, in the Court of Common Pleas, for a prohibition against the sentence of a general court martial by which he was adjudged to receive a thousand lashes for the crime of having been instrumental to the enlisting, for the service of the East India Company, of two drummers, knowing them at the same time to belong to the Foot Guards. His Lordship in delivering the opinion of the Court on this important trial entered so learnedly into the merits of the case and marked so nicely the distinction between military and martial law, as exercised formerly and in present times, that it may be proper to give his ideas on the subject at length as taken from the Trinity Term Reports, June, 1792."

McArthur then quotes from the opinion of Lord Roslyn as follows: "*Martial Law*,' (said that most able Judge) 'such as it is described by Hale, and such also as it is marked by Mr. Justice Blackstone, *does not exist in England at all*. When martial law is established, and prevails in any country, it is of a totally different nature from that which is inaccurately called martial law, merely because the decision is by a court martial, but which bears no affinity to that which was formerly attempted to be exercised in this kingdom, *which was contrary to the constitution, and which has been for a century totally exploded*. Where martial law prevails, the authority under which it is exercised claims jurisdiction over all military persons, in all circumstances. Even their debts are subject to enquiry by a military authority; every species of offence, committed by any person who appertains to the army is tried not by

(*) That is by jury.

a civil jurisdiction, but by the judicature of the regiment or corps to which he belongs. It extends also to a great variety of cases, not relating to the discipline of the army in those States which subsist by military power. Plots against the sovereign, intelligence to the enemy, and the like are all considered as cases within the cognizance of military authority.

In the reign of King WILLIAM there was a conspiracy against his person in HOLLAND, and the persons guilty of that conspiracy were tried by a council of officers. There was also a conspiracy against him in England, but the conspirators were tried by the common law; and within a very recent period, the incendiaries who attempted to set fire to the docks at Portsmouth were tried by the common law. In this country, all the delinquencies of soldiers are not triable, as in most countries in Europe, by martial law; but when they are ordinary offences against the civil peace, they are tried by the common law courts. *Therefore it is totally inaccurate to state martial law as having any place whatever within the realm of Great Britain.*"

In the 7th chapter of his work, McArthur returns to this subject, and says;—"Sir Edward Coke observes that 'if a Lieutenant, or other that hath commission of martial law, doth, in time of peace, hang, or otherwise execute a man by color of martial law, this is murder, for it is against Magna Carta.' (*) 3 Inst, 52; and Sir Matthew Hale declares '*martial law to be, in reality no law*, but something indulged, rather than allowed as law,'' &c., &c., &c., and then says:—"The doctrines laid down by these great lawyers have, to former systems of martial law, practiced in this country, *but now more than a century exploded.*"

De Hart, (Capt. 2 Regt. U. S. Artillery,) in his "Observations on Military law, and the Constitution and Practice of Courts Martial," published in New York in 1859, says, (p. 13):—"But the days when arbitrary rulers could exert an irresponsible power for the gratification of personal objects, have passed away; and the doubts which confused, and the fears which enfeebled the minds of individuals or of communities, when subjected to the rule of arbitrary authority which claimed, as it likewise exercised, the right of disposing of private and public interests, are dissipated or chased away by the light and warmth of humane and liberal government, Under constitutional forms, the legislature is the supreme power of the state, and it is thence in our country that Military Courts, as well as the Civil Courts, derive all the power which they possess for the exercise of their appropriate functions. Flowing from the same source and imbued or endowed with the like essence of judicial power, the military and the ordinary courts of civil judicature, within the spheres of their several jurisdictions, are deserving of the same regard, and entitled to a like respect."

Again, (p. 17,) "It must be understood, however, that the term *martial law* has a different interpretation from that of *military law*. Military law, as has been stated above, is a rule for the government of military persons only; but martial law is understood to be that state of things when, from the force of circumstances, the military law is indiscriminately applied to all persons whatsoever. The distinction is thus expressed by a writer on military law;—'Martial law extends to all persons, military law to all *military* persons, but not to those in a *civil* capacity.'

How and when, under particular conjunctions of the time, martial law may be declared, and by whom, is not here considered; *but the proclamation of such a rule within the limits of the United States, is a very questionable proceeding, and thought to be an 'excrescence' not warranted or sanctioned by any 'distemper of state.'* The substitution of this power for the Civil Courts, subjects all persons to the

(*) This limitation of this doctrine *to time of peace*, seems now to be exploded. The further guarantees of the Petition of Right and of the Bill of Rights, (passed in 1869.—See Hurd on Hab. Cor., p. 90.) have led the later authorities, as we shall see, to deny entirely the right to proclaim martial law in England, in peace or in war.

arbitrary will of an individual, and to imprisonment for an indefinite period, or trial by a military body. Of such importance to the public is the preservation of personal liberty, that it has been thought that unjust attacks, even upon life or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth than such as are made upon the personal liberty of the citizen.

Now, to guard against such abuse, the constitution guarantees the privilege of the writ of *habeas corpus*, which it declares, 'shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it,' *and the intervention of Congress is necessary before such suspension can be made lawful.* Such, too, is the doctrine of the British constitution, where the Crown, invested with high prerogatives, is yet most scrupulously restricted in all that relates to the liberty of the subject. In commenting upon this part of the laws of England, Mr. Justice Blackstone says, '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, (the arbitrary imprisonment of persons) expedient; for it is the parliament only, or legislative power, that, 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.' As the promulgation and operation of martial law within the limits of the Union would necessarily be a virtual suspension of the *habeas corpus* writ for the time being, it would consequently appear to stand in opposition to, or be in conflict with, that provision of the constitution above cited.

As the army, as has been above stated, is established by the highest power in the State, with a definite shape and legal existence, it must therefore be received and acknowledged as a constitutional body. From the moment it became an organ of legislative creation, it likewise became an object of legislative control; and hence the institutions intended for its government, are derived from the same source as those which affect the mass of the community."

O'Brien, another of our military writers of acknowledged authority, treats the subject more at length. He says, (O'Brien's Military Laws: Phila. Ed. 1846, p. 26:) "Many erroneous notions and much unfounded prejudice in regard to military institutions, have arisen from confounding *military* with *martial* law. The popular opinion seems to be that these are but two names for the same code. Nothing can be further from the truth. Military law is a digested system of enactments, carefully made and deliberately confirmed by the supreme legislative authority of the commonwealth, and published for the observance of a body, known to the constitution, and created and sustained like any other executive organ of the country. Martial law is something very different from this. As Blackstone truly remarks, *it is in fact, no law.* It is an expedient resorted to in times of public danger, similar, in its effect, to the appointment of a dictator. *The general, or other authority charged with the defence of a country, proclaims martial law. By so doing, he places himself above all law.* He abrogates or suspends at his pleasure, the operation of the law of the land. He resorts to all measures, however repugnant to ordinary law, which he deems best calculated to secure the safety of the State, in the imminent peril to which it is exposed. Martial law, being thus vague and uncertain, and measured only by the danger to be guarded against, exists only in the breast of him who proclaims and executes it. It is contained in no written code. It bears, therefore, no analogy whatever to military law, and should ever be carefully distinguished from it. Despotic in its character and tyrannical in its application, it is only suited to those moments of extreme peril when the safety and even existence of a nation depends on the prompt adoption and unhesitating execution of measures of the most energetic character. That such cases do arise, all history attests; and that popular governments are illy calculated to meet them, it would be vain to deny. At such periods, republics especially, require some prompt mode of suddenly drawing out and instantaneously applying the whole energies of the people From the principle of self-

preservation, the constitution of the United States has wisely, and indeed, necessarily, permitted the proclamation of martial law (*) in certain specified cases of public danger, when no other alternative is left to preserve the State from foreign invasion or insurrection."

Again, (at p. 30,) after referring to the constitutional provisions which empower Congress to raise and support armies and make the President the Commander in Chief of the Army, O'Brien says:—"The effect of these provisions is, that Congress, after raising and equipping an army, cannot use it against the liberties of the country because it can neither command it, nor appoint a commander to it. The President can do nothing detrimental to the public safety, for Congress may, at any moment, strike from his hands the instrument he is misusing. Independently of this, any military command, contrary to law, is null, and no military officer dare obey it under penalty of punishment by a civil or military court.

In all that relates to the raising of an army, to its strength, to its organization, to its criminal code, Congress is omnipotent; the President, powerless. The same remark applies to the fiscal concerns of the army. Anything which involves expense, must directly or indirectly come under the control of Congress. This prerogative of command, so formidable in appearance, will in practice be found to be very limited; hemmed in and contracted as it may always be, by the positive or negative action of the legislature.

The command of the President is, indeed, absolute within its sphere, but its sphere is bounded on all sides by law. The moment the executive oversteps the boundaries prescribed, he becomes powerless and his commands are of no force. Congress may declare when and for what objects the army is to be used, and for what purposes it may not be used, and thus chart out accurately the limits of executive power. And even within these limits the action of the executive indirectly but absolutely depends on the concurrence of Congress, which must appropriate funds for the purpose, before even a corporal's guard can be moved.

So contracted is the actual authority of the President, that, but for the protective power of his qualified veto, his command might be so restricted by legislation as to destroy its utility. It is in the power of Congress not only to protect itself, but to embarras the action of the executive at every step. It may prohibit the approach of troops within a certain distance from the capitol,—it may raise troops for a special service, such as to garrison a particular fort or to operate in a particular district, and may declare that this corps shall serve no where else. In none of these or similar cases, dare the President overstep the limits prescribed. The only effect of his illegal order would be to subject to punishment the officer who obeyed it. As commander in chief the President may issue to the army any military commands or orders whatever, provided they be not illegal.—These orders are of binding force on those to whom they are given, not merely by virtue of law, but in consequence of the article of the Constitution appointing him supreme commander. Still it is equally true that these commands could not be enforced except by the dismissal of the offender, without the action of the legislature; *for it alone can constitute tribunals for the trial of offenders and can annex punishment for crimes.* The President's power extends no further than removal from office or suspension from duty.

As the executive has no legislative power, it is plain the regulations issued by him to the army are not law; and as he is as much bound by law as any other citizen it follows that if any of them conflict with law they are so far null and void; otherwise they are constitutionally binding as military commands. The army therefore is subject to action from two distinct sources, the executive and the legislative, and it

(*) O'Brien here probably refers to the provision which regulates and limits the suspension of the privilege of the writ of *habeas corpus*, which suspension is ordinarily one of the incidents of the existence of martial law. It is believed that there is no other provision of the constitution which can possibly be supposed to authorize the declaration of martial law; but many, particularly in the amendments, which forbid it.

is important that their respective powers should be traced out."

In Lamb's case, Judge Bay recognized the definition of *martial law* given by Mr. Justice Derbigny in Johnson vs. Duncan, &c., and said: "If by martial law is to be understood that dreadful system, *the law of arms,* which in former times was exercised by the King of England and his Lieutenants, when his *word was the law and his will the power* by which it was exercised, I have no hesitation in saying that such a monster could not exist in this land of liberty and freedom. The political atmosphere of America would destroy it in embryo. It was against such a tyrannical monster that we triumphed in our Revolutionary conflict. Our fathers sealed the conquest by their blood, and their posterity will never permit it to tarnish our soil by its unhallowed feet, or harrow up the feelings of our gallant sons by its ghastly appearance. All our civil institutions forbid it; and the manly hearts of our countrymen are steeled against it.

But if by this military code are to be understood the rules and regulations for the government of our men in arms, when marshalled in defence of our country's rights and honor, then I am bound to say there is nothing unconstitutional in such a system." Note to Martin's La. Reports. (condensed Ed. by Harrison, New Orleans, 1839, Vol. 1, pages 169, 170. And see the Opinions of Judges Martin and Derbigny, quoted *ante pp.* 18—21)

Mr. Attorney General Cushing, in an official opinion furnished at the request of the late Governor Marcy, then (1857) Secretary of War, in consequence of the unauthorized declaration of martial law by the Governor of the Territory of Washington, discussed this subject (See 8th Vol. of Opinions of U. S. Attorney Generals, p. 365 to 374) with his accustomed ability.

In regard to the questions, "What is martial law?" "What is meant by the proclamation of martial law?" "Who has power to declare martial law?" "How does such a state exist lawfully, and what are the effects of its existence?"—after examining and criticising the English authorities—he says: "*Martial law,* as exercised in any country by the commander of a foreign army, is an element of the *jus belli.* (*) It is incidental to the state of solemn war and appertains to the law of nations. The commander of the invading, occupying or conquering army, rules the invaded, occupied or conquered foreign country with supreme power, limited only by international law, and the orders of the sovereign or government he serves or represents. For by the law of nations, the *occupatio bellica* (†) in a just war transfers the sovereign power of the enemy's country to the conqueror. (Wolf's Jus. Gentium, sec. 863; Kluber, Droit des Gens, sec. 253; Grotius, De Jure Belli et Pacis Ed. Cocceii, lib. III. Cap. 8.)

Such occupation by right of war so long as it is military only, that is, *flagrante bello,* (‡) will be the case put by the Duke of Wellington, of all the powers of government resumed in the hands of the Commander-in-Chief. In any local authority continue to subsist, it will be with his permission only, and with power to do nothing except what he, in his plenary discretion, or his own sovereign through him, shall see fit to authorize. The law of the land will have ceased to possess any proper vigor.

Thus while the armies of the United States occupied different provinces of the Mexican Republic, the respective Commanders were not limited in authority by any local law. They allowed, or rather required the magistrates of the country, municipal or judicial, to continue to administer the laws of the country among their countrymen,—but in subjection always to the military power, which acted summarily and according to discretion, when the belligerent interests of the conqueror required it, and which exercised jurisdiction either summarily, or by means of military commissions, for the protection or the punishment of citizens of the United States in Mexico.

That, it would seem, was one of the forms of martial law; a violent state of things, to cease, of course, when hostilities should

(*) Law of war.
(†) Military occupation by right of war.
(‡) While the war is raging.

cease, and military occupation be changed into political occupation. [Elphinstone vs. Bedreechand, 1 Knapp's Rep., 338; Cross vs. Harrison, 16 Howard Rep., 164.]

But these are examples of martial law, administered by a foreign army in the enemy's country, and do not enlighten us in regard to the question of martial law in one's own country, and as administered by its Military Commander. That is a case, which the law of nations does not reach.

Acccordingly in England, as we have seen, Earl Grey assumes (*) that where martial law exists, it has no legal origin, but is a mere fact of necessity, to be legalized afterwards by a bill of indemnity, if there be occasion. I am not prepared to say that, under existing laws, such may not also be the case in the United States." * * *

Farther on Mr. Cushing says:—"I say we are without law on the subject. The Constitution, it is true, empowers Congress to declare war; to raise and support armies; to provide and maintain a navy; to make rules for the government of the land and naval forces; to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; and to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States. But none of these powers has been exerted in the solution of the present question.

In the amendments of the Constitution, among the provisions of general right which they contain, are some, the observance of which seems incompatible with the existence of martial law, or, indeed, any of the supposable, if not necessary incidents of invasion or insurrection. But these provisions are not sufficiently definite to be of practical application to the subject matter.

In the Constitution there is one clause of more apparent relevancy, namely, the declaration that '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.' This negation of power follows the enumeration of the powers of Congress; but it is general in its terms; it is in the section of things denied, not only to Congress but to the Federal Government as a government, and to the States. I think it must be considered as a negation reaching all the functionaries, legislative or executive, civil or military, supreme or subordinate, of the Federal Government; that is to say, that there can be no valid suspension of the writ of *habeas corpus* under the jurisdiction of the United States, unless when the public safety may require it in cases of rebellion or invasion. And the opinion is expressed by the commentators on the Constitution that the right to suspend the writ of *habeas corpus*, and also that of judging when the exigency has arisen, belong exclusively to Congress. [Story's Comm. 1342, Tucker's Bl. vol. 1, p. 292.]

In this particular, as in many others, the Constitution has provided for a secondary incident, or a single fact, without providing for the substance or for the general fact; just as when it gives power to establish post roads, but says nothing of the transportation of the mails. It does not say

(*) This refers to a previous part of his opinion, in which Mr. Cushing, after referring to a debate in parliament, in 1824, occasioned by the trial of a missionary before a Military Commission, says:—"There is a later debate,—that on the proclamation of martial law in Ceylon, by its Governor, the Earl of Torrington,—in which Earl Grey, in accordance with the advice of Lord Cottenham, Lord Campbell and Sir J. Jervis (†) said:—'What is called proclaiming martial law is no law at all; but merely for the sake of public safety in circumstances of great emergency, setting aside all law, and acting under the military power; a proceeding which requires to be followed by an act of indemnity when the disturbances are at an end. (Hausard 3 series, vol. CXV, p. 880.)"

(†) As Lord Cottenham, Lord High Chancellor of England; Lord Campbell, then Chancellor of the Duchy of Lancaster, and afterwards Chief Justice of the Queen's Bench, and Lord Chancellor; and Sir John Jervis, Attorney General, and afterwards Chief Justice of the Common Pleas, gave this advice, and as Earl Grey, the Secretary of State, doubtless had the concurring opinions of his colleagues in the Cabinet, and of the Law Officers of the Crown—who are always consulted on such occasions—this may be considered as settling, upon the very highest authority, the law of England upon the subject.

that martial law shall not exist,(*) unless when the public safety may require it in cases of insurrection or invasion, but only that the writ of *habeas corpus* shall not be suspended except in such circumstances. But if the emergency of insurrection or invasion, involving the public safety, be requisite to justify the suspension of the writ of *habeas corpus*, surely that emergency must be not the less an essential prerequisite of the proclamation of martial law, and of its constitutional existence.

We have in Great Britain, several recent examples of acts to give constitutional existence to the *fact* of martial law. One is the act of Parliament of the 3d and 4th Geo. IV., Ch. 4, designed for the more effectual suppression of local disturbances in Ireland. Another act of the same nature, that of 57, Geo. III. c. iii., was for the case of apprehended insurrection 'in the metropolis and many other parts of Great Britain,' which act was followed the next year by the indemnifying act of 58, Geo. III. ch. vi.—These examples show, that, in the opinion of the statesmen of that country, the general fact of the existence of martial law and its incident, the suspension of the writ of *habeas corpus*, alike require the exercise of the supreme legislative authority.—Blackstone's Com., Vol. 1, p. 136. Coleridge's note. Bowyer's Const. Law, p. 424.

That idea pervades the constitutional organization of the several States of the Union.

Thus, in Massachusetts, it is provided that the writ of *habeas corpus* 'shall not be suspended by the legislature, except upon the most urgent and pressing occasions and for a limited time.' In other States, while the exigency for the suspension of the writ is defined, as in New York, the suspending authority is not specified. In others, there is express general provision as to the suspension of laws without specifying the writ;—the general power of suspension being confided to the legislature, as in Maryland, Virginia and Tennessee. The State of Pennsylvania has both provisions in its constitution. And it may be assumed, as a general doctrine of constitutional jurisprudence in all the United States, that the power to suspend laws, whether those granting the writ of *habeas corpus*, or any other is vested exclusively in the legislature of the particular State.

How intimate the relation is, or may be between the proclamation of martial law and the suspension of the writ of *habeas corpus*, is evinced by the particular facts of the case before me,—it appearing, as well by the report of the Governor as by that of Chief Justice Lander, that the very object for which martial law was proclaimed was to prevent the use of the writ in behalf of certain persons held in confinement by the military authority, on the charge of treasonable intercourse with Indians. That, however, is but one of the consequences of martial law, and by no means the largest or gravest of these consequences, since, according to every definition of martial law, it supercedes, for the time being, all the laws of the land and substitutes in their place no law,—that is, the mere will of the military commander.

There may undoubtedly be, and have been, emergencies of necessity, capable of themselves to produce, and therefore to justify, such suspension of all law, and involving for the time, the omnipotence of military power. *But such a necessity is not of the range of mere legal questions. Where martial law is proclaimed under circumstances of assumed necessity, the proclamation must be regarded as the statement of an existing fact, rather than the legal creation of that fact.* In a beleagured city, the state of siege lawfully exists because the city is

(*) The amendments to the Constitution, to which reference has been made in the preceding pages, do say, in effect, that martial law shall not exist; because it cannot exist without repeated violations of the provisions of those amendments. Scott, and others have therefore properly assumed that it cannot exist in this country, under the authority of the government of the United States; and it is clear it cannot exist consistently with the provisions of the amendments referred to.

