THE PRIVILEGE

OF THE

WRIT OF HABEAS CORPUS

UNDER

THE CONSTITUTION.

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INTRODUCTORY.

THE right of the President of the United States, in time of rebellion, and when the public safety in his judgment requires, to arrest and detain a freeman, in temporary denial or delay of bail, trial, or discharge, that is to say, of his privilege of the Writ of Habeas Corpus, has been exhibited by writers in our Journals, in three points of view:

1. As the lawful exercise of military power, derived to the President as commander in chief of the military force now on foot for the suppression of insurrection:

2. As an incident of martial law, in time of war within the country, repelling the interference of the civil authority in all cases in which the restoration of order requires the application of the military principle:

3. As a civil power springing from the Habeas Corpus clause in the Constitution, and to be authorized by Congress, in like manner as by the Parliament of England, by delegating to the President the power to arrest and detain persons, within the limitations prescribed by the Constitution.

The Attorney-General's opinion is not comprehended by this division. That opinion is founded on the alleged co-ordination of the three departments, and upon the co-equal authority of the Executive, to interpret the Constitution in what regards the Executive duties and powers, and especially his duty and power to protect and defend the Constitution, and to suppress insurrection and rebellion against the government of the nation; and in the execution of this duty and power, to arrest and detain persons who are in either actual or suspected complicity with rebellion.

The bearing of the Habeas Corpus clause in the Constitution, is not particularly expounded in that opinion, nor is it specially relied upon or the President's authority; neither is the Presi-

dent's power treated as a military power, but as a civil power, exercised in the performance of the civil duties of his office.

It is not the purpose of the following remarks, to treat the subject from either of the first two points of view, nor to affirm or reject the argument of the Attorney-General. The exclusive design of the writer is to consider the right of the President to arrest and detain, of his own motion, in the required conditions, as derived from the language of the Constitution, and from the nature of the Executive office.

There are two modes of treating this matter. One of them is the merely legal and artificial. The other is the constitutional and natural.

In the first mode may be presented an argument against the President's power, until Congress have authorized it, which it may not be easy to answer, if the premises are admitted. The argument is as follows:

The language of the Habeas Corpus clause in the Constitution, says nothing, directly and explicitly, in regard to the department of government, which is to exercise the power it gives; but it must be viewed in the light of Parliamentary law in England, and by reference to the customary sense in which such language was received in the country from which we have taken the great body of our laws. This, it must be presumed, was the sense in which the Convention used this language in the formation of the Constitution.

Suspended, applied to the privilege of the writ of Habeas Corpus, means the temporary withdrawal or withholding of the legal operation of that Writ from an imprisoned person. The *Writ* is instituted by law. Law alone can withdraw or withhold its operation, in any case to which it applies. There must, therefore, be a law or statute to countervail the law by which the Writ is given, before the operation of the Writ can be withdrawn or withheld from a person who is imprisoned.

To create a suspension of the privilege of the Writ in the case of an imprisoned person, there must then be, 1, a statute or law which withdraws the privilege from the contemplated case of imprisonment; and 2, an arrest and imprisonment within the purview of that statute. Effectual suspension is, therefore, a conjoint operation of law and act; the operation of a law to suspend the Habeas Corpus privilege in reference to the contem-

plated arrest, past, present, or to come, and the operation of the act of arrest or imprisonment referred to by the law.

This is the meaning of *Suspension* of the privilege as it was understood and practised in the Parliament of England, when our Constitution was formed.

Although our Constitution does not expressly say which department of the government may suspend the privilege, it necessarily implies, by the use of such language, that the Legislature shall first pass the law, and that the executive officer shall then perform or order the act of imprisonment and detainer.

This is the merely legal and artificial argument.

But the language of the Constitution, in this particular, was not the customary language of the day, either in England or in the United States; and the Parliamentary practice was the very thing that was to be strenuously rejected and excluded. The language of the Habeas Corpus clause in the Constitution was new, and is peculiar; and it must be viewed in its own light, and in the light afforded by other parts of the same Constitution.

The Constitution does not use the word *suspended* in an artificial or technical sense, for it had none in this relation; nor as consisting of two acts, an act of legislation, and an act of imprisonment; but as one thing under the sanction of the Constitution. The warrant of arrest, with the order that the party's privilege be denied for a season, is suspension under the Constitution. A temporary denial of the privilege by a single act, founded on the authority of the Constitution, is all that is necessary to suspend the privilege.

The power to imprison, and to deny or delay a discharge from imprisonment, is an executive power. All the conditions of the exercise of the power described in the Habeas Corpus clause, are of executive cognizance, that is to say, rebellion or invasion, and the requirement of the public safety in the time of either. No legislative act is necessary or proper to give the cognizance of these facts to the executive department. No act of Parliament has ever been passed in England, or has been proposed in Congress, to take away or abridge the executive power in regard to these facts. All the acts of Parliament which deprive persons of the right to bail or trial, in derogation of the Habeas Corpus Act of Charles II, leave this power and discretion to the Crown. They cannot be taken away by Congress without invading the constitutional limits of the Executive office. They cannot be

given by Congress to the Executive without supererogating what the Constitution gives. The only thing required to bring this power and discretion into operation in the conditioned cases, against the privilege of the Writ, is an authority superior to the law which authorizes, or may authorize, the Writ; and *that* is the authority of the Constitution in the Habeas Corpus clause.

The power to suspend the privilege of the Writ, is moreover inseparably connected with rebellion or invasion,—with internal war. The direction of such a war is necessarily with the Executive. The office cannot be deprived of it. It is the duty of the office, in both its military and civil aspects, to suppress insurrection, and to repel invasion. The power to suspend the privilege, is supplementary to the military power to suppress or repel. It is a civil power to arrest for privity or supposed privity with rebellion, as the military power is to suppress by capture for overt acts of rebellion. They should reside in the same magistrate, as inseparable incidents of the Executive power, in time of internal war. The aversion to this doctrine, where it exists, is a reminiscence of the English practice, when the Crown claimed the right to suspend the privilege in time of profound peace and order; or it is a misconception of the grounds of Parliamentary action, since the Habeas Corpus Act of Charles II.