The constitutional grant of power to Congress "To establish post offices and post roads," is not like the provision in regard to the suspension of the privilege of the habeas corpus. The latter provision is full and special and definite, and nothing is necessary to be implied to make it entirely effective; but "to establish post offices and post roads" without providing for the transportation of the mails would be entirely useless. To make these post offices and post roads of *any* the least service or value, other things are necessarily required, and, therefore, this general grant of power is held to include the power necessary to carry into useful operation the power expressly granted.

beleagured; and the proclamation of martial law, in such case, is but notice and authentication of a fact—that civil authority has become suspended, of itself, by the force of circumstances, and that by the same force of circumstances the military power has had devolved upon it, without having authoritatively assumed, the supreme control of affairs, in the care of the public safety and conservation.

As to the present case, therefore, it suffices to say, that the power to suspend the laws and to substitute the military in the place of the civil authority, is not a power within the legal attributes of a Governor of one of the Territories of the United States."

In the debate in the House of Commons, in 1824, upon the case of the Missionary in Demerara, Lord Brougham, [Brougham's Social and Political Speeches, vol. 2, p. 128.] —after referring to the atrocious proceedings against the Missionary and his trial by court martial, said;—"I know that the general answer to all which has been hitherto alleged on this subject is, that martial law had been proclamed in Demerara. But, Sir, *I do not profess to understand, as a lawyer, martial law of such a description; it is entirely unknown to the law of England.*—I do not mean to say in the bad times of our history, but in that more recent period which is called Constitutional.

It is very true, that formerly the Crown sometimes issued proclamations, by virtue of which civil offences were tried before military tribunals. The most remarkable instance of that description, and the nearest precedent to the case under our consideration, was the well known proclamation of that august, pious, and humane pair, Philip and Mary, of happy memory, stigmatizing as rebellion, and as an act which should subject the offender to be tried by a Court Martial, the having heretical, that is to say, Protestant books in one's possession, and not giving them up without previously reading them. Similar proclamations, although not so extravagant in their character, were issued by Elizabeth, by James the First, (and of a less violent nature,) by Charles the First; until at length the evil became so unbearable that there arose from it the celebrated Petition of Right, one of the best legacies left to his Country by that illustrious lawyer, Lord Coke; to whom every man that loves the Constitution, owes a debt of gratitude which increasing veneration for his memory can never pay. The Petition provides that all such procedings shall thenceforward be put down; it declares 'that no man shall be forejudged of life or limb against the form of the Great Charter;—that no man ought to be adjudged to death, but by the laws established in this realm; either by the custom of the realm, or by Acts of Parliament;' and, 'that the commissions for proceeding by martial law should be revoked and annulled, lest, by color of them, any of his Majesty's subjects be destroyed or put to death, contrary to the laws and statutes of the land.' Since that time no such thing as martial law has been recognized in this country; and courts, founded on proclamations of martial law, have been wholly unknown."

Samuel, in his Historical Account of the British Army, and of the Law Military, (London, 1816,) says, (p. 201);—"In every *mutiny act*, from the 1st of William and Mary, to the 55th of the King, it is expressly declared that the subject generally is exempt and wholly free from the operation of martial law, and of the judgment of any other than his peers, under the known and established laws of the realm; and that in the matters in which the act is about to alter the condition of the soldier from that of the ordinary citizen, it goes entirely on the ground of enforcing the *military* duties, and exact discipline; and of punishing in a more summary way than the common law authorizes the peculiar offences of soldiers."

In Luther vs Borden (7 Howard's Rep. S. C. U. S. p. 1, 59—88,) Mr. Justice Woodbury discussed at considerable length this question of martial law. At page 62 he says: "By it, every citizen, instead of reposing under the shield of known and fixed laws as to his liberty, property and life, exists with a rope round his neck, subject to be hung up by a military despot, at

the next lamp-post, under the sentence of some drum-head court martial. (See Simmons' Pract. of Courts-Martial, 40.) See such a trial in Hough on Courts-Martial, 383, where the victim was 'blown away by a gun,' 'neither time, place, nor persons considered.' As an illustration how the passage of such a law may be abused Queen Mary put in force in 1588, by *proclamation merely*, and declared 'that whosoever had in his possession any heretical, treasonable, or seditious books, and did not presently burn them without reading them or showing them to any other person, should be esteemed a rebel, and without any further delay be executed by the martial law.' Tytler on Military Law, p. 50, c. 1, 31.

For convincing reasons like these, in every country which makes any claim to political or civil liberty, martial law as here attempted, and as once practiced in England against her own people, *has been expressly forbidden there for near two centuries, as well as by the principles of every other free constitutional government.* [1 Hallam's Const. Hist. 420.] And it would be not a little extraordinary, if the spirit of our institutions, both State and National, was not much stronger than in England against the unlimited exercise of martial law over a whole people, whether attempted by any chief magistrate, or even by a legislature."

And again (at page 69) Mr. Justice Woodbury says: "It would be alarming enough to sanction here an unlimited power, exercised either by legislatures, or the executive, or courts, when all our governments are themselves governments of limitations and checks, and of fixed and known laws, and the people a race above all others jealous of encroachments by those in power. And it is far better that those persons should be without the protection of the ordinary laws of the land who disregard them in an emergency, and should look to a grateful country for indemnity and pardon, than to allow, beforehand, the framework of jurisprudence to be overturned, and everything placed at the mercy of the bayonet.

No tribunal or department in our system of governments ever can be lawfully authorized to dispense with the laws, like some of the tyrannical Stuarts, or to repeal, or abolish, or suspend the whole body of them, or, in other words, appoint an unrestrained military dictator at the head of armed men.

Whatever stretches of such power may be ventured on in great crises, they cannot be upheld by the laws, as they prostrate the laws and ride triumphant over and beyond them," &c.

And again, (p. 83,) "my impression is that a state of war, whether foreign or domestic, may exist, in the great perils of which it is competent, under its rights and on principles of national law, for a commanding officer of troops under the controlling government to extend certain rights of war not only over his camp, but its environs, and the near field of his military operations, (6 American Archives, 186.) But no farther nor wider, (Johnson vs. Davis et. al., 3 Martin, 530, 531.) On this rested the justification of one of the great commanders of this country, and of the age, in a transaction so well known at New Orleans.

But in civil strife they are not to extend beyond the place where insurrection exists, (3 Martin, 551) nor to portions of the state remote from the scene of military operations, nor after the resistance is over; nor to persons not connected with it; (Grant vs. Gould, et. al., 2 Hon. Bl. 69.,) nor even within the scene, can they extend to the person or property of citizens against whom no probable cause exists which may justify it; (Sutton vs. Johnson, 1 D. & E. 549.) nor to the property of any person, without necessity or civil precept."

And again, (p. 65,) "Having thus seen that *martial law*, like this, ranging over a whole people aud state, was not by our fathers, considered proper at all in peace, or during civil strife, and that in the country from which we derive most of our jurisprudence, the King has long been forbidden to put it in force in war or peace, and that Parliament never, in the most extreme cases of rebellion, allows it, except as being sovereign and unlimited in power, and under peculiar restrictions," &c.

In the late publication of the Hon. B. F. Curtis, (formerly a justice of the Supreme Court of the United States, and which place he resigned a few years since,) he says;—"Are the great principles of free government to be used and consumed as means of war? Are we not wise enough and strong enough to carry on this war to a successful military end, without submitting to the loss of any one great principle of liberty? We *are* strong enough. *We are wise enough*, if the people and their servants will but understand and observe the just limits of military power.

What, then, are those limits? They are these. There is military law; there is martial law. *Military* law is that system of laws enacted by the legislative power for the government of the army and navy of the United States, and of the militia when called into the actual service of the United States. It has no control whatever over any person or any property of any citizen. It could not even apply to the teamsters of an army, save by force of express provisions of the laws of Congress, making such persons amenable thereto. The persons and the property of private citizens of the United States, are as absolutely exempted from the control of military law as they are exempted from the control of the laws of Great Britain.

But there is also *Martial law*. What is this? It is the will of a military commander, operating without any restraint, save his judgment, upon the lives, upon the property, upon the entire social and individual condition of all over whom the law extends. But, under the Constitution of the United States, over whom does such law extend? Will any one be bold enough to say, in view of the history of our ancestors and ourselves, that the President of the United States can extend such law as that over the entire country, or over any defined geographical part thereof, save in connection with some particular military operations which he is carrying on there? Since Charles I, lost his head, there has been no king in England who could make such law, in that realm. And where is there to be found, in our history, or our constitutions, either State or national, any warrant for saying, that a President of the United States has been empowered by the Constitution to extend martial law over the whole country, and to subject thereby to his military pewer, every right of every ctizen? He has no such authority.

In time of war, a military commander, whether he be the commander-in-chief, or one of his subordinates, must posses and exercise powers both over the persons and the property of citizens which do not exist in time of peace. But he possesses and exercises such powers, *not in spite of the Constitution and laws of the United States, or in derogation from their authority, but in virtue thereof and in strict subordination thereto*. The general who moves his army over private property in the course of his operations in the field, or who impresses into the public service means of transportation, or subsistence, to enable him to act against the enemy, or who seizes persons within his lines as spies, or destroys supplies in immediate danger of falling into the hands of the enemy, uses authority unknown to the Constitution and laws of the United States in time of *peace*; but not unknown to that Constitution and those laws in time of *war*. The power to declare war, includes the power to use the customary and necessary means effectually to carry it on. As congress may institute a state of war, it may legislate into existence and place under executive control the means for its prosecution. And, in time of war without any special legislation, not the commander-in-chief only, but every commander of an expedition, or of a military post, is lawfully empowered by the Constitution and laws of the United States to do whatever is necessary, and is sanctioned by the laws of war, to accomplish the lawful objects of his command. But it is obvious that this implied authority must find early limits somewhere. If it were admitted that a commanding general in the field might do whatever in his discretion might be necessary to subdue the enemy, he could levy contributions to pay his soldiers; he could force conscripts into his service; he could drive out of the entire country all persons not desirous to aid

him;—in short, he would be the absolute master of the country for the time being.

No one has ever supposed—no one will now undertake to maintain—that the commander-in-chief, in time of war, has any such lawful authority as this.

What, then, is his authority over the persons and property of citizens? I answer, that, over all persons enlisted in his forces he has military power and command; that over all persons and property *within the sphere of his actual operations in the field*, he may lawfully exercise such restraint and control as the successful prosecution of his particular military enterprise may, in his honest judgment, absolutely require; and upon such persons as have committed offences against any article of war, he may, through appropriate military tribunals, inflict the punishment prescribed by law. *And there his lawful authority ends.*

The military power over citizens and their property is a power to *act*, not a power to prescribe rules for *future* action. It springs from present pressing emergencies, and is limited by them. It cannot assume the functions of the statesman or legislator, and make provision for future or distant arrangements by which persons or property may be made subservient to military uses. It is the physical force of an army in the field, and may control whatever is so near as to be actually reached by that force, in order to remove obstructions to its exercise.

But when the military commander controls the persons or property of citizens, who are beyond the sphere of his actual operations in the field, when he makes laws to govern their conduct, he becomes a legislator. Those laws may be made actually operative; obedience to them may be enforced by military power; their purpose and effect may be solely to recruit or support his armies, or to weaken the power of the enemy with whom he is contending. *But he is a legislator still;* and whether his edicts are clothed in the form of proclamations, or of military orders, by whatever name they may be called, they are laws. If he have the legislative power conferred on him by the people, it is well. If not, he usurps it.

He has no more lawful authority to hold all the *citizens* of the entire country, outside of the sphere of his actual operations in the field, amenable to his military edicts, than he has to hold all the *property* of the country subject to his military requisitions. He is not the military commander of the *citizens* of the United States, but of its *soldiers*."

When, in 1850, the Convention to amend the Constitution of the State of New Hampshire, had under consideration article 34 of the proposed Bill of Rights, in the following words;—"No person can, in any case, be subjected to *law martial*, or to any pains or penalties by virtue of that law, except those employed in the army or navy, and except the military in actual service, *but by authority of the legislature*," Judge Woodbury, then an Associate Justice of the Supreme Court of the United States, and a member of the Convention, moved to strike out 'but by authority of the legislature,' which, he said, "authorized the legislature to apply the law martial to citizens in private life; and he would allow no legislature to apply to him the cat, at the drum's head. This could not be done without abolishing the whole constitution; and the power was not necessary. It would not be tolerated, except in cases of war; and scarcely then, even in the army. He spoke of the law martial separate from the military code. The fact was there was no law martial. *It was no law. It was a contempt of law.* If we ever get into such a state of society that *any* man must be tried at the drum head by a court martial, the foundation of society was broken up. This power belonged to the general government in time of war, *if any where;* but they had never dreamed of applying the law martial to persons in civil and private life."

"*The motion prevailed unanimously.*" 1 Woodbury's Writings, pp. 485, 486.

Some of the abuses growing out of the proclamation of *martial law*, are briefly stated in Adye on Courts Martial, London, 1801, p. 13, as follows:—

"In the reign of Mary, a proclamation was issued, that whoever was possessed of heretical books, and did not presently burn them, without reading them or showing

them to others, should be deemed a rebel, and executed immediately by martial law; and in the succeeding reign of Elizabeth, it was no less an object of complaint; for in cases of insurrection and public disorder, it was not only exercised on military men, but on people in general; and was extended also to those who brought *bulls*, (*) &c. from Rome. We read of a very extraordinary exertion of the prerogative in a matter of this sort by Queen Elizabeth, who, upon some disturbances from the apprentices of London, constituted the Lord Mayor Provost Marshal, with power to proceed against them according to martial law; and it was a circumstance of nearly a similar nature, though a more flagrant breach of the laws, that occasioned the enacting of the Petition of Right, in the third year of the reign of Charles I. This monarch, inheriting his father's notions of Kingly power, *and entertaining a contempt for the commons,* endeavored to raise money without their consent: and among other arbitrary methods which he took to effect his purpose, sent commissioners into the different counties to demand a certain sum from each individual, according to his estate, and soldiers were ordered to be quartered upon the houses of those who were backward in their contributions; and if injured or insulted by the soldiery, they could not apply to the ordinary courts of justice, but were obliged to seek redress from a council of war which the king had constituted with power to proceed, within the land, against such soldiers, mariners, and other dissolute persons joining with them as should commit murder, felony, robbery, or other outrage or misdemeanor, as was used in armies in time of war, and condemn and cause such offenders to be executed according to martial law.—Finding, however, that these methods were ineffectual, he was obliged in the end to ask the assistance of the commons, who on their part were become resolutely bent on granting no subsidies, till the grievances which the people suffered were redressed,—and CHARLES, perceiving that money, which he could no longer do without, was to be had on no other terms, gave his assent to the bill prepared by the commons, called the Petition of Right, *one clause of which was, that the commissions for proceeding by martial law should be dissolved, and no such commissions be issued for the future.*"

TYTLER, in his work on Military Law, not understanding, or not sufficiently regarding the distinction between martial law and military law, apparently dissents from the doctrines of Hale and Blackstone; and says, (see pages 11 to 27 in London ed. by James—1814) "The martial law is a code or body of regulations for the proper maintenance of that order and discipline of which the fundamental principles are, a due obedience of the several ranks tothe proper officers, a subordination of each rank to their superiors, and that subjection of the whole to certain rules of discipline, essential to their acting with union and energy."—This shews that he was speaking of *military law*, and not of *martial law*. At p. 105 he speaks of the same system of law as *martial law:* but in p. 364 he designates it by its proper term, *military law*. In pages 21 and 22 he apparently recognizes the distinction between the two, for he says, "That the summary mode of execution, which was termed the *martial law*, in former periods of our history, (when the prerogative of the crown seemed to have no determined limit) deserved all those characters of tyranny which have been assigned to it by HALE and COKE, we may most readily acknowledge," &c. And in a note to this later edition (p. 23) the decision in the case of Grant vs Gould, [2 Hen. Blackstone, 69], before alluded to in the extracts from McArthur, [*ante* p. 59] is referred to as "most accurately marking the distinction between *martial law*, properly so called, and so described by these writers," (Hale, Coke and Blackstone) "and that *military law* which regulates the British army." And he quotes in full nearly two pages of Lord Roslyn's opinion, a considerable and the most important portion of which has already been quoted in the extract from McArthur's work.

In pages 58—62, Tytler gives the 6., 7.,

(*) Papal proclamations, or mandates or edicts issued by the Pope, under seal, and which were formerly issued for the purpose of influencing the action of the Catholic population of different countries in Europe,—sometimes even upon political questions.

8., 9. and 10. articles of the Petition of Right, and says;—"to this great retrenchment of the high military powers of the crown, which, though reasonable and necessary, in as far as it went to the correction of all abusive exertion of the prerogative, must be deemed excessive, inasmuch *as it abolished altogether the exercise of the martial law even in cases of the most extreme and urgent danger*, the king, with much reluctance, was obliged to consent." Thus he concedes that *martial law*, as that term is now well understood, was abolished in England, by the Petition of Right; the provisions of which are certainly not stronger than those of the Constitution of the United States.

A writer in the Law Magazine, [London May 1851, vol. 14; new series, page 409,] says: "But the power of declaring and exercising martial law cannot, we contend, be properly described as a prerogative of the crown: for that power arises wholly out of an overwhelming necessity impossible to be met and coped with by other means, and for cases of such necessity no rules or systems can provide, nor, in fact, with such does any jurisprudence pretend to deal. Moreover, neither Stanford nor Comyns, nor as far as we are aware any other writer except Hale mentions this power or right among the prerogatives of the crown." * * "*Martial law is directly contrary* to *Magna Charta*, and no prerogative of the king can be claimed contrary to that statute."

During a former rebellion in India, the Advocate General, in an official despatch, said;—"The object of martial law, and the trial of offenders under it, is justly stated in the Regulation X, of 1804, to be immediate punishment, 'for the safety of the British possessions, and for the security of the lives and property of the inhabitants thereof.' *It is, in fact, the law of social self defence, superceding under the pressure, and, therefore, under the justification of an extreme necessity, the ordinary forms of justice.* Courts martial, under martial law, *or, rather, during the suspension of law*, are invested with the power of administering that prompt and speedy justice, in cases presumed to be clearly and indisputably of the highest species of guilt. The object is self preservation by the terror and the example of speedy justice. *But courts martial which condemn to imprisonment, and hard labor, belie the necessity under which alone, the jurisdiction of courts martial* can exist in civil society." *Hough, on Military Courts, London*, 1834, *pp.* 349, 350.

Hough, in his Precedents in Military Law, &c., (London, 1855, pp. 514, 516,) says;—"The late Duke of Wellington said, in the House of Lords, 1st April, 1851, regarding the *Ceylon Rebellion;*—'The noble Earl (*) had referred to his conduct in respect to *martial law*. He concluded that *martial law* was neither more nor less than the will of the General who commands the army. In fact, Martial Law meant no law at all." Hough quotes further, from the continuation of the debate, as follows:—"Earl Grey was glad to hear what the noble Duke said with reference to what is the true nature of martial law. It is exactly in accordance with what I myself wrote to my noble friend at the period of those transactions in Ceylon. I am sure that was not wrong *in law*, for I had the advice of Lord Cottenham, (†) Lord Campbell, (‡) and the Attorney General, Sir John Jervis; (§) and explained to my noble friend that *what is called martial law is no law at all;* but merely, for the sake of the public safety, in cases of great emergency, setting aside all law, and acting under the military power;—a proceeding which requires to be followed up by an *act of indemnity* when the disturbances are at an end."