The true character of every act of Parliament in this relation, and of the only bill that has been proposed in Congress, has been executive, and so it must be. They have said, in effect, and must say, that the *act* of the King's Council, or of the President, shall be *final.* The only aspect in which an act of Congress to this effect can be regarded as legislative, is as the grant or creation of an *authority* to detain against the writ; but this is supererogation, because the Constitution gives it. The only question is, to which department of the government, the exercise of it belongs, by the general scheme of the Constitution; and according to the delineation of the departments in that instrument, the exercise of the power appertains to the President.

This is the broad constitutional and natural argument; and it is in support of this hypothesis that the following remarks are made.

THE PRIVILEGE OF THE WRIT.

THE clause in the Constitution of the United States in regard to the privilege of the Writ of Habeas Corpus, is this:

"The privilege of the Writ of Habeas Corpus shall not be suspended, unless, when in cases of rebellion or invasion, the public safety may require it."

The sentence is elliptical. When the ellipsis is supplied, it reads thus:

"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 then it may be suspended.*"

This is the necessary effect of the conjunction "unless," which reverses the action of the preceding verb; and it will be of perfectly equivalent import and effect if the clause be transposed as follows: "The privilege of the Writ of Habeas Corpus may be suspended in cases of rebellion or invasion, when the public safety may require it; and it shall not be suspended in any other case."

The clause contains an expression that belongs to the law,—"The Writ of Habeas Corpus." "The Writ of Habeas Corpus," simply and without more, means the Writ of Habeas Corpus *ad subjiciendum*. This was and is the meaning universally when we speak of a Writ of Habeas Corpus in the United States, without any affix.

This Writ commands that the body of a detained or imprisoned person be brought before a court or judge, with the cause of his commitment or detainer, to be subjected to the order of the court or judge in regard to the disposal of his person. By Habeas Corpus acts generally, the privilege of every freeman is to be delivered on bail, put upon his trial, or discharged, without ar-

bitrary delay; and this is the privilege which the Writ of Habeas Corpus is used to enforce,—to be bailed, tried, or discharged without arbitrary delay.

The United States, while the Constitution was in the course of formation, had no Writ of Habeas Corpus, or Habeas Corpus Act; and the clause therefore does not refer to any particular law, statute, or writ that was in operation or use in a particular place. It used the expression generally as language of the law in the States, in which it had a certain meaning.

The privilege mentioned in the clause is, therefore, the privilege of an imprisoned or detained person, of being bailed, tried, or discharged without arbitrary delay.

The words "*shall not be suspended,*" as applied to the *privilege*, are not words of the common law, or of any other system of law in particular. They are not technical. They are words in general or popular use; and whenever used in reference to a privilege, signify the same thing as hung up, deferred, delayed, denied for a season. It is not uncommon in England and in this country to speak of the suspension of the Habeas Corpus *Act*, a loose and inaccurate expression, because the Habeas Corpus Act is never suspended. The Parliament of England, by its imprisonment acts, depriving certain persons, committed by warrant of the King's Privy Council or Secretary of State, of the privilege of bail and trial, do not speak of suspending the Habeas Corpus Act of 31 Charles II, or of suspending the Writ of Habeas Corpus, or of suspending anything. *Blackstone*, in one instance, speaks of "suspending the Habeas Corpus *Act* for a short or limited time;" when, in fact, the Habeas Corpus Act of England has never been suspended for a moment. He spoke loosely and inaccurately. The English imprisonment Acts, made during the rebellion for the Pretender, did suspend a *Statute* of Scotland to prevent *wrongous* imprisonment, so far as regards treason, in order to *oust* the jurisdiction of a local authority over a particular crime; and the expression was right. But they used no such words as to the English statute or writ.

Suspending the *privilege* of the Writ, is not an English law expression. It was first introduced into the Constitution of the United States. The privilege is personal and individual, not local, but subsists in remedy. The right of being exempt from

arbitrary imprisonment is a natural right, and is predicable by the Common Law of every freeman; and to hang up, defer, delay, deny for a season, the privilege which a statute gives, or is expected to give, in relief of imprisonment, is to *suspend* it in the sense of this clause of the Constitution. Freedom is the right, either absolute or qualified. The remedy is privilege.

This, then, is the whole meaning of the clause in our Constitution,—the privilege of being bailed, tried, or discharged from imprisonment without delay, shall not be discretionally denied, or hung up or deferred, unless, when in cases of rebellion or invasion, the public safety may require it; and then, or in those circumstances, it may be denied or deferred for a season, or temporarily.

The people of the United States have said this by their Constitution of government. The power to say this belongs to the United States by the grant of the people. They have said that the privilege of being bailed, tried, or discharged when in cases of rebellion or invasion the public safety may require it, may be denied, deferred, or hung up for a season.

The Constitution of the United States *authorizes* this to be done, under the conditions that there be rebellion or invasion at the time, and that the public safety requires it. The Constitution does not *authorize* any department of the government to *authorize* it. The Constitution itself authorizes it. By whom it is to be *done*, that is to say, by what department of the government this privilege is to be denied or deferred for a season under the conditions stated, the Constitution does not expressly say; and that is the question of the day.

The Constitution uses the one word *suspended*, to signify one act, by one agent or body, with one effect, consummate by one operation,—imprisonment without bail, trial, or discharge, for a season; which act it authorizes in certain conditions of the nation. It is impossible to suppose, that in speaking of suspending the *privilege* of the Writ, it meant by one act of *law*, as if it had spoken of the *Writ* alone, or of the Habeas Corpus *Act*. And it is equally impossible that it meant the general or universal privilege in the United States at large. This would have been an infinite absurdity, comprehending and involving all freemen, friends as well as foes of the government, and even the

very persons who should suspend the privilege. Neither did it mean to speak of two acts, one of authority and one of execution, for its own words are the authority. The privilege is necessarily personal or individual; and by ordaining that this may be suspended on certain conditions, it leaves nothing contingent except those conditions, and nothing unexpressed except the department by which the conditions were to be declared to exist, and the act of imprisonment to be executed. The question is, which is that department?

It must be remarked that this whole provision is unlike any provision of the Constitution of England, or of the Common Law. The bearing of the Constitution of England upon the Writ of Habeas Corpus, and upon the executive power of the King to suspend the personal privilege of a subject, supplies a very defective and a very deceptive analogy for the interpretation of the Constitution of the United States; a very different Constitution as we know, and which has adopted new and quite original language in relation to the privilege.

The doctrine of the English Common Law is the *universal* exemption of the freemen of England, at all times and without any exception, from discretionary imprisonment by any body. The language of the 39th clause of *Magna Carta* is to the same effect: "NULLUS LIBER HOMO *capiatur, vel imprisonetur, aut utlagetur, aut exuletur, aut aliquo modo destruatur; nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum vel per legem terræ.*" "From the era, therefore, of King John's charter," Mr. Hallam says, "it must have been a clear principle of our Constitution that no man can be detained in prison without trial." Midd. Ages II, 324. And this conforms precisely to the two resolutions carried by Sir Edward Coke in the House of Commons in 1628, which were afterwards the foundation of the English Habeas Corpus Act of 31 Charles II.

I. That no freeman ought to be committed or detained in prison, or otherwise restrained, by the command of the King or the Privy Council, or any other, unless some cause of the commitment, detainer, or restraint be expressed, *for which, by law, he ought to be committed, detained, or restrained.*

II. That the Writ of Habeas Corpus cannot be denied, but

ought to be granted to *every man* that is committed or detained in prison, or otherwise restrained, by the command of the King, the Privy Council, or any other. 2 Parl. Hist. 259.

Exemption from discretionary imprisonment without bail or trial, is therefore an undoubted principle of the Common Law.

Before the era of King John's Charter, there may be historical uncertainty in this matter. The previous age was one of the exercise of large arbitrary power by the King. The Norman conquest sat down on the free code of the Saxons, in the *cunabula* of the common law, and pressed it heavily. Temporary imprisonment at the King's pleasure had doubtless occurred in many cases; and in time of rebellion, of which the Norman Kings had more than one sample, it is quite probable that such imprisonment may have been acquiesced in for the public safety; and that the King's right may thus have acquired some sanction from usage, giving color to the exercise of the same power, when there was no rebellion. But the English Barons, in their contest with King John, had the magnanimity to put the matter beyond doubt, not only as to themselves, but as to the freemen of England generally; and it is for this reason that Mr. Hallam has signalized that epoch.

The principle allows of no exception or qualification on account of rebellion or invasion, when war is within the kingdom, nor on account of any other cause or matter whatever, not even the public safety in time of rebellion or invasion.

It is a glorious principle, and worthy of all aspiration, like *perfectness*. But it is too perfect for human society, at least for the condition which human society has usually assumed for several centuries. It was the occasion of fierce struggles between kings and people in England before Magna Carta and after; and the struggle was not finally ended until the latter half of the 17th century, by the defeat of the King's arbitrary power, and by the deposit of arbitrary power over the same principle, not in the people who originally held it beyond all arbitrament, but in the Parliament of England, as if they were incapable of abusing it. Less likely Parliament may be; less able, Parliament is not. The Constitution of England *appears* to be now what it always was in regard to this principle; and English lawyers and statesmen still say, that it is a principle of their Constitution, as

it always was, that no man can be detained in prison without trial. But there is another principle which they assert with equal strength and constancy, that what Parliament declares to be the Constitution of England, is the Constitution of England; or, rather, that what Parliament enacts, the courts of England cannot adjudge to be unconstitutional and void; and, therefore, that although by the Common Law and Magna Carta and the Constitution of England, no man can be detained in prison without trial, yet that Parliament may constitutionally, or imperially, authorize the King's Privy Council, or one of his Secretaries of State, or perhaps anybody at their pleasure, to imprison a freeman in time of peace, when there is neither rebellion nor invasion, nor anything like war in the kingdom, but only seditious agitations for reform, or clamors against a ministry, with scarcity and derangement of trade, accompanied by treasonable or *suspected* treasonable practices; and may detain him without trial or bail for six months, or a year, or for any time they see fit, renewable forever at the pleasure of Parliament.

The principle, therefore, of the old common law, that every freeman is entitled at all times and in all cases, to be exempt from discretionary or arbitrary imprisonment, has, in England, come practically to this,—that he is entitled to it, unless Parliament shall, in their discretion, see fit to take it away for a time, by giving the power of such imprisonment to the King in Council, or to one of the King's principal Secretaries of State, or perhaps to anybody they see fit.

There is no intention in saying this, to find fault with the English Constitution, which must be taken as a whole, and is truly a magnificent work, the result of vast experience, wisdom, and genius for the government of freemen; but the intention is to state an indisputable fact, to which the people of these United States were wide awake when they made their Constitution, and regarded it as a very exceptionable fact, and wholly inadmissible by them. They meant to exclude Parliamentary law, to qualify the principle as the public safety of the country required, and to declare the conditions or qualifications of the principle for themselves. To state this, is to clear away something from the deceptive analogy of the English Constitution and the course of Parliament.

The formal contest for the possession of this discretion to imprison and detain without trial, was long in England; but does not require long to state. It was first between the King and the Lords or Barons, and then between the King and some of the people, and finally between the King and the Parliament; and this Parliamentary contest with the King began and ended with that family of Kings, in whose reigns, or at the end of them, Englishmen settled the great principles of their government.