At page 516, Hough says;—"A learned member of the House of Commons, 29th May, 1851, said;—'Mr. Baillie has run a parallel between *martial law* and the common law of England, and he was inclined to carp at the statement of the Judge Advocate General, *that martial law was a denial of all law*. But the Judge Advocate was quite correct; it was *a denial of*

(*) Earl Grey, Secretary of State for the Colonies.
(†) Lord High Chancellor.
(‡) Chancellor of the Duchy of Lancaster, and afterwards Chief Justice of the Queen's Bench, and Lord High Chancellor.
(§) Afterwards Chief Justice of the Common Pleas.

all law, and could not be the subject of regulation. The rule was, when martial law was proclaimed, the commanding officer must use his discretion, and he was expected to approximate as near as he could to the regular cause of Justice." * * * * "Sir F. Thesiger remarked, that Sir J. Mackintosh, (one of the most accomplished jurists this country ever produced,) said;—'When law is silenced by the noise of arms, the rulers of the armed force must punish, as equitably as they can, *those crimes which threaten their own safety, and that of society, but no longer.* Every moment beyond, is usurpation. *As soon as the law can act, every other mode of punishing supposed crime, is itself an enormous crime.*"

General Halleck in his late work on International Law and the laws of War, adopts substantially the views of Attorney General Cushing, either by direct quotation or by extracting the substance of Mr. Cushing's statements. General Halleck, it must be recollected, is treating of *Martial Law* generally, and not with particular reference to the legality or fact of its existence in this country alone; and this should be continually borne in mind in considering the views he has expressed.

He recognizes the distinction between *military law* and *martial law*, and says:—"The latter exists only in time of war, and originates in military necessity. *It derives no authority from the civil law, (using the term in its more general sense,) nor assistance from the civil tribunals, for it overrides, suspends and replaces both.* It is, from its very nature, an arbitrary power and extends to all the inhabitants (whether civil or military) of the district where it is in force."

He says, too, (p. 372) "What is called a declaration of martial law, in one's own country, is the mere announcement of a fact; it does not and cannot create that fact. The exigeucies which, in any particular case, justify the taking of human life without the interposition of the civil law, may justify the suspension of the power of such tribunals and the substitution of martial law."

General Halleck (p. 372) further says, (quoting verbatim from Mr. Cushing's Opinion,)—"There may undoubtedly be, and have been, emergencies of necessity, capable of themselves to produce, and therefore to justify *such suspension of all law*, and involving for the time, the omnipotence of military power. But such a necessity is not of the range of mere legal questions.—When martial law is proclaimed, under circumstances of assumed necessity, the proclamation must be regarded as the statement of an existing fact, rather than the legal creation of that fact. In a beleagured city, for instance, the state of siege lawfully exists, because the city is beleagured; and the proclamation of martial law, in such case, is but notice and authentication of a fact,—that civil authority has been supended, of itself, by the force of circumstances, and that, by the same force of circumstances, the military has had devolved upon it, without having authoritatively assumed the supreme control of affairs in the care of the public safety and conservation."

Again, at pages 273, 274, General Halleck says, "The right to declare, apply and enforce martial law is one of the *sovereign powers*, and resides in the *governing authority of the State*, and *it depends upon the Constitution of the State* whether restrictions and rules are to be adopted for its application, or whether it is to be exercised according to the contingencies which called it into existence. But even when left unrestricted by constiutional or statutory law, like the power of a civil court to punish contempts, it must be exercised with due moderation and justice; and as paramount necessity alone can call it into existence, *so must its exercise be limited to such times and places as this necessity may require;* and moreover it must be governed by the rules of general public law, as applied to a state of war."

Professor Parker, of the Law School of Cambridge, in his very elaborate and somewhat extraordinary review of the opinion of Chief Justice Taney, in the case of Merryman, says, (pp. 36, 37):—"The Duke of Wellington is quoted as having said that 'martial law is the will of the commander-in-chief,' and Blackstone says it 'is built upon no settled principle, but is entirely

arbitrary in its decisions.' *With such a scope and extent it cannot exist in this country consistently with the Constitution, for it would be utterly subversive of the Constitution for the time being. Neither the President nor Congress can constitutionally proclaim or authorize such a power*, nor can it exist by the general principles of law. Burrill in his Dictionary, defines it as 'An arbitrary kind of law or rule, sometimes established in a place or district occupied or controlled by an armed force, by which the civil authority and the ordinary administration of the law are either wholly suspended or subjected to military power.' This is founded upon the idea of Blackstone, and is clearly imperfect as a definition, *unless the military power which exercises this law or rule is not responsible to the civil authority in any mode for the manner of its exercise; which in this country is clearly contrary to the fact.* It has been said that it is 'founded upon a permanent necessity.' Of course, then, it extends as far as the necessity extends, but no further."

It is true this learned professor supposes that this disease of the body politic may exist in this country, after being somewhat changed in its character and its original virus has been made less active, so as to present the disease in a milder and less repulsive form; but he fails to inform us how this is to be accomplished. Dr. Jenner, by passing the original *virus* of the small pox through one of the brute creation, was able to produce the kine-pock *virus*, and to introduce a disease of a less repulsive and less virulent form, which appeared to work that change in the constitution of man which, when occasioned by the original disease, prevented a second attack of the small pox; but the Jennerian experiments of our political doctors have shown that the original *virus* of martial law has been made more virulent and its effects made more repulsive in the instances of Jennerian transmutation which they have been able to accomplish.

The foregoing quotations, from the most reliable authorities, will, it is hoped, afford the means of determining the signification and force of the term *martial law*, and aid the inquirer after truth in the formation of an opinion upon the question—whether or not *martial law*, properly understood, can have existence under the proclamation or authority of any officer or department of the government of the United States?

There is little, if any, reason for questioning the character of the power which ordinarily is, and always may be, exercised where *martial law* prevails. That power is absolute, unlimited, despotic. It is bound by no law;—it is guided by no fixed principles. Subject, for the time being, to no legal restraints, it disregards statutes—violates constitutions—contemns all idea of superior authority;—and, so long as it holds uninterrupted sway, it paralyzes and defies the authority and action of all the officers of civil administration, whether belonging to the Executive, the Legislative, or the Judicial department. It places a rope around the neck of every person within the range of the exercise of its unlimited and unregulated power;—a power upheld by physical force, made irresistable by arms and discipline, and accustomed to yield unquestioning obedience to the military commander. This commander assumes not only all the powers and functions of all the officers of every department of Government, but all powers reserved to the people; for *his word is the only law*, and his will, and the force of his armed adherents and followers, the irresistable power by which his decrees are enforced. His power is limited only because it must be exercised by physical force, and cannot, therefore, be extended beyond the immediate neighborhood of the forts, camps, and fields in which the army reigns supreme; and it knows no restraints except such as his humane character, or the fear of future responsibility and consequences, may impose.

Is not such a power above all law and all constitutions? Does not its exercise violate, and, for the time, destroy the Constitution? And can any such power be delegated, conferred or *authorized* by any officer of our government, whose powers are conferred and limited by the Constitution? It has been said by newspaper writers, that in a state of war,—that in the midst of a

of a rebellion,—the President is authorized to exercise powers, the exercise of which is forbidden by the Constitution,—notwithstanding that such prohibition is general, and makes no distinction between the conditions of rebellion and war and of peace and tranquility. But is not the Constitution intended to bind and control at all times and in all conditions of the country? Does it not contemplate and make provision for peace and war, for invasion and rebellion? Certainly it does; and the idea that the Constitution provides for or authorizes its own suspension, or justifies its overthrow, or violation, by any of its officers, in peace or in war, would have been as difficult of comprehension to the great and clear mind of that profound constitutional lawyer, Daniel Webster, as was the idea of *peaceable secession* of one of our States from the Union and Government formed by that Constitution. *That* he truly declared to be "the most absurd of all ideas" (Works, vol. 2, p. 591,) and (vol. 5, p. 361) "an utter impossibility."

Can those who advocate the doctrine that the Constitution "suspends itself in time of war," refer to any expression of the Constitution which contains even the germ of such a suicidal element, or points to any such instrument or occasion of self-destruction? And can those who advocate such doctrines and the right of the President to declare *martial law*, throughout all the loyal States, and of other officers to do acts under it clearly and expressly forbidden by the Constitution, deny that the language of Mr. Webster, in reference to secession and nullification, might with scarcely the change of a single word be applied to the measures which they seek to justify and maintain? Mr. Webster says, (Works vol. 3, pp. 459 and 460): "*The Constitution does not provide for events which must be preceded by its own destruction.* SECESSION, therefore, since it must bring these consequences with it, is REVOLUTIONARY; and NULLIFICATION is equally REVOLUTIONARY. What is revolution? Why, sir, *that is revolution which overturns or controls, or successfully resists, the existing public authority; that which arrests the exercise of the Supreme Power; that which introduces a new paramount authority into the rule of the State.*"

Again (p. 461): "Nullification, if successful arrests the power of the law, absolves citizens from their duty, subverts the foundation both of protection and obedience, dispenses with oaths and obligations of allegiance,(*) and elevates another authority to supreme command. Is not this revolution? And it raises to supreme command four-and-twenty distinct powers, each professing to be under a general government, and yet each setting its laws at defiance at pleasure. Is not this anarchy, as well as revolution? Sir, the Constitution of the United States was received as a *whole,* and for the whole country. *If it cannot stand all together, it cannot stand in parts; and if laws cannot be executed everywhere, they cannot be long executed anywhere.*"

Again, [p. 490,] "Nullification, sir, is as distinctly revolutionary as secession; but I cannot say that the revolution which it seeks is one of so respectable a character. Secession would, it is true, abandon the Constitution altogether, but then it would profess to abandon it. Whatever other inconsistencies it might run into, one, at least, it would avoid. It would not belong to a government, while it rejected its authority. It would not aid in passing laws which others are to obey, and yet reject their authority as to itself. It would not undertake to reconcile obedience to public authority with an asserted right of command over that same authority. It would not be in the government and above the government at the same time."

But, it will be asked, may not the existence of a paramount and pressing necessity, and the just rights of present self-defence, justify or excuse extreme measures on the part of the actual commander of an army? Can any party be punished, or be held responsible, civilly or criminally, for an act forced upon him against his will, and com-

(*) As it is assumed war and martial law dispenses with oaths to support the Constitution and execute the laws.

pelled and justified by an overruling, overwhelming, inevitable necessity? May not a General, or any popular leader, who can find adherents and followers, and who has no unlawful designs and no unworthy motives, exercise influence or control over those followers, and prompt or direct them to use all necessary means of self-defence, against pressing and imminent dangers, against which the laws can afford them no protection? Are not armies,—and other organized bodies,—as well as individuals, to enjoy the right of self-defence? It seems to be just and reasonable that they should, but their rights of self-defence must be determined and restrained by the same principles and the same civil tribunals which determine the limits of the right of individual self-defence. Courts and juries in the ordinary judicial tribunals,—not the leaders of the army or other force,—must determine whether any act complained of was justified by the necessity of the case. If we concede this right of self-defence, and allow those who assume to exercise this right to determine for themselves, when, and under what circumstances its exercise shall be justified, and the manner of its exercise, the insurgent leaders and insurgent states, will have no difficulty in deciding that the rebellion which has perilled the existence of the Constitution and the Union, was required and may be justified by this right of self-defence,—while courts and jurors would necessarily reach a different conclusion. Does not this show that this right of social or military self-defence, when exercised under the pressure or the pretence of necessity, by individuals or organized bodies,—armed or unarmed,—must be judged of, and its limits be determined in the ordinary way, by courts and juries, in the course of judicial investigation, and upon the well settled principles of the common law? And, in case any party shall be injured, and seeks legal redress; or in case acts, which, under ordinary circumstances, amount to a crime, have been committed, and a criminal prosecution instituted, is not the party who has committed such acts, to be visited with their legal consequences, if a court and jury determine such acts to have been unnecessary, and, therefore, unjustifiable? Indeed, under all the authorities, are not the acts of a military commander,—even when martial law may be proclaimed without a violation of the Constitution,—subject to investigation, before the ordinary courts of justice: and is not such commander subject to claims for private damages, or to criminal punishment, if not fully justified by the apparent necessities of the case? During the prevalence of *martial law*, courts and juries may be submissive and silent; but, as soon as the exigent necessity has passed, their functions must be resumed;—and the military commander, who has, without the justification of inevitable and inexorable necessity, put a rope around the neck of all or any of his fellow citizens, may find that at the same time he placed his own neck in similar peril. And, if he has adopted any measures which, in the opinion of a jury, were not dictated and justified by the necessities of self-defence, or the magnitude of the perils which endangered his own and the public safety, he must submit to the legal consequences, and answer, civilly and criminally, for all such acts which courts and jurors may decide were not justified by the present necessity of the particular case.

Must not the character and extent of the necessity which justifies the exercise of extraordinary powers determine the character and extent of the measures adopted to meet the emergency; and if life be taken from wantonness, or malice, or without apparent necessity, is not the party, guilty of the homicide, a murderer? And if the peaceful and unoffending citizen be injured, in person or property, without such apparent necessity, are not the judicial tribunals of the country to afford him the proper redress? (See Com. vs. Blodget, 12 Metcalf 50; Mitchell vs. Harmony, 15 Howard's, Rep., 115.)

Must not the necessity which justifies such acts, be *then and there*, present and pressing, as well as inevitable and irresistible? Is it not then, at the very least, exceedingly doubtful whether any such thing as an *authoritative* and valid declaration of *martial law*, (distant from, or even at the scene of the perils and necessity which, in a foreign

country, will alone justify it,) can be made in the United States, under its present Constitution? And can there be any legal or justifiable exercise of the powers usually exercised where *martial law* prevails, except from the absolute and inevitable necessity of their exercise *for the purposes of social or military self-defence?* And must not that necessity be such as to *force* the adoption of such measures;—a necessity which could not have been avoided, and is irresistible; which leaves no choice of measures, and admits of no delay? In this view, can any previous proclamation of the President confer any power, or change, in any degree, the legal aspects of the case?

Would not any measures which, under the circumstances, are justifiable after such proclamation, be quite as justifiable if no previous proclamation had been made? In other words, are not Cushing, Halleck, and the other writers quoted, entirely correct in stating (to use the language of General Halleck) that "*what is called a declaration of martial law in one's own country, is the mere announcement of a fact; it does not and cannot create that fact.*" Is not the justification of the exercise of arbitratry power in this country to rest wholly on the *law of social and military self-defence* to be administered in the ordinary courts of justice; and does not such law depend substantially upon the same principles which justify an individual in inflicting an injury upon another, or even in taking life in self-defence? And are not these rights of self-defence, individual, social and military, based upon and limited by the necessities of the moment, substantially in the same manner, in all those cases? And are they not in all those cases to be finally judged of by courts and juries in the ordinary civil tribunals?

Is it, then, safe or proper for our people or their representatives to look approvingly, or even without earnest but respectful remonstrance, upon the partial declaration of *martial law* already made, and under which so many and such gross abuses have already been detected and exposed? Is it not certain that but a very small proportion of those abuses have yet been exposed; and that such abuses will rapidly increase in number and enormity, so long as they are unrebuked? And shall the exercise of this power, in a modified and mild form, be approved until the acts committed under it shall constitute a mass of precedents under the shadow of which this little offspring of usurpation shall grow into the fearful proportions and attain the terrible vigor of *martial law*, as it prevailed in the reigns of Mary and Elizabeth, of Charles and James I. and II.? Is it wise or prudent for those in authority to sanction, by repeated precedents, the exercise of unconstitutional power upon the ground that necessity overrides the judicary, the law, and the Constitution? A leading New York newspaper (*) which professes to support the Administration has very distinctly intimated to the President that the people, dissatisfied with the action of the administration, might, *from necessity*, depose him, and, (disregarding the forms of the Constitution) appoint another leader;—and so late as October 24, 1862, the same paper published a letter from its "*correspondent*" at New Orleans, in which it is said—"The time indeed is not far distant when the people, in their majesty, will rise and demand that the resolutions of the French Assembly shall be adopted as the basis of our future action. Then will ring through the land:

1.—That it is a crime to despair of the Republic.

2.—That every man capable of bearing arms, is at the disposal of the Republic.

3.—That every horse, mule, ox, cart, or all else serviceable in war, are at the disposal of the Republic.

4.—That the men at the recruiting stations everywhere, shall hasten to the borders, armed with such weapons as are at their command.

5.—That every General of Division shall be responsible with his head for a defeat.

6.—That to punish the guilty, the guillotine on trucks shall accompany every division of the army.

7.—That a commission of the people shall accompany each division of the army, who shall see that these decrees of the people are sternly carried out."

(*) The New York *Times*.

And in the Sunday paper from the same office, October 20, 1862, the letter of its "*correspondent*" at London, contains the following pregnant sentences:

"Englishmen are in great trouble at the illegality and unconstitutionality of the acts of President LINCOLN. They have a great tenderness for the Constitution and the laws, and feel very badly that the Northern people, while conquering the South, should lose their own liberties. They tell us that the President cannot do this and that—that his proclamations are only waste paper. They appear to have very little idea of what the Commander-in-Chief of the army and navy of the United States can do. A man of firm and resolute will, with a million of men in arms to support him, can do pretty much what he pleases. They have to learn that paper constitutions, however convenient they may be, can be amended when necessary, suspended, or laid aside altogether, and that it is no longer a question in America what this or that constitution authorizes, but what is necessary to be done to make of thirty-four States and a vast territory, one nation."

What are we coming to when such propositions are made and pass unrebuked? Are the *people* (and who are the *people* that are to do it,) to depose the President, take command of the army, and re-enact the scenes of the French Revolution with all the improvements in atrocity and the means of destruction that the experience of seventy years may have introduced or suggested? The *people* certainly cannot command the army until the Constitution is overthrown; and if the constitutional commander-in-chief of an army of a million of men can suspend or lay aside the Constitution, the General who commands that army in the field—"a man of firm and resolute will"—can, if the army will follow and obey him—and they are quite as likely to be willing to do that, as to follow and obey a civilian President who proposes to overthrow the Constitution—may suspend not only the Constitution, but the President and his Cabinet.

Is it then wise or prudent for rulers or people to assume that any necessity may authorize the President or any other civil or military officer to override the constituted authorities, to suspend all law, and to overthrow the Constitution? Is it wise or prudent to make a precedent for some able and ambitious military leader to assume the reins of government on the plea of necessity? Certainly not. It is moonstruck madness. There is no safety except in obedience to the Constitution and the lawful authority of all holding office under it. Is it not clear that the President's authority may be resisted on this ground of necessity, as well as the authority of the Judicial Department,—the authority of the law? And if any ambitious and unscrupulous military chieftain shall ever assume the powers of government and maintain his infamous usurpations, will it not be under this same *plea of necessity?* If this assumption that necessity can suspend the Constitution, and authorize the exercise of powers which have not been granted, and which have in fact been denied, is sanctioned, will it not be insisted, and plausibly if not reasonably argued that, as a necessary result, the same kind of necessity, differing only in degree, will authorize a General in the actual command of an army to overturn the then existing administration of the government as well as the Constitution of the country? If some unscrupulous but popular General should pitch the President, the Senate, the Supreme Court, the Heads of Departments and the House of Representatives into the Potomac, it would be easy for him,—if he had 200,000 bayonets to maintain his position—to say these acts were required and justified by inexorable necessity? Suppose he should say that the necessity was of the highest and most extreme character,—that it was absolute, unavoidable, inevitable,—that it was palpable, present and pressing, as well as inevitable, inexorable, irresistible and overwhelming;—that it admitted of no choice of measures and no inactivity or delay, and that such necessity imperilled alike his own and his army's present safety and the ultimate safety of our free institutions, our Constitution and our country? What answer could those who have made a necessity not discernible by ordinary men the justification

of smaller but still most dangerous breaches of the law and the Constitution, logically make to this assertion? But would not courts and jurors who had sanctioned no such dangerous heresies be likely to say that any commander, who, on *any* pretence of necessity, should resort to such extreme measures was a rebel, a wholesale murderer, and a traitor? And would not the memory of the perpetrator of such an outrage descend to all future generations blackened and blasted by the universal execration of all good citizens; unless the impartial historian was compelled to record the fact that all these functionaries had established the precedents which led to and justified the outrage, and had by tyranny and oppression and a deliberate conspiracy to overthrow the Constitution of the country and deprive the people of the inalienable rights of life, liberty and the pursuits of happiness which that Constitution had guaranteed them, deserved their fate? Ought not, then, all men, everywhere, whether holding official position or not, to beware how they sanction, upon the dangerous plea of necessity, the exercise of powers not conferred by law or the Constitution, but denied by both?