The Habeas Corpus Act of 31 Charles II, as well as a more pointed and anti-regal statute of 16 Charles I, which followed the Petition of Right, was made during this contest, in jealousy of the Royal hereditary power, as the Constitution of that monarchy had immemorially established it. It was in jealousy of the Royal hereditary power generally, but was quickened and invigorated greatly by jealousy of the race of Kings then on the throne. Nearly the whole of that century was an age of transition from the irregular and disputed pretensions of the English Crown, sometimes controlling and always menacing the Commons, frequently using and perpetually threatening the use of arbitrary power, to the principles of constitutional government as asserted by Parliament, and as denied by the Crown; and Parliament succeeded. It cannot be said that the people succeeded in the same degree. That nation has now arrived at a stage, in which the contest for influence in the government is between different *classes of the people;* and the great question between them is, whether the people at large have as large a share in the government of themselves as they ought to have and can bear; but for nearly the whole period of the second Stuart King, it was a contest between the Parliament and the Crown; and the security of the person of the subject from arbitrary imprisonment by the King, and of his property from the arbitrary exactions of the King, were the points upon which all political movements turned.

Neither the 16 Charles I, nor the 31 Charles II, did more than affirm the immemorial custom or principle of the common law which has been adverted to, and the King's incapacity to supersede it at his discretion; but the later statute has derived its reputation and popularity from fencing the privilege of the Writ of Habeas Corpus with the most jealous guards against the

dependants of the King, his Judges, who held their offices during his pleasure, and his officers of his sole appointment, who, in subservience to his wishes, had, in conspicuous instances, made the common law of no avail against the Crown. Two changes in the Constitution of England, making good behavior the tenure of judicial office, and requiring the assent of a branch of the Legislature to the King's appointments to office, might perhaps have obviated the necessity of nearly all the provisions of the great Habeas Corpus Act. If anything makes this doubtful, it is the constitutional power of the Crown, which is large and has a pervading influence, though much of it is disguised from our observation, by its exercise through ministers who are in Parliament, and the leaders of that body. But with these provisions in the Constitution of the United States, and with the Habeas Corpus clause just noticed, the Federal Constitution has gone on for seventy years without a Habeas Corpus Act, and without anything of that kind, but a naked authority to the Courts and Judges of the Federal Judiciary, to issue, among other writs, the writ of Habeas Corpus.

The jealousy toward the King in regard to this Writ, so deeply rooted in the English heart during the struggle with the Stuarts, has continued to exist, and still exists in the people of that kingdom, as a principle, without the same personal causes in the conduct of the reigning monarch; but considering what the office of the King of England is by the settled Constitution of the Kingdom, there is no doubt good reason for it even at this day; and there always will be. The royal power in England, whatever we may say of it, is still a great power, and must remain a great power if that nation would remain what it is. With a people jealous of their personal liberty, and intent upon maintaining it, this jealousy has, and will always have, a foundation in a justifiable fear of the royal prerogatives and influence.

The exclusive right to declare war, and to make treaties with foreign powers without the advice and consent of either branch of the legislature—the power to build ships and to regulate a navy—the power of calling forth the militia for any cause which in the King's judgment makes it expedient—the sole and exclusive power of appointments to office, both civil and military—

the power of appointment to great office in the established Church—the power of conferring upon such subjects as the Crown favors both rank and title, and hereditary authority as law-makers in one branch of the legislature—and the power of absolute *veto* upon acts of Parliament; it is these prerogatives which make the King's hereditary office, in connection with an hereditary aristocracy, a source of apprehension to the Commons of England, and justify their jealousy in maintaining the guards of the Habeas Corpus Act, and in extending them, as they did so late as the 56 George III, from commitments for any criminal or supposed criminal matter, to commitments for any cause whatever.

At the same time it must be remarked that the people of England have not in this matter shown, or been permitted to give effect to, the least jealousy whatever of the absolute power of Parliament. While the 31 Charles II by express provision places the Writ of Habeas Corpus at the call of anybody committed for any criminal or supposed criminal matter, and now for any cause whatever by the 56 George III, so that the occurrence of rebellion or invasion, or any the most extreme crisis of public danger, cannot deprive any one of the privilege of the Writ for an instant, nor give the King the power to detain the most reasonably suspected and dangerous man in the kingdom, Parliament has an unlimited power to suspend the privilege without either invasion or rebellion, or any crisis of danger, other perhaps than such as may attend an unpopular ministry for persevering in unpopular measures. Parliament is under no guard or restriction whatever in point of time or circumstance. Parliament and the people, in the late, or even present, condition of representation in England, are not precisely the same. The people and a majority of Parliament are not always the same in sympathy.

It is no answer to this remark on the Constitution of England, to say that the King and Parliament must unite before the privilege of the Writ can be interrupted. The King may be a party to it for purposes of his own, in opposition to the interests of his people; and so may his ministry; and so may a majority of Parliament, in a certain condition of representation in Parliament. This condition of government may last and has lasted

for some years at different epochs, and has been exhibited clearly and distinctly in the early part of the present century. In matters which concern anything so precious as personal liberty, and its protection in general against arbitrary imprisonment, it is a *desideratum* in every free Constitution, to guarantee the privilege of the Writ of Habeas Corpus, absolutely, to the whole extent that the government will be and remain in its normal condition of internal peace, and in the regular administration of law. When it is thrown out of that condition by rebellion or invasion, facts easily made certain beyond cavil, tending to the derangement of the course of justice, and requiring a resort to military force, and, to some extent, discretionary civil authority, the security of both the people and the government demand a temporary limitation of the privilege to prevent its being abused to increase the disorder of the times. At such seasons it is of less importance in what branch of government the power of applying the limitation is vested. That must depend upon the nature of the government and upon the distribution of its powers; but it should obviously be with that department of the government which is the least able of itself to abuse the power, and is the most easily and directly made amenable to responsibility and correction for abuse. In fine the Common Law principle requires qualification for modern times, and most of all in governments which are the least strong, and among a people who are the most free. The English Constitution still asserts its universality, and restricts it at pleasure by the omnipotence of Parliament. Of course such a power is liable to abuse, and to be without remedy, however rarely it may be abused.

In former years, after the Revolution of 1688, and when the contest between classes in England was not as warm as it has become in more modern times,—from the time of the Revolution to the close of the eighteenth century, the power of Parliament was used very much in the spirit of the limitation adverted to; but in the early part of the present century, in one or more instances, it is supposed to have departed from it.

When there was neither rebellion, nor invasion, nor war, and when the danger of foreign war was removed by the overthrow of Napoleon, the 57 Geo. III, 3 May, 1817, gave the power to the King's Privy Council and Secretaries of State, to detain

without bail or trial, persons committed by their warrant for treasonable or suspected treasonable practices, during the limitation of the statute; and it was to a great extent a question of the ministry, and of party. The country was deranged by scarcity and embarassments of trade, and agitated by their common consequences, frame-breaking or rick-burning, and cries for reform. There were probably treasonable practices at the same moment; but the imprisonment statute in the 57th year of the King, was obviously promoted, and but shortly preceded, by an acquittal of Dr. Watson from the charge of treason, by a jury of Middlesex, after a week's trial, strong evidence of his guilt, and a pointed charge to the jury against him by Lord Ellenborough. The Courts were open and unobstructed; but the juries could not be relied on to convict the guilty. It was a case of immense party agitation. Sir Samuel Romilly, and others, equally loyal to the Constitution, though not friendly to the ministers, opposed the statute vehemently as a party or political measure. So also they opposed the Seditions bill, a bill it might be said, *in pari materia*, carried in the same month; and the bill for imprisonment without trial was continued by another statute in the same session, to March in the following year. And this is the scope of Parliamentary power over the privilege of the Writ of Habeas Corpus.

The Habeas Corpus Act of England, with this discretionary power of Parliament, affords no analogy for the United States, who have qualified the principle, so as to secure it against the discretionary power of any body, except when the nation is forced away from its normal and orderly condition by internal war, rebellion, or invasion. In such a condition, the government cannot,—properly speaking, will not, and cannot extensively,—abuse the exception. Such disorders as rebellion or invasion, touch the life of the government itself; and the exception cannot be either usefully or *constitutionally* applied, except to defeat a sympathy with domestic or foreign enemies, to the overthrow of the fundamental institutions of the people. More of this *constitutional* dependence of the exception upon rebellion, presently.

There is another particular in which it is necessary to disregard the analogy of the English law, a particular in which we

are most likely to be led astray, and have been, in fact, to some extent, led astray, by supposing an analogy, where there is none. It is the *manner* in which the privilege of the Writ is overruled in England, and which *must* be done by a Legislative Act,—by an Act of Parliament. It can be done in no other way.

The Habeas Corpus Act of Charles II is an Act of Parliament; and by the Constitution of England, nothing but a subsequent Act of Parliament can abolish, restrain, or impair such a preceding Act. There is no Constitution above it, that imparts an authority to arrest its operation in any case, nor upon the occurrence of any event whatever, except in this one way, by a subsequent Act of the same body which enacted it. If a written Constitution in England, superior to an Act of the Legislature, —if even the statute of 31 Charles II,—or any subsequent Act of Parliament, had declared 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, and under such a provision, it had been uniformly held that Parliament alone could declare the fact of rebellion or invasion, and the fact of public danger, or what the public safety required, there would have been an analogy which we might examine and consider. But under our different Constitutions, there is none. There is nothing of higher authority in England than the Statute of 31 Charles II, except a subsequent statute; and until such subsequent statute, its provisions are of absolute authority over King, and Privy Council, and Secretaries of State, and everybody. That statute gives to everybody committed to prison for any criminal or supposed criminal matter, which a subsequent statute extends to every commitment, not only a right to the Writ of Habeas Corpus, but a right to immediate bail, or speedy trial, or discharge from imprisonment. The statute contains no exception whatever. Nothing but a subsequent statute can make an exception. There is no ground or place to argue that the King's power to watch over the public safety, and to provide for it by all the means at his disposal, or his authority to proclaim rebellion or invasion, or even to call out the Militia, has any the least virtue to stay any part of the operation of the Habeas Corpus Act. The Constitution of England is absolutely silent, where the Constitution of the United States has at least

spoken. The Constitution of England is more than silent in this matter; it says that nobody but Parliament shall speak in regard to it.

Our Constitution, on the contrary, speaks to all subordinate authorities created by it. It does not say "*the Writ of Habeas Corpus*," or "*the Habeas Corpus Act*," shall not be suspended, a Writ and Act of Legislative ordination, whether made or to be made, and presumably to be repealed or suspended by similar authority only; but it speaks of the *privilege* of the Writ, by one word comprehending the whole protection of the principle, and declares that *it* may be *suspended;* by this one word *suspended*, also comprehending by the exception, all temporary and occasional disturbances, by imprisonment, by denial, delay, or hanging up for a season. Suspension is *authorized* by the Constitution by the same clause which guarantees the principle; and as the expression of the principle includes all its rights, the expression of the exception includes all temporary delays and denials of the rights which are included in the exception. The Constitution is *itself the authority*, and all that remains is to *execute* it in the conditioned case.

In regard, therefore, to the qualified right of being exempt from imprisonment without trial, unless in cases of rebellion or invasion, when the public safety requires such imprisonment, we must discard English analogy. The Constitution of the United States must be judged by itself, by its own distribution and ordination of the powers of Government, by the jealousies or confidences which appear in it, by its own language in fine, and not by the English Constitution or by the powers of Parliament.

There is still another particular in which we must guard against English analogy, when we come to examine the question of power under the Habeas Corpus clause.