But it may be said,—Is the necessity of the time and place to be disregarded? and are parties to be punished for acts of necessity which it was beyond their power to omit or prevent? Certainly not. But is not the necessity to be judged of by the common law, and to be used simply as a shield of defence, and not as a weapon for assault? And must it not be a common law defence, and not a military one? In short, under our Constitution, can the President or any military commander suspend the law so that the validity of all acts shall not be determined by the laws as administered by our judicial tribunals? And can Congress, as the national legislature, amend or suspend the Constitution, or any part of the Constitution, under which alone they have authority to sit and act as legislators? In their official and legislative character they are the offspring of the Constitution; and can they constitutionally and without a violation of their official oaths be guilty of the parricidal act of destroying that Constitution.

It is said that the President, as commander-in-chief or under the "War Power," may declare martial law, make arbitrary arrests, imprison in remote and secret prisons, and for indefinite periods of time; and that while as President he is bound by the Constitution, he is not bound by it as commander-in-chief, and that "*Constitutionality and unconstitutionality cannot, therefore, be predicated of the acts of the commander-in-chief.*" (Lowry's pamphlet, p. 11.) But where is the authority for saying that a rebellion in any section of the country or the fact of the existence of a foreign war renders the President, as commander-in-chief, a military despot? If he can disregard the Constitution and the law and arbitrarily imprison, without trial, or even a preliminary complaint on oath, may he not take the life of any citizen of this State under the same authority? If he is not restrained by the Constitution, but is vested with despotic authority in the one case, is he not vested with it in the other? Did not the framers of the Constitution, most of whom had participated in the long and severe struggle, with the armies of Great Britain, which established our independence, know that future wars and future rebellions were to be anticipated, and did they not in the Constitution make provision for both? And would they not have been fit subjects for an asylum for idiots, or for a lunatic asylum if they had made provision for restraining and limiting the power of the President as a civil magistrate, or as commander of the army in time of peace, and yet had given him despotic and unlimited power in time of war? Did they not know that it was in time of war and while he was exercising the power of military command, that there was the most necessity for a limitation of the power of the Chief Executive Officer, whether acting in his military or civil capacity? All the teachings of history and all the experience of the past, must have taught the members of the Convention that framed the Constitution that it was whilst ambitious leaders and embryo tyrants held high military commands, and in the midst of war or insurrection, that their designs against

the liberties of the people are most to be apprehended. Do not the provisions of the Constitution which vest in Congress the power to declare war, (a power which in England and most other European countries is vested in the King alone,) to raise and support armies, to make rules for the government and regulation of the land and naval forces, to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions, to provide for organizing the militia and for governing such parts of them as may be employed in the service of the United States, and those which provide that no appropriation of moneys for the raising and support of an army shall be for a longer term of two years, and that the right of appointing the officers of the militia shall be reserved to the States, show that they had no idea whatever of giving the commander-in-chief, under any circumstances, the despotic powers which political pamphleters and partizan editors now ascribe to him? The President in his civil capacity, and as commander-in-chief, is but the creature of the Constitution, and in neither capacity has he any powers except such as are conferred on him by that instrument, or by laws passed under its authority.

But it is said the Constitution has authorized the suspension of the writ of habeas corpus, which is one of the principal incidents and effects of martial law, and that, as one of the incidents of it is authorized, the authority to declare martial law, as the principal, may be inferred. This certainly is not the sound conclusion. The authorization of the principal necessarily includes all the inevitable incidents; but it would be a strange doctrine that an authority from the President to the Secretary of War to do one executive act would justify him in exercising all the powers of the Executive. Precisely the opposite is the legal rule. "*Expressio unius est exclusio alterius;*"—the express mention of one, is the exclusion of the other; is the sound maxim of legal construction in such cases. *Acessorium non ducit sed sequitur suum principale;*—the incident shall pass by a grant of the principal, but not the principal by the grant of the incident. (Coke v Littleton 152, a: 6, Bingham 63.) The suspension of the *habeas corpus* in certain cases is allowed; but the very strong provisions of the amendments to the Constitution,—copied in the preceding pages, and which therefore need not be repeated here,—abundantly show that the arbitrary and despotic powers assumed and exercised where martial law prevails were most studiously, expressly, and distinctly denied to every officer and department of our government. And even the suspension of the privilege of the writ of *habeas corpus* requires the action of Congress, as the authorities cited in the foregoing opinion and notes abundantly show.

It is hoped the foregoing authorities, thus hastily grouped together without other order than that in which they happened to be found, and the very hasty and crude suggestions, which their perusal has occasioned, may lead others, who have the requisite leisure, to a more careful and thorough examination of the authorities and a more systematic and complete discussion of the grave questions to which reference has been made. If this shall be accomplished the writer of this note will have attained the principal object which he had in view in its preparation.

NOTES.

RAWLE, in his work on the Constitution of the United States, (2d Ed., Phila., 1829, p. 118) speaking of the writ of *habeas corpus*, says: "This writ is believed to be known only in countries governed by the common law, as it is established in England; (*) but in that country the benefit of it may at any time be withhold by the authority of Parliament, whereas we see that in this country it cannot be suspended, even in cases of rebellion or invasion, unless the public safety shall require it. Of this necessity the Constitution probably intends that the legislature of the United States shall be the judges. Charged as they are with the preservation of the United States from both these evils, and superceding the powers of the several States in the prosecution of the measures they may find it expedient to adopt, it seems not unreasonable that its control over the writ of *habeas corpus*, which ought only to be exercised on extraordinary occasions, should rest with them. *It is at any rate certain, that Congress, which has authorized the courts and judges of the United States to issue writs of habeas corpus in cases within their jurisdiction, can alone suspend their power*, and that no State can prevent those courts and judges from exercising their regular functions,—which are, however, confined to cases of imprisonment professed to be under the authority of the United States. But the State courts and judges possess the right of determining on the legality of imprisonment under either authority."

Judge Bouvier (Institutes, p. 91.sec. 211) says: "*The habeas corpus can be suspended only by authority of the Legislature.* The Constitution provides that 'the privilege of the writ of *habeas corpus* shall not be suspended, unless when in case of rebellion or invasion the public safety may require it.' Whether this writ ought to be suspended depends on political considerations, of which the Legislature is to decide. The proclamation of a military chief, declaring *martial law*, cannot, therefore, suspend the operation of the writ."

Judge Walker (Introduction to American Law, Ed. 1837, p. 195, 3. 193,) says:—"Our State Constitution declares that 'no power of suspending laws shall be exercised except by the Legislature.' Perhaps it may be asked what other power than the Legislature could suspend laws? None, certainly, without usurpation. *The power to suspend a law is the same as the power to make it; for one law can only be suspended by making another to suspend it.* Hence the exception in favor of the Legislature.—The provision, therefore, must have contemplated a very remote possibility of usurpation by the executive, judicial, or military departments. We have seen that there is one law securing the privilege of the writ of *habeas corpus*, which cannot be suspended, even by the Legislature unless in the extreme emergencies of rebellion or invasion."

Judge Tucker, (Tucker's Blackstone, vol. 1, Appendix, p. 292) says: "In England the benefit of this important writ can only

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(*) The interdict *de homine libero exhibendo*, of the Roman law was a remedy similar to the writ of *habeas corpus*. When a freeman was restrained by another, contrary to good faith, the praeter ordered his interdict that such person should be brought before him that he might be liberated. Dig. 43, 29, 1.

The following is Judge Bouvier's note on this subject, in which he gives (in the original Latin and in English) the substance of the provisions of the ROMAN, or CIVIL LAW; (note A, Bouvier's Institutes, Vol. 1,, p. 91.) "The words of the Digest which grant a writ simlar to the *Habeas Corpus* are: '*Ait praeter quem liberum dolo malo retinens, exhibeas.* Dig. 43, 29, 1.—The edict of the praeter is thus conceived: 'I order you to bring before me the free person whom, in bad faith, you detain.' This mandate requiring the production of any person who was unlawfully held in confinement, might be sued out by any one, it being open to every person in favor of liberty. '*Ait praeter, exhibeas*,' continues the Dig. 43. 29., 8 and 9; 'exhibere est, in publicum producere, et videndi tangendique hominis facultatum praebere. Proprie autem *exhibere* est, extra secretam habere. Hoc interdictum omnibus competit: nemo enim prohibendas est libertati favere.' The edict of the praeter says, that you exhibit. To exhibit a person is to produce him in public, and put it in the power of others to see him and to touch him.—To exhibit, is, properly, not to have in secret. This interdict is open to every one, because every one is entitled to it in favor of liberty." And see Hurd on *Habeas Corpus*, pp. 145, 146.

"And the process of the Spanish law, called '*Manifestation*,' appears to have resembled the writ of *habeas corpus*. Mr. Hallam cites a remarkable instance of its use and efficiency against the sovereign, not only in order to illustrate the privilege of '*Manifestation*,' but as exhibiting an instance of judicial firmness and integrity, to which, in the fourteenth century, no country in Europe could offer a parallel." Hallam's Middle Ages, 222. HURD on *Habeas Corpus*, p. 146.

be suspended by authority of Parliament.—It has been done several times of late years (this was published in 1803) both in England and Ireland, to the great oppression of the subject, as hath been said. *In the United States it can be suspended, only, by the authority of Congress*; but not whenever Congress may think proper; for it cannot be suspended, unless in cases of rebellion or invasion. A suspension under any other circumstances, whatever might be the pretext, would be unconstitutional, and consequently must be disregarded by those whose duty it is to grant the writ. The Legislatures of the respective States are left, I presume, to judge of the causes which may induce a suspension within any particular State. This is the case at least in Virginia."

Dr. Lieber, in his work on Civil Liberty and Self Government, [vol. 1, 130] says:—"It is obvious that whatever wise provisions a constitution may contain, *nothing has gained it the power of declaring martial law to be left in the hands of the Executive; for declaring martial law, or proclaiming a place in a state of seige, simply means the suspension of the due course of law, of the right of habeas corpus, of the common law, and of the action of the courts.*"

Attorney General Cushing [Attorney General's Opinions, vol. 8, p. 365 and 379. See further extracts from opinion past, NOTE H.] says: "And the opinion is expressed by the commentators on the Constitution that the right to suspend the writ of *habeas corpus*, and also that of judging when the exigency has arisen, belongs *exclusively* to Congress."

Mr. Justice Woodbury, in his opinion in Luther vs. Borden, [7 Howard Rep. U. S. Supreme Court, p. 87.] says: "*The writ of habeas corpus, also, unless specially suspended by the Legislature having power to do so, is as much in force in intestine war as in peace, and the empire of the laws is equally to be upheld, if practicable.*

Dr. Hart, in his work on Courts Martial [see pp. 17 and 18], also supports the doctrine contended for, and says, "the Constitution guarantees the privilege of the writ of *habeas corpus*, which it declares "shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it," *and the intervention of Congress is necessary before such suspension can be made.*" [See past NOTE H., on Martial Law.]

Sedgwick, in his Commentaries on Statuary and Constitutional Law, [New York, 1857] says: [p. 598] "The writ of *habeas corpus ad subjicciendum*, was first secured to English liberty by the famous statute 31. Car. II. C. 2; but in England, like all the other guarantees of private right, it is subject to the pleasure of parliament.—Here, we have fixed it in the Constitution, and declared that it can only be forfeited during periods of warfare or rebellion.—Practically as yet, *Congress* has never authorized the suspension of the writ. *It is understood that as the unlimited power is vested in Congress, the right to judge of the expediency of its exercise is also absolute in that body.*"

Judge Conkling, in his work on the Jurisdiction and Practice of the United States Courts, [3d Edition, Albany, 1856, p. 73,] says;—The nature and extent of the power of the courts and judges of the United States, to protect the right of personal liberty by means of the great writ of *habeas corpus, ad subjiciendum*, have been the subject of most earnest discussion. The framers of the Constitution, assuming that the power would belong to the National Judiciary, contented themselves with ordaining that 'The privilege of the writ of *habeas corpus* shall not be suspended, unless in cases of rebellion or invasion, the public safety may require it.' This power, therefore, in common with all other judicial powers, with the qualified exception of the original jurisdiction of the Supreme Court, *was left at the disposal of Congress.*

Judge Smith, (of Indiana,) in his Elements of Laws, [Phila., 1853.] p. 38, refers to the constitutional restriction in respect to the suspension of the habeas corpus as a restraint upon the legislative authority of Congress.

The Convention of the State of New York, which, in 1788, gave the assent of the people of the State to the Constitution

of the United States, and thus made the State one of the States of the Union, in the act or instrument by which the people of this State, through such Convention, became parties to the Constitution of the United States, did "declare and make known," (among other things,) "that all power is originally vested in, and consequently derived from the people, and that government is instituted by them for their common interest, protection and security."— * * * "That every power, jurisdiction and right, which is not by the said constitution clearly delegated to the Congress of the United States, or the departments of the government thereof, remains to the people of the several States, or to their respective State governments, to whom they may have granted the same; *and that those clauses in the said Constitution, which declare that Congress shall not have, or exercise certain powers, do not imply that Congress is entitled to any powers not given by the said Constitution; but such clauses are to be construed as exceptions to certain specified powers, or as inserted merely for greater caution;*"— * * * "THAT EVERY PERSON, RESTRAINED OF HIS LIBERTY, IS ENTITLED TO AN INQUIRY INTO THE LAWFULNESS OF SUCH RESTRAINT, and to a removal thereof, IF UNLAWFUL; AND THAT SUCH INQUIRY and removal ought not TO BE DELAYED, EXCEPT WHEN, ON ACCOUNT OF PUBLIC DANGER, THE CONGRESS SHALL SUSPEND THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS." And, after these, and other declarations, the instrument proceeds, "*Under these impressions, and declaring that* THE RIGHTS AFORESAID, *cannot* be abridged or violated; *and that the explanations aforesaid* ARE CONSISTENT WITH THE CONSTITUTION;" * * * "We the said delegates, in the name, and in the behalf of the people of the State of New York, do, by these presents, *assent to and ratify* the said Constitution." Journal of the Federal Convention, Wait's Edition, Boston, 1819, (Supplement,) pp. 426, 427, 428, 431.

And among the amendments which this Convention recommended was the following, [Ibid, p. 434];—"*That the privilege of the* HABEAS CORPUS *shall not*, BY ANY LAW, *be suspended for a longer term than six months, or until twenty days after the meeting of the Congress next following* THE PASSING OF THE ACT FOR SUCH SUSPENSION."

These extracts show that this Convention, (presided over by Gov. George Clinton, and composed of the ablest men of the State, among whom were ALEXANDER HAMILTON, ROBERT YATES, and JOHN LANSING, JUN. who had been members of the Convention which framed the Constitution of the United States, and JOHN JAY,) entertained and acted upon the opinion that *Congress only* could suspend the privilege of the *habeas corpus* under the Constitution; and that it would be wise to restrict, still further, the authority of Congress to suspend a privilege so essential to the maintenance of personal liberty. See, also, the acts of ratification by the other States. [Ibid, pp. 391—450.] See the instruments of ratification,—Journals of Congress, from 1774 to 1778, vol. 4., pp. 46 and 61.

It is proper here to acknowledge that the writer is indebted for this reference to the proceedings of the New York Convention, to the letter of a venerable and learned lawyer and statesman,—now retired from public life,—who was, twenty years since, one of the ablest and most respected of the then judges of the highest Court of the State.

And Ingersoll, in his History and Law of the Writ of Habeas Corpus, says;—"It has never been suspended in the United States. In January, 1807, a bill passed the Senate for its suspension; but was rejected in the House of Representatives, by a large majority."

The writ of *habeas corpus* appears to have been once *practically suspended* in the Colony of New York, as appears by "A MODEST and IMPARTIAL *Narrative,*" *&c., of the extravagant and arbitrary proceedings of Jacob Leysler, and his accomplices.*" [DOCUMENTS, relating to the COLONIAL HISTORY OF N. Y., vol. 3, pp. 665, 671 to 684.]

From this narrative it appears that "this proud usurper," (Leysler,) finding the sweetness of an arbitrary power agreeable with arbitrary mind," deemed "it a fault in any who *objected* the law against his illegal proceedings. Upon all such occasions he would angrily answer;—'*What! do you talk of law? The sword must now rule.*" And he sent, by his order in council, his prisoner to *Fort William;* and refused obedience to the writ of *habeas corpus.*

The whole narrative is curious and interesting, and shows that old practices, as well as old modes may, after the lapse of one hundred and seventy years, come again in fashion.

The British General Gage, asssumed (during the American Revolution,) to suspend the writ of habeas corpus at Boston, by declaring martial law;—announcing, as the ground and justification of the act, "that, as a stop was put to the due course of justice, *martial law* should take place, till the laws were restored to their due efficacy." [Annual Register for 1775, p. 133—7. Howard's U. S. Rep. 65.

It is believed that the privilege of the writ of *habeas corpus* was never suspended by the American Congress, or by General Washington, as a Military Commander, during the whole period of our revolution; although the American government and commander were then engaged in a most desperate struggle against great numbers of open and secret enemies at home, and the well disciplined and powerful British armies sent against them from abroad.

It cannot be necessary to suspend it in reference to alien enemies or prisoners of war; for it is well settled in England, and would be held here, that the writ of *habeas corpus* cannot be obtained by an alien enemy, or prisoner of war. [2 Hen. Blackstone, 1324; 2 Burrow, 765.] The relief, if any, in such cases, is by application to the *Secretary of War.*

NOTE W.

It is believed, after considerable research, that, prior to 1861, no respectable jurist, or elementary writer of reputation sufficient to secure the publication of his opinion, had ever expressed the opinion that the President alone, without the authority of Congress, could suspend the privilege of the writ of *habeas corpus.* At the time our Constitution was adopted, it was incontestably established that the King of England had no such authority; and no lawyer of that day could have imagined that any such power could exist in the President, without express provision, to that effect, in the Constitution.

It is, of course, well understood, that since the publication, (in 1861), of the opinion of the Chief Justice of the Supreme Court of the United States, referred ro in the preceding opinion, many editors of newspapers, and even some lawyers of teputation, have written articles, more or less elaborate, for the purpose of maintaining the power of the President to suspend the privilege under consideration.

The most respectable and prominent of these writers were doubtless actuated by a laudable desire to strengthen and sustain the executive Government, in order to enable it to meet, with energy and efficiency, the momentous responsibilities under which it was laboring, in the then existing condition of the country; and, regarding the case of *Merryman* as exceptional, rather than as the commencement of a permanent system of arbitrary arrests, they earnestly endeavored, with patriotic zeal, to justify the course of the Executive.

It will not be forgotten that some of the same persons, and others of more prominence, actuated by like laudable and patriotic motives, published ingenious and elaborate articles, proving to their own satisfaction, and perhaps to the satisfaction of most persons who are not lawyers—that the proceedings of Captain Wilkes,

in the case of the English steamer, Trent, from which the rebel emissaries Mason and Slidell were taken, were justified by the law of nations, and by the reported decisions of the High Court of Admirality in England; and it will doubtless be remembered, that such writers were subsequently instructed, not only by the decision of our own government, but by the concurring opinions of nearly every government of Europe with which we have diplomatic intercourse, that their zeal had led them to avow unsound opinions; and that they had urged upon our government and people, as established principles of international law, entirely erroneous doctrines;—doctrines which Mr. Seward did not attempt to maintain, and which, if persistently acted upon by our government, would have involved us in a foreign war.

A review of these opinions, respecting the power of the President, would have but little interest, except to professional readers; and to prepare such a review would require more leisure than the writer of this note is likely soon to be able to command. It is sufficient to say that the writers referred to have generally made two prominent points in opposition to the opinion of the Chief Justice. They have endeavored to convict him of inconsistency, by quoting from his opinion, in the case of Luther vs. Borden, [7. Howard 1,]—not regarding, or else concealing the fact that that case did not at all involve the question of the power of the President—or even of Congress—to suspend the privilege of the writ of habeas corpus. That was a case in which, not the executive, but the *Legislature* of Rhode Island had passed an act which declared *martial law* in that State; a legislature whose powers are not limited by any express Constitutional provision, and which was organized and established under the charter granted by Charles II, in 1663—the only Constitution which Rhode Island had until 1842.

On the case of Luther vs. Borden, and on the alleged but somewhat visionary inconveniences and dangers of allowing military operations to be obstructed by the writ of habeas corpus, or of waiting for the action of Congress until it could be convened,—after the necessity of suspension should occur—they have based their strongest arguments; overlooking, in respect to the last, the established and acknowledged doctrine, that the government of the United States is one of specially delegated and limited powers; and that the Constitution expressly declares,(amendment art. 10) 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." Arguments from inconvenience and danger cannot therefore be made the foundation of powers not granted; and the neglect of Congress to exercise, in advance, its power to authorize the suspension of the privilege, in certain cases, could no more give that power to the President than their neglect to make necessary appropriations could authorize him to take money from the Treasury without authority of law; or their neglect to establish the necessary Courts could enable him to establish such Courts by his own authority.

The writers alluded to, do not agree in their views of the Constitutional provision, in regard to the suspension of the privilege of the writ of habeas corpus. One holds that the Courts and Judges authorized to grant the writ, are, on their own mere motion, to declare the privilege suspended, in the cases mentioned in the Constitution. Another holds that the President alone has power to suspend the privilege, and that Congress has no power to suspend it by an act of legislation; another affirms the power of the President to suspend the privilege without the authority of Congress, but concedes the privilege may also be suspended by act of Congress; while others concede the power to the President only in the recess of Congress, and that on the ground of necessity,—holding that if Congress be in session, the power must be exercised by the legislative department.

It would seem to be a very plain question,—even in the absence of all authority. The Constitution has not provided for the

issuing of the writ, or for compelling obedience to its commands. It has not declared in what cases, or under what circumstances it shall issue; or what courts or judges shall be authorized to allow it. All this was designedly left to the legislation of Congress: and until an act of Congress had defined the cases in which it may be granted, and the courts and judges who are authorized to allow it, no such writ could be issued.

In the same manner the Constitution has declared that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish;" but it has not declared the number of judges of the Supreme Court, nor the time or place of its sessions; nor has it provided any means for enforcing its judgments or decrees. It has only partially defined the extent of its powers and jurisdiction. And it has not determined the number, the organization, or the jurisdiction of any of the inferior courts.

These details, like the provisions of the law which should authorize such courts and the judges thereof to grant writs of *habeas corpus*, are left to the national legislature. And in both these cases Congress has legislated. It has determined and limited the number of judges of the Supreme Court and defined its jurisdiction. It has provided the proper officers and the proper means for enforcing its decrees. It has established district and circuit courts and determined their powers and jurisdiction. It has declared what courts and what judges are authorized to grant the writ of *habeas corpus*, and in what cases they may direct its issue. All this, every constitutional lawyer will concede, could have been done by Congress, only in the exercise of its law-making powers; and none will contend that the President has any constitutional power or authority to make, repeal, suspend or change any of the laws required or passed for these purposes, unless he has the power to suspend the privilege of the writ of *habeas corpus* under and by the authority of the constitutional provision which has been so often quoted in the preceding pages. Strike that provision from the constitution and there is no foundation for the argument that the President has the power to suspend the privilege of the writ, given by a law of Congress; any more than there is for insisting that he has the power of suspending the laws which provide for the election of representatives in Congress; impose duties on imports; establish courts and define their jurisdiction; prescribe the duties of public officers; and provide for the punishment of crime.

The power to pass all these laws is conferred upon Congress alone; and though the constitution does not, in express terms, declare that Congress shall pass such laws, it certainly confers the power of legislation under which they are passed; and it assumes that Congress, without being expressly required to do so by the language of the constitution, will pass such laws. In the same manner the constitution is silent in regard to the duty of Congress to provide for the issuing of the writ of *habeas corpus*. It assumes that Congress will certainly enact the statutes necessary to secure to every other citizen in common with themselves, the full benefits of that writ, under all ordinary circumstances; and that the only danger to be guarded against is the suspension of the ordinary privilege, under peculiar, exciting or extraordinary circumstances. In the absence of any restrictive constitutional provision, Congress might at any time have suspended the privilege of the writ, by law: for, in the absence of any such provision, their authority over the subject would have been unlimited. Is it not then entirely clear that, if the constitutional provision before referred to had never been adopted as part of the constitution, the control over this privilege, and over the law which gives or secures it, would have been vested in Congress alone, as the sole depositary of the law-making power? It must be so: for no other department of the government would or could have had any control over the subject matter. The whole subject would have been regulated—indeed must have been regulated—by act of Congress. The courts would then have been bound to administer the law as framed and

passed by Congress; and it would have been the duty of the President "to take care that the law was faithfully executed."

This brings us to the consideration of the constitutional provision, which is in the following words:—"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."

This provision, or rather prohibition, is found in the Section of the Constitution which restricts the powers of Congress by enumerating certain acts and things which shall not be done, notwithstanding the fact that the grants of powers to be exercised by Congress, made in other and prior sections of the same article, would have enabled Congress to do such acts or things, if these prohibitory provisions had not been inserted. The particular provision in question is, therefore, a negation or denial of power, in restraint or partial abrogation of an authority already given. "It is not a delegation of power, but a limitation,—a negation rather than a positive enunciation of a power, the previous existence of which is recognized." [Halleck, International Law, &c., p. 386. Att'y Genl's' Opinions, vol. 8, 372.]

Now the power, the previous existence of which is thus recognized and restrained, is the power of Congress,—the law making power,—which, in the absence of any restriction, and in the exercise of the authority conferred by the prior provisions of the same article, might have suspended or annulled the privilege of the writ of *habeas corpus;* a privilege to be established, regulated and limited by act of Congress. No power is delegated; no authority is conferred by this provision; but it restricts, restrains and limits the powers already conferred. And these powers had most certainly been conferred upon Congress only, and not upon the President. Without this provision, the power of Congress over the subject matter, would have been unlimited, while the President would have had no power or authority whatever, over the subject. And it is self-evident that this restriction of the power of Congress cannot confer any authority upon the President.

The simple effect of this provision, then, is to take away the power of Congress, to suspend the privilege in their discretion; and to restrict that power of suspension, so that it can be exercised only "when, in cases of rebellion or invasion, the public safety may require it."

The clause is expressly and entirely prohibitory; it restrains and limits a power, assumed to be in existence, but does not confer any power upon Congress, or upon any other department of the government. In the absence of the prohibition, no constitutional lawyer could, for a moment, contend that the President had any power to suspend the law securing the privilege of the writ; and it would therefore appear to be as certain as a mathematical demonstration, that Congress, and Congress only, can suspend, or authorize the suspension of this privilege.

It may be proper, in this connection, and in view of this negative and prohibitory character of the constitutional provision, to suggest the question whether this restriction upon the powers of Congress, or any other provision of the Constitution of the United States, authorizes Congress to suspend the privilege of the writ of *habeas corpus*, as given by the laws of the States, defining the powers and jurisdiction, and prescribing the duties of State courts and judges.

It would seem to be quite clear upon authority, that the restriction referred to is only a restraint upon the powers of the general government and not a restriction upon the powers of the State authorities; and, as it confers no authority, this provision, at all events, does not authorize Congress to suspend the writ when authorized, by State laws, to be issued by the courts and judges of the State.

In the case of Barron vs the Mayor and City of Baltimore, (7 Peters' Rep. 543.) Chief Justice Marshall, in delivering the opinion of the court upon the question "Whether the clause in the fifth amendment to the Constitution, which inhibits the taking of private property for public use, without just compensation, being in favor of the liberty of the citizen, ought to

be so construed as to restrain the legislative power of a State, as well as that of the United States," said:— "The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States.—Each State established a Constitution for itself, and, in that Constitution, provided such limitations, and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations of power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments, framed by different persons, and for different purposes." And the following cases substantially affirm this doctrine: Livingston vs Mayor of New York, 8, Wendell R. 85; Bloodgood vs Mohawk R. R., 14 Wendell 51, and 18 do. 9; Murphy vs People; 2 Cowan 815, 818; 5. Gray's Rep. 482, 486; and cases cited at end of next paragraph.

Judge Hurd, in his valuable work (Hurd on *habeas corpus*, pp 133, 134,) says:—"Rawle, in his "Views of the Constitution," p 117, expresses the opinion that the restriction imposed by this clause in the Constitution, extends to the States as well as to the United States. But it is a settled rule of construction of that instrument that the limitations of power contained in it, when they are expressed in general terms, apply only to the government created by it; and although this clause has not been the subject of express adjudication, there is no doubt that its construction is governed by this rule, and, consequently, that the restriction does not extend to the States." And he cites Barron vs. The Mayor and City of Baltimore; *ubi supra*; James vs Commonwealth, 12, S. & R. 220; Barker vs The People, 3d Cow. 701; Reed vs Rice, 2. J. J. Marsh, 45; and Colt vs Eves, 12, Conn. 243.

Congress undoubtedly has the power, as necessarily incident to some power expressly delegated,—that to declare war, or that to provide for the punishment of treason, for example,—to declare and provide that persons in custody, *under the laws of the United States*, in cases of rebellion and invasion, shall not be discharged from custody, under a writ of habeas corpus, whether such writ shall be applied for under the laws of the United States or of any individual State; as it clearly has the power to provide for the arrest and trial in the courts of the United States, without the interference of the State authorities, of all persons charged with offences against the laws of the United States. Congress may therefore prohibit the discharge of such persons on a writ of habeas corpus issued by State courts or judges.

The case of Barron vs. the Mayor &c. of Baltimore, and the other authorities above cited, show very clearly that the opinion of the Chief Justice in the case of Luther vs. Borden cannot be properly cited as an authority in favor of the alleged power of the President to suspend the privilege of the writ of *habeas corpus*. The act of the legislature of Rhode Island, under which that case arose, was not at all affected by the constitutional provision now under discussion; and a passage from the Koran, or a fable of Æsop, might, with as much propriety, have been cited, as the basis of the preposterous charge that the Chief Justice, in the case of Merryman, had disregarded his own opinion, and the ruling of the Supreme Court in the case of Luther vs. Borden.

NOTE X.

This was not the first time that the judicial authorities of the United States of this judicial district have been insulted and the ordinary course of justice unlawfully interfered with, by the orders of an Executive Department at Washington.

In August, 1861, a prisoner in the actual custody of the Marshal, under criminal process issued upon an indictment for treason found by the Grand Jury of that district, was, in accordance with a telegraphic despatch from the Secretary of State, taken out of the district and confined in Fort Lafayette. Whether still so imprisoned or not is not known to the writer; but it is certain that he has never been arraigned or brought to trial for the offence charged against him, or returned to the custody of the civil authority. It is also understood that not long prior to the case of Benedict, a writ of *habeas corpus*, issued by Mr. Justice Nelson of the Supreme Court of the United States, was disregarded by parties acting under the orders of the War Department. Many other cases in which the constitutional authority of the judicial department was wantonly disregarded have occurred in other districts. Under such circumstances, it would seem to be the right, if not the imperative duty of the judges, to sustain by legal argument and the citation of reliable authorities, the jurisdiction which the constitution and laws have given them; and in this constitutional, legal and peaceable mode to resist and repel the illegal encroachments of the War Department.

In the early days of the Republic, Chief Justice Jay and Associate Justice Cushing, of the Supreme Court of the United States, and Judge Duane, District Judge of the United States for the district of New York, holding the Circuit Court of that district, did not hesitate to declare that they were "unanimously of the opinion that, by the Constitution of the United States, the government thereof is divided into *three* distinct and independent branches, and that it is the *duty* of each to abstain from, and to oppose encroachments on either," &c. [1, Blatchford's Repts., p. 98.]

The provisions of the constitution itself afford conclusive evidence that the framers of that once sacred, but now derided instrument, regarded the independence of the judges, and the permanency of the rightful power of the Judicial Department as of the highest importance; and statesmen whose opinions were formerly thought deserving of confidence, have confirmed, by the strongest language these opinions of those who framed the constitution.

In his letter of the 30th of September, 1789, informing the Associate Justices of the Supreme Court of the United States, of their appointment, President Washington said;—"*Considering the judicial system as the chief pillar upon which our national government must rest,* I have thought it my duty to nominate for the high offices in that department, such men as I conceived would give dignity and lustre to our national character." And in his letter of the 5th of October, 1789, enclosing to John Jay, his commission as Chief Justice of the Supreme Court of the United States, he said;—"I have a full confidence that the love which you bear to our country, and a desire to promote the general happiness, will not suffer you to hesitate a moment to bring into action the talents, knowledge and integrity which are so necessary to be exercised at the head of *that department, which must be considered as the key stone of our political fabric.*" See Spark's Life and Writings of Washington, vol. 10, pp. 35, 36.

Mr. Webster's expressions of opinion are not less decided. He says, in speaking of the judicial power; [Webster's Works, vol. 1, 208];—"In every free and balanced government, this is a most essential and important power. Indeed, I think it is a remark of Mr. Hume, that the administration of justice seems to be the leading object of government; that legislatures assemble; that armies are embodied; that both war and peace are made, with a sort of ultimate reference to the proper administration of the laws, and the judicial protection of private rights."

Again, (Ibid, vol. 3, p. 31, 32;)—"There is nothing, after all, so important to individuals as the upright administration of justice. This comes home to every man; life, liberty, reputation, property, all depend on this. No government does its duty to the people, which does not make ample and stable provision for the exercise of this part of its powers. Nor is it enough, that there are courts which will deal justly with mere private questions. *We look to the judicial tribunals, for protection against illegal or unconstitutional acts, from whatever quarter they may proceed. The courts of law, independent judges, and enlightened juries, are citadels of popular liberty, as well as temples of private justice. The most essential rights connected with political liberty are there canvassed, discussed and maintained; and, if it should, at any time, so happen that these rights should be invaded, there is no remedy but a reliance on the courts to protect and vindicate them."* * * * "*These considerations are among those which, in my opinion, render an independent judiciary equally essential to the preservation of private rights and public liberty."* And, see also, Webster's Works, vol. 1, pp. 209, 212, 213, 214, 228, 229; vol. 2, pp. 300, 371—394; vol. 3, pp. 6, 7, 26—32, 163, 482—486; and the Federalist, Letters, 78 to 83.

Dr. Lieber also says, (Political Ethics, Part 1, Book 2, Sec. 94 and 95, Vol. 1, pp 386, 397,) "Destroy the bulwark of the law (and you do destroy it as soon as you destroy the independence of the judiciary), and the mighty sea of power will soon break in upon the people.

By the independence of the judiciary is meant a judiciary that, in the administration of justice, cannot be influenced or overawed by any one, or anything, neither by monarch, President, people or populace, but which is strictly dependent upon the law and the spirit which made it, so that no citizen who ought to be judged by it, can be sent from it, nor can be judged or punished without judgment by the same, nor otherwise be injured in any way by the protection of the laws being withheld from him. The more deeply and earnestly we study history, the more sacred will appear this wonderful institution of an independent judiciary." * *

"By an independent judiciary, the citizen stands in each individual case, when the law comes home to him, under the constitutional protection of the judiciary; by the independence of the judiciary alone, the American judge can assume that elevated function of declaring a law, when it finally strikes an individual, to be unconstitutional; a principle of which the ancients knew very little, we may say nothing, if compared in its practical use to modern times. By the independence of the judiciary alone, an independent development of the law, according to the genius of the people and the essential wants of the times, becomes possible. Without it, the best intended and most liberally conceived institutions and political organisms will always become what a distinguished French jurist said, in 1818, of the administration of justice and the Constitution of his country: 'We have contented ourselves to place a magnificent frontispiece before the ruins of despotism; a deceiving monument, whose aspect seduces, but which makes one freeze with horror when entered! Under liberal appearances, with pompous words of juries, public debates, judicial independence, individual liberty, *we are slowly led to the abuse of all these things, and the disregard of all rights;* an iron rod is used with us instead of the staff of justice."

Again Dr. Lieber says: (Political Ethics, Part 2, Chap. 4, Sec. 8.) "From all that has been said of justice, as the main and broad foundation of the State, of the superior sway of law as an indispensable requisite of civil liberty, and the necessary independence of the judiciary, it must appear that there is no member of the State or officer of government superior in importance to the judge, and very few indeed, of equal importance with him."

Stephens says;—(2. Stephens' DeLolme, p. 569,) "In this distinct and seperate existence of the judicial power, in a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown, consists one main preservative of the pub-

ic liberty, which cannot subsist long in any state, unless the administration of common ustice be, in some degree, seperated both from the legislative, and also from the executive power."

Mr. Justice Story, in his commentaries on the Constitution, says; (sec. 1621) "Indeed, a republic with a limited Constitution, and yet without a judiciary sufficiently independent to check usurpation, to protect public liberty, and to enforce private rights, would be as visionary and absurd as a society organized without any restraints of law. It would become a democracy with unlimited powers, exercising through its rulers, a universal despotic sovereignty. The very theory of a balanced republic, of restricted powers, presupposes some organized means to control and resist any exercises of authority. The people may, if they please, submit all power to their rulers for the time being, but then the government should receive its true appellation and character. It would be a government of tyrants, elective, it is true, but still tyrants; and it would become the more fierce, vindictive, and sanguinary, because it would perpetually generate factions in its own bosom who could succeed only by the ruin of their enemies. It would be alternately characterized as a reign of terror and a reign of imbecility; it would be as corrupt as it would be dangerous. It would form another model of that profligate and bloody democracy which, at one time in the French revolution, darkened by its deeds the fortunes of France and left to mankind the appalling lesson, that virtue and religion, genius and learning, the authority of wisdom and the appeals of innocence are unheard and unfelt, in the frenzy of popular excitement, and that the worst crimes may be sanctioned, and the most desolating principles inculcated under the banners and in the name of *liberty*. In human governments, there are but two controlling powers; the power of arms and the power of laws. If the latter are not enforced by a judiciary, above all fear and above all reproach, the former must prevail; and these lead to the triumph of military over civil institutions. The framers of the Constitution, with profound wisdom, laid the corner stone of our national republic in the permanent independence of the judicial establishment. Upon this point the vote was unanimous. They adopted the results of an enlightened experience. They were not seduced, by the dreams of human perfection, into the belief that all power might be safely left to the unchecked operation of the private ambition or personal virtue of rulers. Nor on the other hand were they so lost to a just estimate of human concerns, as not to feel that confidence must be reposed somewhere, if either efficiency or safety are to be consulted in the plan of government. Having provided amply for the legislative and executive authorities, they established a balance-wheel, which, by its independent structure, should adjust the irregularities and check the excesses of the occasional movements of the system."

And again; sec. 1624:—"They" (the people of the United States) "have chosen to establish a Constitution of government with limited powers and prerogatives, over which neither the executive nor the legislative have any power, either of alteration or control. It is to all the departments equally a supreme, fundamental, unchangeable law, which all must obey, and none are at liberty to disregard. The main security relied on to check any irregular or unconstitutional measure, either of the executive or legislative department, was, as we have seen, the judiciary."

SECOND OPINION;

AND MEMORANDA OF OTHER CASES AND AUTHORITIES.

ON HABEAS CORPUS.

IN THE MATTER OF JUDSON D. BENEDICT.

HALL, District Judge.