It has already been suggested that the great motive of England for pressing the Habeas Corpus power into its present condition, was jealousy of the Crown. It was this feeling, as every one knows, that led Parliament in the 16th Charles I, to reduce the King's power of detainer by warrant, *expressly* to the same rank as that of any subject of the realm. It operated with more than the same force at the close of Charles II, whom the nation,

not twenty years before, and from their undoubted preference of hereditary monarchy, had recalled from exile to the throne. England deliberately preferred hereditary monarchy, with all its powers and dangers, to any other form of government; but it was the sense of these dangers, specially excited near the close of his reign by the occurrence of a particular case—Jenks's case—and by the prospect of a Roman Catholic successor in the King's brother, the Duke of York, afterwards James II, that impelled them to drive home, as it were, every stake that would prevent the King or his judges or officers, from removing the barrier of the Habeas Corpus Act from between the King and the people. The author of the 31 Charles II, Lord Shaftesbury, would have altogether excluded the successor, the Duke of York, from the throne, by act of Parliament; and so would the House of Commons that passed the Habeas Corpus Act, if the vote of that house alone had been sufficient. But the House of Lords could not be brought to concur.

Next to the benefit of exclusion was the benefit of the Habeas Corpus Act; and they passed it with as little respect for the Common Law principle, and with as much regard for their own power as any Parliament that ever sat; for in the very next year after that Act, the House of Commons, by its own authority, and by the speaker's warrant, seized in all parts of England and imprisoned multitudes who had dared to express in their addresses to Charles, their deep *abhorrence* of those who had offensively importuned him to call a Parliament. They were called *abhorrers*. The Parliament dreaded the King's power, and loved their own, more than they loved the general liberty of the subject; and their fears were very reasonable.

But in regard to the power of the President, as the draft of the Constitution had substantially settled it by major consent before the Habeas Corpus clause was proposed, there was absolutely nothing in the powers of the office which could justly excite jealousy, that he might abuse the power of suspending the Habeas Corpus privilege with a view to enlarge his other powers. The President has no powers that can be abused or enlarged by himself, except with more danger to himself than to the country. Elected directly or indirectly by the people for a short term of years—unable to *veto* a law of Congress if two-thirds of each House

shall concur in passing it against his advice—unable to make war, or to arm a soldier, or to call forth the militia for any purpose, or to build a ship, or enlist a sailor or marine—unable to make a treaty, unless two-thirds of the Senators present concur, or to appoint an ambassador, minister, consul, judge, or any other officer, without the advice and consent of the Senate, unless it may be *inferior* officers, *if* Congress shall choose to grant him the power—commander in chief of the army, but without power to arm a soldier—and of the navy, but unable to build a ship—commander also of the militia of the States, *if* Congress shall see fit to call them into the service of the United States—unable to adjourn Congress unless both Houses disagree—and impeachable for any misconduct in office by the House of Representatives, and triable and punishable by the Senate beyond the power of pardon,—this is the array of Presidential powers, as the draft of the Constitution substantially presented them, when the Habeas Corpus clause was proposed and carried. We cannot be surprised that in view of this scheme, an eminent English statesman and man of letters has said, that our Constitution of government exhibits "the feeblest Executive, perhaps ever known in a civilized community." *Bulwer Lytton* has said this, after seeing the Constitution on its printed pages. *M. de Tocqueville* has said the same, in more measured terms. We who are living under it, know that in the course of seventy years, no President but Washington could have obtained the office for a third term of four years, by the use of all the power of the office whether in war or peace, or by the devotion of his patriotic services. Whether Washington could have obtained it, remains an historical doubt. His prudence, and his experience of the office, withdrew him from the canvass. Jealousy of that office during the earlier part of the Convention, and in certain of the States before the adoption of the Constitution by nine States, was a topic with those who did not wish any Constitution or Union; but for sixty years at least, it has been beyond any sensible man's power of face to profess it gravely.

It is but reasonable to give weight to this consideration when the power of applying the exception shall be considered.

The Convention which prepared the Constitution were aware of all the circumstances which have been noticed,—the universality

of the Common Law principle, and the necessity of exception to it in times of great public disorder and violence, when war should be within the country, and the public safety placed in jeopardy, as well as the ordinary course of justice impeded. They were aware also of the manner in which the Constitution of England, under the Statute of Charles II, had exposed the principle to dangerous prejudice by the discretionary power of Parliament; and they deemed it wise to qualify the principle itself so as to protect the safety of the public in a season of great disorder, and yet to prevent its defeat by any power in any other condition of the country. The Common Law principle was suggested in the Convention in full universality, without exception of any kind, and three States adhered to it in their final vote; but the majority deemed it better for the Union to qualify and abridge the principle constitutionally, by annexing to it an exception most strictly limited to the occurrence of certain great and critical disturbances in the public condition of the country, and to let the public safety, at the times of such disturbance, and in those only, overrule the principle for the time and season.

Their departure from the English Constitution and rule, altogether set them aside as a safe analogy in the application of the clause finally adopted.

The history of the clause is not without interest, and pretty strong application.

The Convention to form the Constitution began its session on the 14th May, 1787, on which day there was no business done, nor any subsequent meeting until the 28th May. On the following day, the 29th May, Mr. Charles Pinckney, of South Carolina, exhibited a "Plan of a Federal Constitution," the 6th article of which, concerning the legislature, contained the following paragraph:

"All laws regulating commerce shall require the assent of two-thirds of the members present in each house. The United States shall not grant any title of nobility. The legislature of the United States shall pass no law on the subject of religion, nor touching or abridging the liberty of the press; *nor shall the privilege of the Writ of Habeas Corpus ever be suspended*, except in case of rebellion or invasion."