On the 23d instant, I allowed a writ of *habeas corpus*, directed to "EDWARD I. CHASE, United States Marshal," commanding him to have the body of JUDSON D. BENEDICT, by him imprisoned and detained, as it was said, together with the time and cause of such imprisonment and detention, before me on the 25th instant, at ten o'clock in the forenoon, at the United States Court Room in this city.—On the return day of the writ, the Counsel for Benedict furnished proof of the service of the writ upon Mr. Chase, in this city, about five o'clock in the afternoon of the day on which it was issued. The affidavit of Harry B. Ransom, Esq., who made the service, also states that he and said Chase went together on the same train of cars to Lockport; that he the deponent, saw, after his arrival there, the said Benedict in front of said Chase's Office, in Lockport,—said Chase, as deponent was informed and believed, being in his Office at the time.

Mr. Chase, the Marshal, did not produce Mr. Benedict, the prisoner, on the return day of the writ; nor did he appear in person to make return thereto; but A. G. Stevens, Esq., delivered me the writ with a statement or return annexed thereto, of which the following is a copy:

"To the Hon. Nathan K. Hall, District Judge of the United States, for the Northern District of New York:

The annexed writ was delivered to me, between five and six o'clock in the afternoon of the 23d day of September inst. Before that time, and about noon of that day, Judson D. Benedict, the person named in that writ, had been arrested by me for disloyal practice, by order of the President of the United States, and put in charge of Daniel G. Tucker, with direction to convey him to the Old Capitol Prison, in the city of Washington, and said Tucker immediately left Buffalo, with the prisoner, for that purpose.

Under general orders made by the President, through the War Department, bearing date the 8th day of August, 1862, said Benedict had been, on September 2d, 1862, arrested by my Deputy, A. G. Stevens, for such disloyal practice, and said Deputy was ordered by the War Department to detain him in custody until the further order of said Department. For safe keeping, said Benedict was removed from Fort Porter to the jail of Erie County.

Afterwards, as is said, a writ of *habeas corpus*, directed to said Stevens, and William F. Best, the jailor, was delivered to said jailor. The War Department was informed by said Stevens of the allowance of said writ, and said Stevens was directed by said Department not to regard said writ. But said Wm. F. Best, the jailor, refused

to allow me or my Deputy, Mr. Stevens, to have any control of the prisoner, or of the writ, and avowed his intention to make return to said writ, and produce the prisoner before your honor.

I informed the War Department of such refusal and avowal. In answer I received an order made by the Secretary of War, saying, in substance, "Your Deputy, Mr. Stevens, was directed to disregard the writ of *habeas corpus.* If Stevens or the jailor permits Benedict to be discharged on *habeas corpus*, arrest him again and convey him to the Old Capitol Prison at Washington."

The original order was delivered by me to Mr. Tucker, into whose charge I delivered the prisoner, and I have no perfect copy. The above is a substantial copy, and in all essential particulars is correct.

In pursuance of such order, after said Benedict was, on the 23d inst., discharged from the custody of said Best, and said Benedict had left the U. S. Court Room, I arrested him and put him in charge of Mr. Tucker, with the directions above stated.

A formidable insurrection and rebellion is, as is well known, now in progress in this country, and the writ of *habeas corpus* suspended, and the President of the United States, by one of the orders referred to, made on the 8th of August, declared the same to be suspended in cases of disloyal practices. I would also refer your Honor to the Proclamation of the President of the United States, of the 24th Sept. inst.

I, therefore, understand that the above arrests are military arrests, in relation to which the writ of *habeas corpus* is suspended.

I have, however, out of respect to your Honor, and the judicial authority of the country, thought it my duty to return to you the annexed writ of *habeas corpus*, and make the foregoing statement.

Very respectfully,

EDWARD I. CHASE, U. S. Marshal.

Dated the 25th day of Sept., A. D., 1862."

The Counsel for the prisoner objected to the receipt of this statement or return of the Marshal, on the ground that it was not a sufficient or proper return to the writ; but as it appears to be in the nature of a return, containing a statement of the reasons which had induced the Marshal, to whom the writ was directed and delivered, to decline obedience to its commands, I can see no sufficient ground upon which to maintain the counsel's objection. The return is therefore received, and forms a part of the record of the proceedings in the case.

The counsel for the prisoner also asked, in substance:

1st. That an order be immediately made, discharging the prisoner.

2d. That proceedings, by order or attachment, be immediately taken for the purpose of punishing the Marshal for a contempt in refusing to comply with the requirements of the writ of habeas corpus.

I declined to make an order for the prisoner's discharge, believing, that at common law, an order for the discharge of a prisoner, for whom a habeas corpus had been issued, could not regularly be made, by a Judge at Chambers, until the prisoner was produced under the writ. Besides, the prisoner was then, as I supposed, already beyond the limits of my district; and, consequently, where my order of discharge could have no legal operation or effect.

It is true that I understood the counsel for the prisoner to suggest that he desired an order for the prisoner's discharge, although he was out of my district, for the reason that he supposed that an order of that kind, made by a judicial officer, would be respected and obeyed, even out of his district; but, notwithstanding the apparently serious manner of the counsel, I cannot but regard the suggestion as practically ironical. At all events, it could have no foundation in law or logic; unless it can be logically argued that because a similar order, regularly made, while the prisoner was before me, in my own district, and within my conceded jurisdiction, was disregarded and contemned, the order now asked for, irregularly made, while the prisoner was not before me, would be regarded and obeyed, beyond my district and jurisdiction, where it had no legal force, and might, therefore, be properly disregarded.

Having no disposition to go one step beyond the limits of judicial duty, knowing that I should do nothing to bring the judicial department of the government into contempt by overstepping those bounds and making orders which can legally be disregarded, and having, (by an examination of a decision of the Supreme Court of Massachusetts,) been confirmed in my impressions that I can make no order of discharge until the prisoner is before me, I adhere to the opinion expressed on the return day of the writ, and to the decision then made, denying the order for the discharge of the prisoner as prayed for by his counsel. (See Hurd on *Habeas Corpus*, 244. Commonwealth *vs.* Chandler, 11 Mass, Rep. 33).

I am aware that in this State, and in some others, statutes have been passed, authorizing proceedings upon the writ of *habeas corpus* and the discharge of a prisoner, in certain cases, where he has not been produced; but these proceedings, in exceptional cases, being founded upon special statutes, only serve to show that the general rule is that declared in Massachusetts. And I know of no act of Congress which authorizes me, under the circumstances of this case, to make the order asked for.

The question, whether I shall proceed to punish the Marshal for a contempt in disobeying the writ of *habeas corpus*, is entirely different in character from that I have just been considering; and, also, from the questions which were under consideration when the prisoner was before me some days since, under the former writ of *habeas corpus*. So long as the question of the prisoner's discharge from custody was before me, every legal presumption was in favor of his right to his liberty; and those who sought to continue his imprisonment were bound to show affirmatively that there was legal authority for his detention.

The question now presented, is not whether the prisoner shall be discharged from imprisonment and restored to liberty, but whether the officer who assumed to arrest and hold him, shall be deprived of his liberty, and committed to prison. Upon questions of this character, the right of the Marshal and of the prisoner is the same, and each has a right to demand that he shall not be imprisoned or restrained of his liberty without authority of law. And this right is not peculiar to these parties. It does not result from the clerical character of the one, or the official position of the other, for it is the common birth-right of every American citizen, and the Marshal and the Clergyman but share it equally with the beggar at their gate.

It is, therefore, my duty, before I authorize any restraint upon the liberty of a citizen, to see that I can proceed at every step upon the most stable and solid ground. And this is more especially the duty of every judicial officer in cases of alleged contempts, because the power of punishing for a contempt is exercised upon the sole judgment of the Court or Judge before whom the proceeding is had, without the intervention of a jury; and ordinarily, (as would be the case in the present instance,) without any right of appeal. It is very certain that no judge, who has a just regard to the rights of his fellow-citizens, can need any suggestions, other than those of his own judicial mind, to convince him that such a power (a power which I have never yet had occasion to exercise, during a considerable period of judicial service, in the Courts of this State and of the United States,) should be exercised with extreme caution, and only after mature deliberation.

After a careful examination of the return made by the Marshal, I am satisfied it is clearly insufficient. It does not directly state, and certainly it does not indirectly show that the prisoner, Benedict, "was not in his (the Marshal's) possession, custody or power, at the time of the service of the writ, or at any time after." [Hurd on Habeas Corpus, 248, &c., and cases there cited.] On the contrary, it shows that the prisoner was arrested in pursuance of an order which directed the Marshal to arrest him, and to convey him to the old Capitol Prison in Washington: and under such order he must have been in the possession, custody and power of the Marshal when the writ was served, and afterwards, as shown by the affidavit of Ransom, annexed to the copy of the writ. There is no state-

ment or pretence that Tucker acted in any other capacity than as Deputy or Assistant of the Marshal; or that any effort was made by the Marshal to obey the writ. The return, in fact, shows that there was no intention to obey the writ; but on the contrary, that there was from the first a settled purpose to disobey it, and to rely upon the action and orders of the War Department to justify or excuse such disobedience. The return avows that Benedict was put into the possession of Tucker, (who is officially known to me as a general deputy of the Marshal,) for the purpose of conveying him to Washington; and it is fair to presume that the report that Benedict was, the next day, taken out of the State, on his way to Washington, is not untrue.

I cannot doubt, therefore, that if I had legal power and authority to grant the writ in this case, as I have already decided after mature deliberation, there has been a contempt of the authority of the law, on the part of Marshal Chase, in deliberately refusing obedience to the writ.

What is my power, and what is my duty under the circumstances of this case? is the question which yet remains to be considered. I can make an order requiring a further return; but if such order should be disobeyed, can I, and ought I to issue and enforce the execution of an attachment for such disobedience?

An order for a further return, if obeyed, would not, under the known and conceded facts of this case, produce any results beneficial to the prisoner; and no return in accordance with such facts, would show either that the command of the writ had been obeyed, or that (in the view I have taken of the case,) there is any legal excuse for disobeying it. Indeed, I do not understand that the Marshal can properly take, or desires to take any other position than that he has disregarded the writ under the express orders of one of the chief Executive Departments of the Government. The case presents a conflict of opinion between the Executive and Judicial Departments of the Government;—and the Marshal is placed in a position in which he must disregard the authority of one or the other of such departments. He is an executive officer, and executive officers are ordinarily expected to follow the instructions of their superiors in the executive department: but a marshal is peculiarly situated. He is properly considered as the executive officer of the courts of his district, and is, ordinarily, to obey the orders, and execute the process of the Judicial Department. The act of Congress which provides for his appointment, in order to secure obedience to all judicial process, also provides that the Marshal, and also his deputies, shall take, "before they enter on the duties of their appointment, the following oath of office:—I, A. B., do solemnly swear or affirm, that I will faithfully execute all lawful precepts directed to the marshal of the district of ——, under the authority of the United States, and true returns make; and in all things will well and truly, without malice or partiality, perform the duties of the office of marshal (or marshal's deputy, as the case may be,) of the district of ——, during my continuance in office, and take only my legal fees. So help me God."

While, therefore, the Marshal is, in one sense, the officer and agent of the President, to aid him in the discharge of his constitutional duty, "to take care that the laws be faithfully executed," he is, in a higher sense, the officer of the constitution and the law, and bound by his oath of office to carry the process of the law into execution. He is, nevertheless, in the power of the President; for the President can remove a marshal who refuses to execute his orders, and may appoint in his stead a marshal who will execute them. If I am right in my conclusions, the Marshal should have obeyed the writ, for that has the authority of law, to which rulers, officers and people are alike subject; but if I am wrong, and the War Department is right, his disobedience is justified. I regard the orders and action of the War Department as direct and clear violations of the legal and constitutional rights of the citizen, and that department disregards my judicial opinion and official action, as erroneous, unauthorized and improper. The Marshal—placed in a position not of his own choosing—must, therefore,

disobey the orders of the War Department or the command of the writ of *habeas corpus*; and must, in either event, expose himself to very unpleasant and injurious consequences, even if the writ of *habeas corpus* has been legally suspended. Such a suspension may prevent the prisoner's discharge, but it leaves untouched the question of the illegality of his arrest, imprisonment and deportation. If these are unlawful, the Marshal and others engaged in these arrests are liable in damages in a civil prosecution; such damages to be assessed by a jury of the country. Besides this civil liability, the parties engaged in making this arrest and carrying the prisoner out of the State and beyond the protection of its officers and tribunals, may, perhaps, be subject to criminal punishment.

In the proceedings, civil and criminal, which may be instituted under the laws of the State, the great questions involved in this case, may be deliberately determined, and they may be taken by writ of error or appeal, before the highest judicial tribunals of the State and nation. There is, therefore, no necessity, in order to prevent a failure of justice, that I should exercise the power of proceeding as for a contempt, in this case, if there is the slightest doubt of the legality or propriety of such a proceeding. And a subordinate executive officer, placed in the disagreeable position now occupied by the Marshal, may properly ask that a single judge, in a proceeding where there is no appeal, shall not punish him for obeying the orders of the Chief Executive, especially as the law affords the party aggrieved a full remedy for his arrest, imprisonment, and deportation, if they cannot be legally justified; and has also provided for the punishment of the arresting officer as a criminal, if he has proceeded without authority. As I understand the laws of the State, the Marshal can be abundantly punished if he has acted without due authority, without resorting to the proceeding for a contempt; and even if I did not doubt my legal authority to do so, I should not be inclined to take proceedings for that purpose. Indeed, to be subject for two years to a civil action for such damages as a jury may award the prisoner for his arrest and imprisonment, and also to be subject for years to indictment and trial in any one county, from Niagara to New York inclusive, even if such proceedings were almost certain to result in verdicts in his favor, would be to me, and I doubt not will be to the Marshal, a much severer punishment than I could, under the circumstances of this case, consent to inflict.

In justification of my course, in thus deciding that it is inexpedient, even if I have the power, to proceed against the Marshal by attachment, I propose to refer, very briefly, to the provisions of the Statutes of this State, which have influenced me in reaching that conclusion. I also propose to refer to them in this opinion because a general knowledge of these provisions may induce arresting officers, and those who incite them to action, to be more careful to ascertain, before making or causing an arrest, that such arrest can be justified. And, for a reason far more important than the interests of those officers, or my own justification, I deem it proper to make such reference;—in order that I may show that the law has made abundant provision for the redress of the injuries inflicted by illegal arrest and imprisonment and the illegal removal of the party arrested and imprisoned beyond the jurisdiction of the State Courts, for the purpose of repressing any disposition to resist these arrests by violence, instead of relying upon legal proceedings for redress and punishment.

The statutes of the State of New York provide, in the most ample and effective manner, for the discharge of all persons illegally restrained of their liberty; and they require the courts and judicial officers of the State to allow the writ of *habeas corpus*, under a penalty of $1,000, unless it shall appear from the petition therefor, or from the documents annexed, that the party applying for such writ is, by the provisions of the statute, prohibited from prosecuting such writ. And the article which provides fully for issuing such writs, also contains the following sections:—

"Sec. 61. Any one having in his custody, or in his power, any person, who, by the provisions of this article, would be entitled

to a writ of *habeas corpus or certiorari*, to inquire into the cause of his detention, who shall, with intent to elude the service of any such writ, or, to avoid the effect thereof, transfer any such prisoner to the custody, or place him under the power or control of another, or conceal him, or change the place of his confinement, shall be deemed guilty of a misdémeanor.

"Sec. 62. Any one having in his custody, or under his power, any person for whose relief a writ of *habeas corpus* or *certiorari* shall have been duly issued, pursuant to the provisions of this article, who, with intent to elude the service of such writ, or to avoid the effect thereof, shall transfer such prisoner to the custody, or place him under the power or control of another, or conceal him, or change the place of his confinement, shall be deemed guilty of a misdemeanor.

"Sec. 63. Every person who shall knowingly aid or assist in the violation of either of the two last proceeding sections, shall be deemed guilty of a misdemeanor.

"Sec. 64. Every person convicted of any offense under either of the last four sections, shall be punished by fine or imprisonment, or both, in the discretion of the Court in which he shall be convicted; but such fine shall not exceed $1,000, nor such imprisonment six months." 2 R.S. pp. 571 and 572.

It is further provided by the statutes of this State, (vol. 2d, 4th edition R. S. p. 857) as follows:

"Sec. 30. Every person who shall, without lawful authority, forcibly seize and confine any other, or shall inveigle or kidnap any other, with intent either;

1. To cause such other person to be secretly confined or imprisoned in this State against his will; or

2. *To cause any such person to be sent out of this State against his will*; *or*,

3. To cause such person to be sold as a slave, or in any way held to service against his will, shall, upon conviction, be punished by imprisonment in a State prison, not exceeding ten years.

"Sec. 31. Every offense prohibited in the last section, may be tried either in the county in which the same may have been committed, or in any county through which any person so kidnapped or confined, shall have been taken, while under such confinement." (*)

And in addition to these provisions of the New York Statutes, it must also be remembered that the prisoner has been taken to Washington, and that in December next the questions in regard to the legality of his arrest, imprisonment and deportation, may be inquired into by the highest judicial tribunal of the United States, in his case, or that of some other prisoner in like condition. To the decisions of that august tribunal all will cheerfully submit; and if I am wrong in the view I have taken of the questions involved in the arrest and imprisonment of Benedict, my error will be corrected.

I have already intimated that there was doubt in regard to my power legally to punish the Marshal for a contempt in this case, and I propose now to state very briefly the grounds upon which that doubt is based.

Process issued by the courts and judicial officers of the United States, is issued in the name of the "President of the United States;" and all process authorizing the arrest or commitment of any person, is by law and custom directed to the Marshal of the district, for execution and return, except in the cases where other provision has been made by act of Congress. In ordinary cases, then, process issued by me in proceedings for a contempt, would commence thus: "The President of the United States of America, to the Marshal of the Northern District of New York, greeting: You are hereby commanded that you take," &c.—and thus the process of the law, committing the Marshal for a contempt, would run in the name and authority of the President, and would direct the Marshal to commit himself to prison. Such a process would surely be practically, and would probably be legally, ineffective for that purpose; and Congress has not, so far as I can ascertain, made any provision for authorizing a judge at chambers to issue process in a different

(*) See Extract from Recorder Hoffman's Charge to the Grand Jury of New York, post p. 97.

form, in a case like that now before me. It is true the Judiciary Act provides (sec. 28.) that "In all causes wherein the Marshal or his deputy is a party, the writs and precepts therein shall be directed to such disinterested person as the court or a judge thereof may appoint, and the person so appointed is hereby authorized to execute and return the same;" but this provision appears to extend only to process issued in *causes* in court. At all events, it is not clearly applicable to such a case as this; and the power of a judge to direct process to an unofficial person, without express authority by statute, is too doubtful to justify me in issuing any such process, or asking any unofficial person (if any one would undertake the duty) to attempt to execute it. Such a process, in the hands of any party willing to take the risk of its execution, would probably be resisted as unlawful; and a breach of the peace would be the inevitable result of any attempt to execute such process. No judge should do anything tending to such a result, where his duty permits him to avoid doing it.

For the reasons I have now given, I shall decline issuing process against the Marshal for his disobedience to the writ of *habeas corpus.*

September 30, 1862.

THE SECOND ARREST OF MR. BENEDICT.

It will be seen by reference to the statement of facts made by Mr. Sawin, the counsel of Mr. Benedict, (*ante* p. 25) that he has incorporated into his statement (pp. 33 to 38) the *Courier's* report of the circumstances of the second arrest of Mr. Benedict, immediately after he had been discharged on *habeas corpus.* This second arrest was made by the officer whose deputy had made the first arrest, and who had but just been called upon by the Judge, to show, if he could, that the prisoner had been guilty of an offence, in order to prevent his discharge.

To the report then made, little need be added, except that Mr. Benedict states that he was placed in a carriage with three deputy marshals, as guards, and was thus taken to Lockport;—although the next train of cars on the railroad from Buffalo to Lockport would have started out of Buffalo in about an hour;—that about 9 o'clock the same evening they again started in a carriage, and about three o'clock the next morning arrived at Batavia, 36 miles east of Buffalo on the New York Central Rail Road; and that at 6 o'clock they took the cars for Canandaigua, and from there to New York, thence to Baltimore and Washington.