The different subjects of this paragraph have no common re-

lation between them, except that they are all restrictive; but the last clause is substantially new in two respects: first, in speaking of the *privilege* of the Writ of Habeas Corpus, and of the *suspension* of the *privilege*, which are not expressions of the Common Law, nor of Blackstone, its commentator, nor of Parliamentary law; and, secondly, in limiting the privilege to the case where there is neither rebellion or invasion. Deviating from the English Constitution and practice also, it proposed this universal safeguard of the privilege, that it should never be suspended unless when rebellion or invasion was upon us, and war, either foreign or civil, was within the country. War alone, if it was not attended by invasion, was not to have any influence upon the privilege; nor, perhaps, though in this respect the language may be too indefinite for legal distinction, any of those local seditions against particular laws of government, which commonly obtain the name of *insurrections*. The privilege was to remain in rigor, and to be intangible by any power whatever, executive, legislative, or judicial, except when a foreign enemy should invade the country, or when such formidable insurrections exist as deserve the name of *rebellion*.

Derivatively, the word signifies a *renewed war*, an uprising in war by a nation once subdued in war, which was the Roman sense; of course, a war against the Government of Rome. Dr. Webster makes the discrimination between rebellion and insurrection, that "*rebellion* is an open and avowed renunciation of the authority of the government to which one owes allegiance, or the taking of arms traitorously to resist the authority of lawful government; revolt. *Insurrection* may be a rising in opposition to a particular act or law, without a design to renounce all subjection to the government. *Insurrection* may be, but is not, necessarily, *rebellion*."

The Constitution, in defining the powers of Congress to call forth the militia, uses the lower term, *insurrection;* and so do the Acts of Congress of 1792 and 1795, which authorize the President to call forth the militia of the States; and very properly, as it was necessary to provide for an outbreak in its lowest type; and as all insurrections may become rebellion, the force raised to suppress insurrection may lawfully suppress it in all its forms and powers.

This, it has been remarked, was a deviation from the English Constitution, and from the Parliamentary practice or course also. Nor is the variation factitious or fanciful merely. It is a just political expression of the principle of the universal personal liberty of freemen under laws of their own making, qualified by the internal perils of their own government. War, generally, was not to be a limitation of the privilege, and ought not to be. War, beyond the limits of a country, leaves the courts and the laws of the country in full operation; but invasion by a foreign army, or rebellion against the government, overthrows or disturbs both the courts and the execution of the laws. In such cases the personal liberty of the freemen of a country becomes secondary to the public liberty of the nation, and must yield for the time to a higher interest and a higher principle, the public safety. As the Constitution finally reported says, it must yield so far in particular instances, as "the public safety may require it." The principle of the Common Law is not the principle of the Constitution of the United States. The principle of the English Constitution is not our Federal principle. Ours is a qualification of that principle, universal and unchangeable in its application. The principle of the English Constitution is universal in name, and changeable at the pleasure of Parliament.

Whether Mr. Pinckney was the first to express this limitation of the right of personal liberty, is not material. He would be more entitled to credit for first introducing it with his Plan of a Federal Constitution, if he had not subsequently appeared willing to throw it away.

The import of his clause is, nevertheless, in one respect obscure, by its imperfect grammatical dependence upon the previous clause. It expressly prohibited the *Legislature* from passing any law on the subject of religion, or touching or abridging the liberty of the press; and then, uniting the clause with what preceded it by repeating the same conjunction, *nor*, he separated it by a change of phrase, which is absolute in its meaning, and not relative to the Legislature; "nor shall the privilege of the Writ of Habeas Corpus ever be suspended, except in case of rebellion or invasion."

But from the form which Mr. Pinckney's proposition assumed afterwards, on the 20th August, it seems to be free from doubt,

notwithstanding the obliquity of the language and the imperfect grammatical structure of the sentence, that the Legislature was intended by the mover to be the suspending as well as the non-suspending power; that is to say, that the Legislature was to be the rein that should hold back or let free another power with whom the executive function of arresting and imprisoning must remain. The Legislature was to hold on to, or to relax the privilege. It is not improbable, therefore, that Mr. Pinckney used the word "suspended" in the same sense with the legal argument which has been already adverted to.

It is unnecessary to make further remark upon the clause which is contained in Mr. Pinckney's "Plan of a Federal Constitution," as it did not come up directly a second time.

Three months afterwards, on the 20th August, 1787, the first subsequent occasion in which the Habeas Corpus clause was mentioned in the Convention, and but about three weeks before the final adjournment of the body, Mr. Pinckney moved, not the adoption of his "Plan of a Federal Constitution," but a number of propositions to be referred to the Committee of Detail. On this occasion he gave to his Habeas Corpus proposition the following form:

"The privileges and benefits of the Writ of Habeas Corpus shall be enjoyed in this government in the most expeditious and ample manner; and shall not be suspended *by the Legislature*, except upon the *most urgent and pressing occasions*, and for a limited time, not exceeding months."

This proposition indicated a disposition to throw away that striking and important qualification of the privilege which had been expressed in his Plan of a Federal Constitution, and to substitute for it the discretion of the Legislature *on the most urgent and pressing occasions*, the omnipotent discretion of Parliament; and it would have brought the Constitution in this respect into perfect identity with the Constitution of England, with a *maximum* limitation of time, instead of the pleasure of Parliament.

It is this form of his proposition which indicates Mr. Pinckney's design in its original form, to give Congress the power of authorizing suspension; and certainly if the occasions of its exercise were to be *indefinite*, however urgent and pressing, as he

now proposed, nothing would have exceeded the incongruity of committing such a power to the Executive department of the government. We shall see how by making the power perfectly definite, and limited by conditions of executive cognizance and by *constitutional* legislation in the clause which made it, the reference to Congress became an incongruity, and was abandoned.

When the subject was finally brought up in the Convention, on the 28th August, we have from Mr. Madison but a brief and meagre statement of what was said upon the occasion. Indeed, Mr. Madison's minutes hardly deserve the name of "Debates in the Federal Convention," which has been given to them. They are a synopsis or general view, more or less full or impartial, according to the disposition of the writer, and to his own position as a member of the body; and though the men of this Convention probably reflected more and spoke less than any public body of its importance will ever do again in this country, yet no one can read Mr. Madison's work with attention, without surmising that on some occasions much more was said than is recorded; and that this probably was one of them.