As the mail train on the New York Central Railroad left Buffalo for Albany, via Batavia and Canandaigua at three o'clock, P. M., or about two hours after Benedict's arrest; and as two express passenger trains left Buffalo for Albany between that time and the time of his actually leaving Batavia, it is quite apparent that the Marshal, or his deputies, intentionally took this unusual and roundabout course for the purpose of misleading Mr. Benedict's friends, and thus preventing the release of Mr. Benedict by proceedings on *habeas corpus* under the laws of the State; or else that they feared that the indignation of an outraged people would produce some further, and perhaps forcible effort to enforce the lawful rights of Mr. Benedict against his kidnappers.

Mr. Benedict was taken to the Old Capitol Prison, at Washington, and, after some five or six weeks confinement, was discharged, without any trial or legal accusation, by the Judge Advocate. He states that when discharged he asked the Judge Advocate "Why he had been imprisoned?" and was told "It was to show *northern people* that the military law was superior to the civil."

EXTRACT

FROM THE CHARGE OF RECORDER HOFFMAN, TO THE GRAND JURY OF THE CITY AND COUNTY OF NEW YORK, DECEMBER 1862:

COURT OF GENERAL SESSIONS.

Before Recorder Hoffman.

The Grand Jury of this court were sworn in on Monday morning, James W. Underhill, foreman. Previous to his Honor charging the jury, Mr. District Attorney Hall requested the Recorder to call special attention to the laws in reference to kidnapping and abduction. Mr. Hall remarked that a number of complaints of this nature had been filed in his office.—After some preliminary remarks upon the ordinary topics to which the court is required to call the attention of the Grand Inquest, Recorder Hoffman made the following important observations upon illegal arrests, which will be read with interest by every citizen of this State:—

"At the close of the last week the District Attorney requested me in my charge to you to-day, to give you especial instructions in relation to the laws of this State against kidnapping. He intimated to me that cases had been brought to his notice in which it was alleged these laws had been violated, and which he would probably feel bound to submit to you for your consideration and action. Having repeated that request to-day, I deem it my duty to give you the desired instructions, and I shall do so briefly and yet pointedly. It is so generally reported and believed that for many months past numbers of persons have, without any lawful authority, been seized on and removed from this State against their will, that great importance attaches to the subject under consideration. At the same time it is so generally understood that these seizures and removals have been made under some claim or pretence of lawful authority, that it becomes necessary to define and state the law with care, so that all who will may understand it. That law, as I shall now state it, will, I think, commend itself to the good sense of all who will examine it with unbiased judgment, and will be the law of this court while I preside in it, until reversed, if reversed it ever shall be, by some higher tribunal. The Constitution of the United States and the Constitution of the State of New York have guaranteed to all citizens the security of their persons against unlawful seizures, and the laws of this State have in substance declared that whoever shall violate this constitutional guarantee, shall be deemed guilty of a felony. The statute provides (vide Revised Statutes, 5th edition, volume 3, page 943, section 30), as follows, viz: Every person who shall, without lawful authority, forcibly seize and confine any other, or shall inveigle or kidnap any other, with intent either:

1. To cause such other person to be secretly confined or imprisoned in this State against his will; or

2. To cause such other person to be sent out of the State against his will; or

3. To cause such other person to be sold as a slave, or in any way held to service against his will, shall, upon conviction, be punished by imprisonment in the State prison not exceeding ten years.

Whoever, within this State, arrests a person charged with an offence alleged to have been committed therein against the laws, either of the State or of the United States, is bound to convey the person so arrested without delay before the proper magistrate or other judicial officer within the State, to be dealt with according to law. Any seizure of the person of a citizen for any other purpose is without lawful authority, and any detention or confinement of a person so arrested for any longer time than may reasonably be required to convey him before such magistrate or officer is also without authority of law. The removal of any person from this State into any other State or Territory, to answer to any charge of having committed here an offence against the laws of either the United States or the State, is without authority of law; and every person, whether he be an officer or private individual, who shall seize and confine any person whomsoever, charged with

having committed any crime within the State, with intent either secretly to confine or imprison him here, or to remove him out of the State against his will, acts in violation of the statute I have just read to you, and renders himself liable to indictment and imprisonment. Upon the trial of such indictment, the fact that such seizure, confinement and removal was by order of the President of the United States, of any member of his Cabinet, or other officer of the government, will constitute no legal defence. Neither the President, nor any member of his Cabinet, or other officer (not judicial), has any lawful authority to order the seizure, or imprisonment, or removal from the State, of any citizen of the State for any offence whatever committed, or alleged to have been committed, within its borders. I need hardly add that the arrest and imprisonment of any person not charged with any crime, no matter by whom, or by whose order the same is made, is in violation of the Constitution and the laws. The Constitution of the United States declares that in criminal prosecutions the accused shall have a speedy trial by jury in the State or district where the crime shall have been committed; and the seizure of any person, and his removal against his will from his State or district, is in violation of this provision of the Constitution, and, in the eye of our statute, without "lawful authority." There are constitutional and statutory provisions in relation to fugitives from justice. When an offence has been committed, or is alleged to have been committed, in another State, and when the offender has fled into this State, provision has been made by act of Congress, in conformity with and obedience to constitutional requirements, for his arrest and return to the State from which he has escaped. In such cases the Governor of the State in which the offence is alleged to have been committed may make a requisition upon the Governor of this State, accompanied by the necessary proofs; and upon such requisition the Governor of this State may issue his warrant for the arrest of the fugitive, by virtue of which he may be seized and returned to the jurisdiction from which he has fled. In this way, and in no other, can he be lawfully seized and conveyed out of the State. Any person, whether he be an officer or not, who shall seize and imprison an alleged fugitive from justice (except to await a requisition) acts without authority; and if he shall seize and detain him against his will, with intent secretly to imprison him here, or remove him out of the State against his will, except upon such requisition and warrant, he is guilty of a violation of the statute I have read to you, and is liable to indictment and imprisonment. Upon the trial of such indictment the fact that he acted by order of the President, or any member of the Cabinet, or other officer of the government, will constitute no legal defence. These, gentlemen, are plain propositions of law, which cannot be disputed, applicable to our loyal State, in which the State courts are in almost uninterrupted session, in which judges and magistrates are faithful to their oaths to support the Constitution of the State and the Constitution of the United States, in which the laws are ample for the punishment of all offenders as well as for the protection of all citizens—a State in which the federal courts are in almost daily session, with all their machinery in full operation, their judges and marshals and deputies ready to perform their duties, whose process can always be enforced and whose judgments and decrees can always be executed—a State in which the acts of Congress are never resisted, and whose people venerate and respect the Constitution and the laws. In such a State, so circumstanced, not being the scene of actual military operations, not having even an army within its borders, nor even any soldiery, excepting such as may be on their way to fight the battles of the Constitution and the Union, whose laws are not obstructed or defied; where no form of the "law martial" can, by any construction, be made applicable to any person not mustered into military service, it is my duty, as a Judge, to declare to you that the seizure of her citizens, their secret imprisonment against their will, their removal from beyond her borders without authority of law

to answer to criminal or other charges, their confinement in places beyond the reach of legal process, is in violation of the rights secured to them by the Constitution and by the laws, and it is the right and solemn duty of the Grand Jury to indict any person or persons who have in these respects offended against the law. I have now, gentlemen, discharged my duty, I leave you, under the obligations of your solemn oath, to the performance of yours. It may not be possible to prevent entirely the arbitrary and unlawful seizure and removal of the citizens of our State, but it is possible to convict and punish those who in this respect shall be found guilty of a violation of our laws."

As soon as the Recorder had finished, one of the Grand Jurors asked this question:—

"Suppose a man is a traitor against the general government, has not the federal government the power to arrest the party?"

Recorder—"They have not, except by process of law. The federal courts are open for the arrest of traitors as well as others."

MEMORANDA.

Persons wishing to pursue the investigation of the questions discussed in the foregoing pages may be aided by a reference to the following authorities:

2 Kent's Com., marginal paging, 26–34.

Hallam's Const. Hist'y of England, chaps. 7, 8, 13.

Hurd on Habeas Corpus—*passim* and particularly chaps. 4, 5, Book 1, chaps. 6, 7 Book 2.

Warden vs. Bailey, 4 Taunton's Rep., 67, S. C. Maule, and S. 400.

Atty. Gen'l Bates' Opinion, 24 Boston Law Rep. 129.

Merryman's Case, Ibid. 78.

The United States vs. Booth, 21 Howard 506.

Binney's Pamphlet Opinion, Phila.

Luther *vs.* Borden, 7 Howard's Rep. 1, and cases cited.

Houston *vs.* Moore, 5 Wheaton 1.

Opinions of Att'y Generals of United States, vol. 6, pp. 92, 103, 713; vol 7, 123, 1 82; vol. 8, 365.

A Curious Case, in Documents relating to Colonial History of New York, vol. 3, pp. 665–684.

Commonwealth *vs.* Blodget, 12 Metcalf's Rep., 56,

Greene *vs.* Briggs, 1 Curtis' C. C. Rep., 311.

Fleming *vs.* Page, 9 Howard 603--615, &c.

Mitchell *vs.* Harmony, 15 Howard 115, and cases cited.

Mostyn *vs.* Fabrigas, 1 Cowper, 161.

Blake's Case, 2 Maule & Selwyn, 428.

Exparte Sheever, 2 Burrow, 765.

Wilkeson *vs.* Leland, 2 Peters, 627.

Cross *vs.* Harrison, 16 Howard 165, and cases there cited.

Wilson *vs.* Mackenzie, 7 Hill's Rep., 95.

United States *vs.* Mackenzie, 1 N. Y. Legal Observer, 371.

The Debates in the British Parliament on proclamations of Martial Law in Ceylon and Demarara, in Hansard's Parliamentary Debates. Hansard's Parliamentary Debates, vol. 11, new series; and vol. 115, 3d series.

Debate in Congress, 1807, on Bill to suspend the Habeas Corpus, and on Broom's Resolution, vol. 3, Benton's abridgement of Debates, p. 500, &c., and Annals of Congress, p. 403—502, &c.

Bowyer on Universal Public Law 424.

Halleck's International Law, pp. 370–380.

North American Review Oct., 1861, vol. 93.

Martin *vs.* Mott, 12 Wheaton 19.

Wilson *vs.* Izard, 1 Paine 68.

Sutton *vs.* Johnstone, 1 Durnford and East 549.

Opinions of Judge Treat, in the Case of Emmett McDonald on Habeas Corpus, U. S. Dist. Court, E. Dist. of Missouri, May Term, 1861.

A pamphlet Review of Mr. Binney's pamphlet. Printed for the Author. Phil'a, 1862.

People *vs.* McLeod, 1 Hill, 377, and 25 Wendell 483.

McLeod's Case, 26 Wendell, 663; 3 Hill, 635; 4 Boston Law Rep., 169; and 1 Am. Law, Mag. 348.

Trial of Smith & Ogden.

Curran's Speech in Bevan vs. Sirr.

The works on Court Martial, by Hough; O'Brien, DeHart, Tytler, Adye, Simmons Samuel, Benet, Macomb, and others.

Proceedings on proclamation of Martial Law, by Lord Dunmore; vol. 4 of 4th series of American Archives; 2 Jefferson's Life and Correspondence, 274, 291, 344.

Matter of Carleton, 7 Cowen, 431. Titles—Articles of War; Law Martial; Law Military; and War, in Scott's Military Dicty.

Sanborn's Case, 23 Boston Law Rep., 7.

Williamson *vs.* Lewis, 24 do., 102.

Elphinstone *vs.* Bedreechund, 1 Knapp's Reports, 338.

United States *vs.* Wingall, 5 Hill, 16,

Matter of Stacy, 10 John Rep., 328.
People *vs.* Cassels, 5 Hill, 164.
Bennac *vs.* The People, 4 Barbour, 31.
Matter of Belt, 1 Parker Rep., 169.
Selections from WRITINGS of COBBETT, vol. 5, pp, 152, 154, 165.
American Ins. Co. *vs.* Canter, 4 Peters' Rep., 511.
Opinion of Hon. B. F. Hall, Chief Justice of Colorado, in McKies Case. Pamphlet. Denver C. T., 1862.

Ex parte, John Nugent, Am. Law Journal, 107.

Entick *vs.* Carrington, 19 Howell's State Trials, 13, 37.

Ex parte, Burford, 3d Cranch, 448.

Bostock *vs.* Saunders, 3 Wilson's Rep. 4, 34.
Bruce *vs.* Rawlin, 3 Wilson's Rep,, 61.
Bell *vs.* Class, 8 Wendell, 263.
Leach *vs.* Mooney, et. al., 19 Howell's State Trials, 1026.
Watson *vs.* Blackman, Ibid 1001.
Wilkes *vs.* Wood, 19 Ibidem, 1166.

Attorney Gen'l Hall's Opinion in the case of Recorder Morris, furnished on the application of Gov. Seward, and Dated Jan. 11, 1841.

Minot's History of Mass., vol. 2, p. 91.

Debates on bill to refund Gen. Jackson's fine, in 1842, 1843 and 1844, in Congressional Globe, and Appendix.

REMARKS.

Since the foregoing notes were written, a large number—indeed most—of the prisoners arrested under the orders of the Secretary of War, have been discharged by direction of the President or War Department. This action, and the late orders of the War Department, indicating a speedy abandonment of its system of arbitrary arrests, will meet the hearty approval of the friends of constitutional liberty. If any of the parties so discharged have really been guilty of treason, or any other crime, they should now be proceeded against in the ordinary courts of justice. And, certainly, if any of the parties who have ordered such imprisonment, know that the parties so discharged have been guilty of any treason they should at once make known the facts to the proper authorities, on pain of being themselves guilty of *misprision of treason.* An Act of Congress provides, "that if any person or persons, having knowledge of the commission of any of the treasons aforesaid," (being the only treasons made punishable by the laws of the United States,)" shall conceal, and not as soon as may be, disclose and make known the same to the President of the United States, or some one of the judges thereof, or to the President or Governor of a particular State, or some one of the judges or justices thereof, such person or persons, on conviction, shall be adjudged guilty of *misprision of treason*, and shall be imprisoned not exceeding seven years, and fined not exceeding one thousand dollars."

For the the prupose of showing that the laws have provided for the proper punishment of treason, and of the minor offences against the established and constitutional government of the United States, it has been thought not inappropriate to give the following extracts from charges to Grand Juries, by Judges Hall and Leavitt, and a decision by Mr. Justice Swayne; and also an extract from an act of Congress passed at the first or special session of the present Congress:—

AN ACT

To define and punish certain conspiracies:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if two or more persons within any State or Territory of the United States (*) shall conspire together to overthrow, or to put down, or to destroy by force the government of United States, or to oppose by force the authority of the Government of the United States; *or by force to prevent, hinder, or delay the execution of any law of the United States;* (†) or by force to seize, take or possess any property of the United States against the will or contrary to the authority of the United States; or by force, or intimidation or threat to prevent any person from accepting or holding any office, or trust, or placee of confidence under the United States ; each and every person so offending shall be guilty of a high crime, and upon conviction thereof in any district or circuit court of the United States, having jurisdiction thereof, or district or supreme court of any territory of the United States having jurisdiction thereof, shall be punished by a fine not less than five hundred dollars and not more than five thousand dollars; or by imprisonment, with or without hard labor, as the court shall determine, for a period not less than six months nor greater than six years, or by both such fine and imprisonment.

Approved, July 31, 1861.

* It is somewhat singular that the District of Columbia is not embraced within the provisions of this Statute.

(†) It is presumed, without regard to the fact, that it is the law which secures to the citizen the privilege of the *habeas corpus*,or some other law.

UNITED STATES DISTRICT COURT.

Present—N. K. Hall, Judge.

Rochester, Tuesday, May 21, 1861.

This Court organized this morning at 11 o'clock at the Supreme Court Room.

A grand jury was called and sworn—S. W. D. Moore was made foreman.

Judge Hall charged the jury on the usual subjects which come under their notice, and then passed to the consideration of the exciting events of the day. On this he addressed the jury as follows:

"Under ordinary circumstances, gentlemen, I should not detain you longer. But, unhappily, the present condition of our country—the existence of a wide spread and most formidable rebellion against the constitituted authorities of the National Government—the hostile array of forces openly raised, organized and armed for the avowed purpose of resisting the execution of the laws of the United States—the seizure of their forts, arms, arsenals, munitions and vessels of war—the openly avowed traitorous designs of those who, maddened by ambition, deluded by falsehood, or moved by groundless fears in regard to the future action of the government, have conspired together to subvert the authority—in many of the States—of the government of the Union, require that I should call your attention to the highest crime known to our laws—the highest crime which can affect the rights and interests, the well-being and safety of our people—the crime of TREASON *against the United States.* In doing this I shall not attempt to present any original or striking views, but shall studiously confine myself to the statement of some general principles which I believe to be clearly deducible from the experience of the past and the decisions of Courts of superior jurisdiction.

The natural and inevitable consequences of the crime of treason are most pernicious and calamitous. Its direct and immediate tendency is obviously to abrogate the authority of law—to dissolve the bonds of social and civil order—to subvert and destroy the foundations of government—to give full scope to the unrestrained indulgence of the worst of human passions—to destroy all security of property, of person, and of life;—in short, to involve a whole people in fratricidal and bloody strife—in anarchy and ruin.

We are not to discuss the causes or to speculate upon the fearful consequences of the existing rebellion. The fact of its existence and the provisions of the Constitution and laws which authorize the punishment of those engaged in its prosecution must be the basis of our action. Leaving to the Executive and Legislative Departments the conduct of all but the prescribed judicial proceedings for its suppression, it is our duty to endeavor to execute fully and faithfully, as well as justly and impartially, the laws of the land in respect to *treason,* as we would execute them in respect to every other crime or offence against the laws of the United States, which may become the subject of our investigations.

The framers of our admirable Constitution, warned by the melancholy history of the past, were careful to secure the citizen against the evils of *constructive treason.*—Knowing that in times of high political excitement, acts of a doubtful or subordinate character might, by the operation of popular prejudice in the jury box, or of arbitrary constructions upon the bench, be declared treason against the Government, they introduced the third section of the third article of the Constitution of theUnited States, which provides that "*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 further, that "*No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open Court.*"

An act of Congress passed in accordance with this Constitutional provision, enacts that "*If any person owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies giving them aid and comfort, within the United States or elsewhere, and shall be thereof convicted on confession in open Court or by the testimony of two witnesses to the same overt act of the treason whereof*

he or they shall stand indicted, such person or persons shall be adjudged guilty of Treason against the United States, and shall suffer death."

These provisions must be your guide and mine in all prosecutions for treason; and under these provisions of the Constitution and laws you will observe that Treason against the United States may consist,

1st—In levying war against the United States; and—

2d—In adhering to the enemies of the United States, and giving them aid and comfort.

In reference to the first class of cases, it is proper to say that *to levy war*, in the sense of the term as used in the constitution, is to raise, or make or carry on war. To attempt to subvert the just authority of Government by the warlike array of numbers and the exercise of force, or to assemble in force and in a condition to make war, with the intent to use such force for the treasonable purpose of subverting the authority of government either wholly or in any particular portion of the country, has, therefore, been held to be levying of war against the United States, and treason.—Levying war is *direct* when the war is made, or carried on, directly against the Government with the intent wholly to overthrow it or to subvert its authority in a particular locality; such, for instance, as seizing or holding against the Government any of its forts or ships of war, or attacking the same, with a view of destroying them or of taking and holding them in possession. It is *constructive* when it is made or carried on, in pursuance of a previous conspiracy or agreement, for the purpose of attempting to compel by force the repeal of a general statute, or to prevent, in all cases, the execution of such statute; or to obtain by intimidation and force the compelled assent of the constituted authorities to the redress of any other public grievance, real or pretended.

Levying of war against the United States is not necessarily to be judged of alone by the number or array of troops or people; or the number or quality of their weapons or means of offence; but there must be a conspiracy to resist or act by force, and an actual resistance or action by force of arms, or by intimidation of numbers. If a body of men conspire and meditate an insurrection to resist or oppose the execution of any statute of the United States whenever and wherever it is attempted to be put in execution, it is only a high misdemeanor; but if they proceed to carry such an intention into effect, by an array of numbers and the exercise of force, they are then guilty of treason by levying war. To conspire to levy war and actually to levy war, are therefore two distinct offences. The first must be brought into open action by the assemblage of men for the purpose, treasonable in itself, or the fact of levying war cannot have been committed. And the conspiracy and insurrection connected with it must be to effect something of a public nature to overthrow the Government, or to nullify some law of the United States by preventing its execution or compelling its repeal.

If war be actually levied directly against the Government, that is, if a body of men be actually assembled and arrayed for the treasonable purpose of overthrowing the Government of the country by force of arms, all those who are actually leagued in the common conspiracy, and who, in pursuance of the general design perform any part, however minute, or however remote from the scene of action, are to be considered as traitors. But in the case of a constructive levying of war, those only of the rioters who actually aid and assist in doing those acts of violence which constitute the treason, are guilty as traitors.

In order to complete the offence of treason, it is necessary that an overt—that is an open—act of treason should be committed, and one or more of such overt acts should be set forth in each indictment for the offence. And, as I have before stated, the Constitution requires that, before conviction, the overt act, alleged in the indictment, shall be proved by the testimony of two witnesses, or by the confession of the offender in open court. It is unnecessary for me to remark upon the propriety of this provision. It is enough to say that it is found

in the Constitution and must not be disregarded or evaded.

The other class of treasons—that of "*adhering to the enemies of the United States, giving them aid and comfort*" is that in respect to which you, as Grand Jurors of this district, are most likely to be called upon to deliberate.

It would not be easy to enumerate the several acts which, when done in furtherance of the treasonable designs of the enemies of the United States or of those engaged in a treasonable resistance of the Government, constitute treason. The modes in which important and efficient aid may be given, either directly or indirectly, to those engaged in the prosecution of a rebellion, or by which aid and comfort may be given to the enemy, are so very numerous and so entirely variant in their character, that I shall refer to a few only;—but such reference will indicate with sufficient clearness the general character of the acts which have been held to be treasonable. If citizens of the United States—or aliens permanently or temporarily residing here—join the public enemy in acts of hostility against our government, or deliver up its forts, ships of war, arms or munitions of war, through treachery, or raise or enlist troops for the enemy, or supply them with money, arms, munitions or ships of war, or even provisions or intelligence, with the intent and purpose that the same shall be used to aid and strengthen a rebel force, or with the knowledge that they are needed and are actually procured for that purpose, they will be guilty of adhering to the enemy and giving them aid and comfort, which is treason against the United States. It is no defence that the aid thus afforded to the public enemy, or known rebel, is sold or furnished for a compensation. To sell to rebels, or the public enemy, arms or intelligence, or other necessary means for prosecuting the war, with the knowledge that they are purchased for use, and are intended to be used for that purpose, would be giving aid and comfort to the rebels, or the public enemy, and would, therefore, be treasonable. (*)

The kindred but minor offence of misprision of treason may also become the subject of your investigations; but this offence is so clearly and distinctly defined by act of Congress that you can have no difficulty in determining what facts must be proved in order to justify the finding of an indictment for that offence. This act of Congress is in the following words:

"If any person or persons, having knowledge of the commission of any of the treasons aforesaid" (being any treason against the United States mentioned in the act of Congress in regard to treason, to which I have referred), "shall conceal, and shall not, as soon as may be, disclose and make known the same to the President of the United States, or some one of the Judges thereof, or to the President or Governor of a particular State, or some one of the Judges or Justices thereof, such person or persons, on conviction, shall be adjudged guilty of misprision of treason, and shall be imprisoned not exceeding seven years, and fined not exceeding one thousand dollars."

None of the treasonable acts to which your attention has been called, can be justified or excused upon the ground that a State has a right to secede from the United States—or in other words to withdraw from our Federal Union. This pretended right of secession has no foundation in reason or the Constitution, and it is distinctly and clearly repelled by the reasonings and authority of our judicial tribunals. Our National Government is founded upon a National Constitution, not upon a compact of federation made by sovereign States.

The government established by that Constitution is one of full stature and just proportions—with the highest attributes of sovereignty, and with all the departments, executive, legislative and judicial, necessary to maintain and exercise its authority in

(*) It will be seen (post p. 109) that Mr. Justice Swayne has held that an indictment for the acts here enumerated, in aid of the rebel States, cannot be sustained, if founded upon the Constitutional and statutory provisions against "*adhering to the enemies of the United States, and giving them aid and comfort.*" But if he is right in this, such acts need not go unpunished, when war has been actually and *directly* levied by rebels, if the parties offending are leagued in the common conspiracy and perform the traitorous act in pursuance of the common design of the insurgents, for they are thus guilty of levying war against the United States.

peace and war, to the extent of its delegated powers,—without resort to the authority or officers of the separate States;—and although in our peculiar American system of government we have two governments, each having jurisdiction with prescribed and limited powers of legislation over the same territory and operating upon the same persons—yet so carefully and wisely did the framers of our National Constitution provide against the dangers of collision between the National and State governments, or their officers, that it might well be supposed that a waut of reason or a want of patriotism on the one hand, or an insane ambition or criminal recklessness on the other, could alone bring the two into hostile collision. But such a collision has now occurred, and while every patriotic citizen must deeply regret the disturbance of the public peace, the injurious derangement of the business and financial operations of the country—and more than all the alienation, estrangement and deadly hostility of those bound by a common allegiance, and who have so long enjoyed in common the manifold blessings of a constitution and government under which the American people have lived for nearly three-fourths of a century, and enjoyed a fullness of prosperity and a degree of happiness never before experienced by any people. And while all must deeply deplore the existence of a civil war of whose evils and horrors we can as yet have no adequate comprehension, and whose end and consequences no man can foresee, our path of duty is plain and clear. And it is precisely what it has been in the past;—alike in seasous of the highest excitement and the serenest tranquility. We are simply to obey and enforce the law, regardless of political or personal prejudice or private predilections; and to sustain in public and private to the best of our ability, the constitutional authority of those to whom the American people, under the forms and in the spirit of the Constitution, have committed the administration of public affairs. In this way only can we secure the blessings of a free and stable government. In this way only can we maintain the Constitution framed by the wisdom of Washington and his compatriots, and wisely adapted to its declared purposes of forming a more perfect union, establishing justice, ensuring domestic tranquility, providing for the common defence, promoting the general welfare and securing the blessings of liberty to the people of the United States and their posterity.

I will add that our jurisdiction in respect to all crimes is limited to offences committed within this judicial district, and offences committed without the territory of the United States, when the offender is afterwards first brought or arrested in this district; and that you should carefully confine your investigations to cases within the jurisdiction of this court.

The consideration of our duty to sustain the constituted authorities, has determined me to venture to depart for once from the strict line of official duty to which I have heretofore confined myself upon similar occasions, and to express the opinion that, at all times, and especially at times like the present, our people are too prone to hasty and uncharitable judgments in respect to the acts of those in authority. The President and his Cabinet, and the high military officers to whom belong the direction of our affairs, are generally able to procure full and accurate information in regard to passing events, while the people and the press are misled and mystified by idle rumors or false or conflicting reports.—Under such circumstances, I invoke for those in authority not simply your charitable judgments, but your patriotic confidence. Trust in the President and his advisers, and give to the first soldier of the age—the gallant and ever to be honored veteran who commands our armies, (*) an undoubting confidence; and regardless of the impatient clamors and provoking taunts of a partisan press, rest satisfied that he will act wisely and efficiently in due time; and that, in military affairs, to attempt offensive operations with undue preparation, is the very worst policy—fraught with the most disastrous consequences.

In advising that a generous confidence, rather than censoriousness and distrust,

(*) General Scott.

shall influence our judgment of public men and public measures, I am sure I do not act the partisan or the politician. I should give you the same advice under all ordinary circumstances, without regard to the party or persons in power, but I give it not the less willingly on this occasion because I am able to say that after considerable acquaintance with the President, during our service as members of the same Congress, I have entire confidence in his integrity and patriotism.

[From the Cincinnati Enquirer.]

At the April Term of the United States Circuit Court of 1861, Judge Leavitt, in his charge to the Grand Jury, said:—

"I will now briefly call the attention of the Grand Jury to the second part of the definition of treason, included in the words, *adhering to the enemies of the United States, giving them aid and comfort.* The statute gives no specification of the acts which constitute treason under this part of the definition of that crime. Nor can we avail ourselves of the aid of judicial authorities, to any extent, in the investigation of this subject. I am not aware that in any of the prosecutions for treason in this country, the words under consideration have reeeived an authoritative construction. The words 'adhering to their enemies, giving them aid and comfort,' leave no room to doubt that treason may be committed by other means than levying war."

The Court then proceeds to state that the utterance of disloyal sentiments is not treason, but in specifying the numerous acts fairly within the scope of the words "giving aid and comfort to the enemy," the Court continues:

"To furnish arms or munitions of war, or to provide boats, vessels, railroad cars, or other means of transportation for those arrayed in hostile opposition to the Government, with a knowledge of the purpose for which they are to be used, are unquestionably acts involving the crime of treason. So, too, inciting, encouraging, or aiding others to engage in any of these treasonable acts, if the treasonable motive appears, would be giving aid and comfort to the enemy within the meaning of the law.* * *

"The purchase of provisions, stores and necessaries for a rebel or foreign army, engaged in war with the National Government, by a commissary of purchases, is an act of levying war, incurring the guilt of treason. If the seller knows that the property is to be used for the army in a State or place in the possession of the enemy, he thereby does give aid and comfort to the enemy, and is within the penalty of the law."

At the October Term Judge Leavitt reaffirmed what had been stated at the April Term, and directed the Grand Jury to the charge given at that time, and on the language "adhering to treason," &c. the Court said: "This language leaves no room to doubt that treason may be predicated of acts, which are not a direct levying of war according to the construction of that phrase." * * * * * *

"To sell to, or provide arms or munitions of war, or military stores or supplies, including food, clothing, &c., for the use of the enemy, is within the penalty of the statute in showing an adherence to the enemy, and an unlawful purpose of giving him aid and comfort."

Upon the charge of the Court at the April Term, James W. Chenoweth was indicted for treason by the Grand Jury, in giving aid comfort to the enemy, &c., and upon the same grounds indictments were found against Thomas B. Lincoln and Jno. A. Skiff, charged with similar offences. At the present term of the Circuit Court, Justice Swayne and Judge Leavitt on the Bench, a motion was made by Hon. Geo. E. Pugh, in an able argument, to quash the indictment, upon the ground that the first clause of section 3, of the Constitution, which provides that "Treason against the United States shall consist only in levying war against them," refers to rebellion, while the second clause, "or in adhering to their enemies, in giving aid and comfort," relates to a public war with a foreign enemy. The learned counsel cited numerous authorities in support of his proposition. The Court took the motion under advisement, and

yesterday morning Justice Swayne (*) delivered the following complete and very able opinion:

CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF OHIO.

The United States vs. James W. Chenoweth—Indictment for Treason—Motion to quash the indictment.

SWAYNE, JUSTICE.--The indictment contains two counts. As they are identical, as regards the question now to be decided, the first count only will be particularly adverted to.

That count charges, substantially, that there is in progress an insurrection and war against the Government of the United States, by persons styling themselves "the Confederate States of America;" that the defendant residing within and owing allegiance to the United States, well knowing the premises, but not regarding the duty of his allegiance, and conspiring and intending to aid and assist the persons styling themselves as aforesaid, during said insurrection and war, to wit: On the 20th day of June, 1861, and on divers other days, before and after that day, at the city of Cincinnati, in the Southern District of Ohio, did traitorously adhere to the persons styling themselves as aforesaid—then and yet being enemies of the United States; and that in the prosecution of his traitorous adhering aforesaid, he did procure certain supplies and munitions of war, to wit: Twenty Colt's navy revolving pistols, ten five-inch revolving pistols, and thirty pistols, of one Samuel Dreyfoos, and from divers other persons unknown, with intent traitorously to deliver to the persons styling themselves as aforesaid, said supplies and munitions of war; and that, in further prosecution of his traitorous adhering aforesaid, deliver to the said persons styling themselves ss aforesaid, the said supplies and munitions of war, for the aid, comfort and use of said persons in the prosecution of their said insurrection and war against the United States."

The Constitution of the United States, Article 3, Section 3, provides that "Treason against the United States shall consist only in levying war against them, *or* in adhering to their enemies, giving them aid and comfort."

The Act of Congress of April 30, 1790, Section 1, is as follows:

"If any person or persons owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving to them aid and comfort, within the United States or elsewhere, and shall be thereof convicted," &c., they "shall suffer death."

This indictment is framed under the second provision of this section of the statute. That provision relates exclusively to adhering to the enemies of the United States, and giving them aid and comfort. The prior provision relates to levying war against the United States. It has no connection with the question involved in this motion, and need not be further adverted to.

The second provision is a literal translation—*mutatis mutandis*—from the Norman-French, of the provision upon the same subject in the English statute, of the 25th Edward the Third: ["On soit adherent as enemies nostre, signiour le roy, a rux a eux donant aid et comfort en sou roialme et alors."]

In support of the motion to quash, it is claimed that the provision in the English statute, corresponding to the provision in our statute, upon which this indictment is founded, has always been held by the English courts to apply only to those who adhere and give aid and comfort to *foreign enemies*, and that it has no application to those who commit the like acts in respect of domestic traitors, engaged in insurrection or rebellion against their own government.

The following authorities are relied upon in support of this proposition: 3 Coke's Inst., 11; 1 Hale's P. C., 359; Foster's C. L., ch. 238, sec. 12; 2 Chitty, Cr. L., 62; 4 Bl. Com., 62; 6 Dane's Ab., 697.

We have carefully examined these authorities. They sustain fully the proposition they have been cited to support.

It is further claimed by the counsel for the defendant that this provision of the English statute having been thus adopted,

(*) Judge Swayne is a very able and upright Judge and was appointed a Justice of the Supreme Court of the United States, by President Lincoln.

it must be held that the construction given to it by the English Courts prior to its adoption, was adopted with it.

The principle which underlies this proposition is so well settled as hardly to require the support of argument or authority.

In Hillhouse vs. Chester, 3 Day, 211, the Court say:

"It is a sound rule that whenever our Legislature use a term without defining it —which is well known in the English law —and *there* has a definite, appropriate meaning attached to it, they must be supposed to use it in the sense in which it is understood in the English law."

This is in accordance with all the authorities on the subject.

The authorities which establish the construction contended for by the defendant's counsel, also lay down the proposition that the same facts which make a case within the statute of adhering and giving aid and comfort to *foriegn enemies*, when done in respect of insurgents and rebels, make the offender guilty of the crime of levying war against the government, and liable to be punished under the other provision of the statute for that offence. (3 Bl. Com., 62)

The question presented by this motion permits of no doubt as to its proper solution.

We sit here to administer the law, not to make it.

With the excitements of the hour, we, as Judges, have nothing to do. They cannot change the law nor affect our duty. Causeless and wicked as is this rebellion, and fearful as has been its cost already in blood and treasure, it is not the less our duty to hold the scales of justice, *in all cases*, with a firm and steady hand.

The motion must be sustained. The indictment will be quashed."

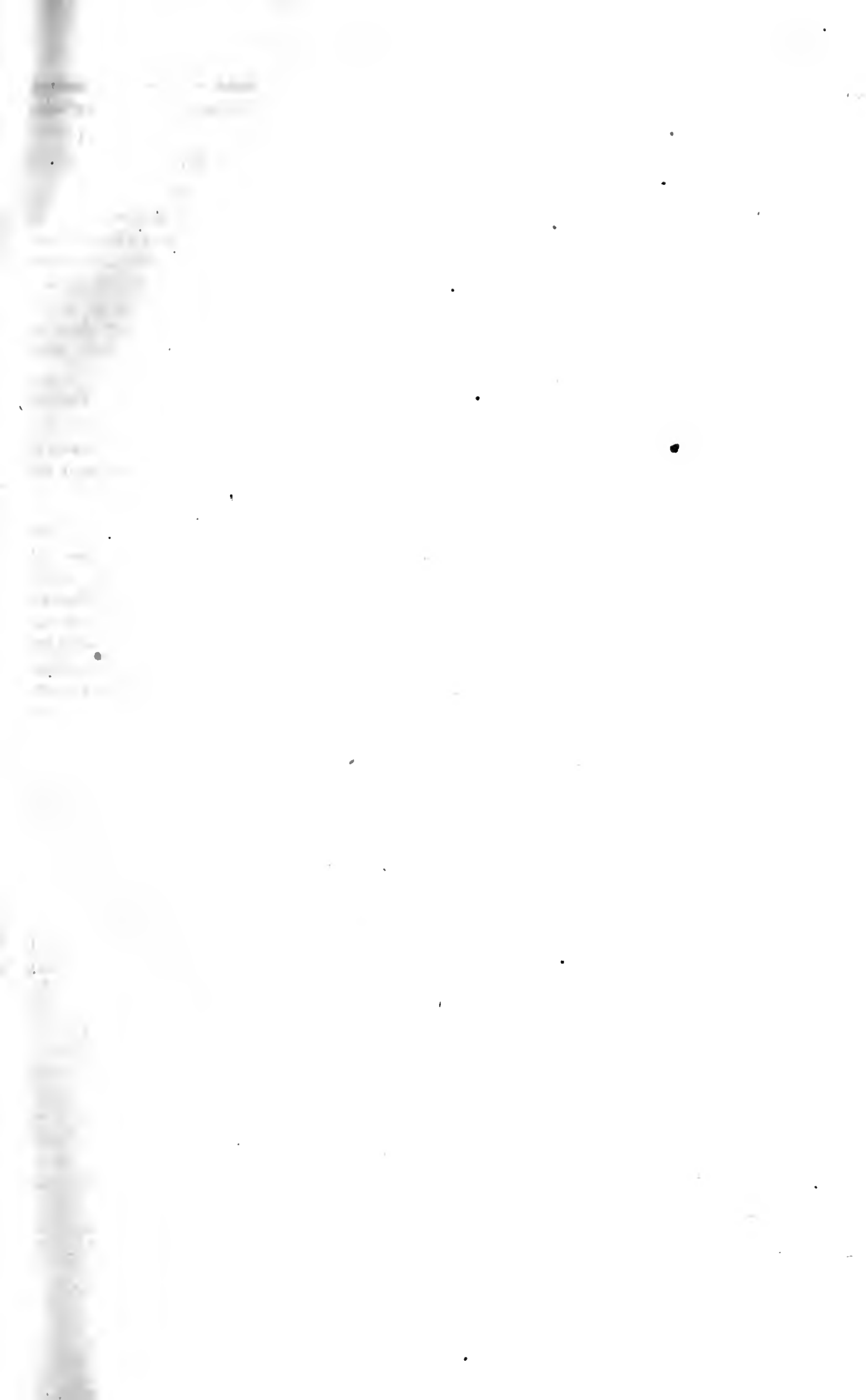
Flamen Ball, Esq., District Attorney for the United States; Pugh and Mitchell for the defendant.

This decison dismisses the case of Chenoweth, virtually disposes of the cases of Skiff and Lincoln, in whose cases *nolle prosequies* will be entered by the District Attorney, Mr. Ball. This decision, being the first of the kind delivered, will dispose of a large number of similar cases pending in the various courts throughout the United States.

EXPLANATORY NOTE.

The preceding notes were mostly prepared in October and November last, and soon after placed in the hands of the Printer. Some additional matter and further quotations and references have since been added, and have not, perhaps, been inserted in their appropriate places.

It will be readily discovered that many unimportant errors have escaped the correction of the proof reader; but it is hoped that none of them are calculated to mislead even an unprofessional reader.



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