The Convention on that day, the 28th August, were taking up and acting upon any motions, either generally and independently, or in amendment of any article or section of the proposed Constitution previously reported by the Committee of Detail, as the delegates were disposed to suggest them; and it is thus, that on a general or independent motion by Mr. Pinckney, the cause of the debate on the Habeas Corpus is presented by Mr. Madison.

"*Mr. Pinckney*, urging the propriety of securing the benefit of the Habeas Corpus in the most ample manner, *moved* that it should not be suspended but on the most urgent occasions, and then only for a limited time, not exceeding twelve months."

Probably this motion was exactly in the form last proposed by him, filling the blank with *twelve*. Mr. Madison does not quote any part of Mr. Pinckney's remarks with inverted commas.

"Mr. Rutledge was for declaring the Habeas Corpus inviolate. He did not conceive that a suspension could ever be necessary at the same time in all the States."

This cannot have been all that Mr. Rutledge said. The conclusion of his remark is in apparent contradiction to the begin-

ning, which expressed his opinion that the Habeas Corpus should be declared inviolable. The latter part seems to regard suspension of the *Writ* or *Act* as the object, and as being either local or general and not as personal. It was a clear mistake. The whole remark is, however, obscure; and there may be some reason to doubt whether the reporter's mind, or the delegate's, embraced the technical doctrine upon the subject.

The two paragraphs thus extracted from Mr. Madison's Debates, are all which they contain on the subject, before Mr. Gouverneur Morris made a motion, which disposed of the whole question. It is impossible, however, to believe that this important question, introduced on the second business day of the Convention, and which had been in view of the delegates for three months, had received as little of private consideration, as Mr. Madison's work represents it to have had, of public comment in the house. Enough, however, is recorded to show that it must have been in the minds of the delegates under at least three aspects: 1. Suspension of the *privilege* and not of the *Writ* or *Act*. 2. Suspension by the Legislature, and only by the Legislature. 3. Suspension generally, and by the department that would be intrusted in rebellion or invasion with the safety of the public.

Immediately after Mr. Rutledge, *Mr. Gouverneur Morris* moved that "the Privilege of the Writ of Habeas Corpus shall not be suspended, unless where (when) in cases of rebellion or invasion, the public safety may require it."

Now, to show how inconclusive and unsafe it is to infer a particular view to Congress in this motion, or in the clause which it proposed, from the *position* which is given to the words in the ninth section of the first article of the Constitution, as now arranged, which treats of the *legislative* power, it may be found on recurring to the Journal of the Convention, that Gouverneur Morris made the motion *expressly*, and so it was adopted by the Convention, as an amendment to the *fourth* section of the *eleventh* article of the Constitution, as it had been reported by the Committee of Five on the 6th August, and which was the *Judiciary* article. (Journal of Convention, Boston, 1819, page 301.) The subsequent change by a Committee of *Style and Arrangement* (this was the whole duty of the committee) in the numbers and sections of the articles, was not intended to change, and could

not change the import or meaning of any of them; but position, in the intention of the mover of the clause, might have, and probably had, a bearing upon its meaning; and this could hardly have been any other than to admonish the judiciary of a restraint upon their power over the Writ, which did not proceed from Congress, the body by which the particular details of the judicial powers were to be made. Whatever was his intention, the place assigned by him to the amendment, did, as it were, *expressly* negative the bearing of Mr. Pinckney's motion, upon the Legislature.

This motion by Gouverneur Morris, rejected the reference to the Legislature of the Union, and said nothing of a term or time of suspension. Mr. Morris had taken up the substance of Mr. Pinckney's proposition in his Plan of a Federal Constitution, submitted on the 29th May, had struck out the oblique reference to the Legislature which the clause in that Plan had contained, as well as the direct reference to it contained in Mr. Pinckney's motion, on the 20th August, and again on the 28th August, and presented it in the words above given.

"Mr. Wilson doubted whether in any case a suspension could be necessary, as the discretion now exists with the judges, on most important cases, to keep in gaol or admit to bail."

The delegate from Pennsylvania seems, from professional associations, to have thought the now superannuated discretion of the judges in capital cases, was a good substitute for any power of suspension, legislative or executive; and to have looked at the suspension referred to, as an *act*, and a judicial act, dispensing with any interference by Congress.

The entire history of the clause, as recorded by Mr. Madison, is thus closed:

"The first part of Mr. Gouverneur Morris's motion to the word *unless*, was agreed to *nem con.* On the remaining part, ayes, 7; no, North Carolina, South Carolina, Georgia, 3."*

Mr. Morris's clause is the same which now stands in the 9th section of the 1st Article of the Constitution, *when* being in

* There were four delegates from South Carolina, of whom three must have voted against it. Probably Mr. Pinckney was one of the three, as his own motion was excluded by that of Mr. Morris.

substitution of *where*, perhaps by the Committee on Style and Arrangement.

Looking at this clause as it is contained in the Constitution, with the aid of its short history, it is the statement of a fundamental rule of personal liberty among freemen in the United States, universal, but not unqualified, and not calling for any legislative action to enforce or apply the qualifying exception.

The word *Legislature*, which was contained in Mr. Pinckney's "Plan of a Federal Constitution," and probably also in his motion, when the subject was finally disposed of, was thus cast aside, and an entirely new form and new limitations were given to the principle; the qualification or exception being founded on public facts, upon the occurrence of which, the Constitution authorizes the suspension of the privilege, by the act of that power which is competent to decide upon them.

What department or power should have the authority to declare what the public safety required in such a case, the Constitution neither expressly declares nor expressly intimates, by any word or words whatever. The clause was a substitute for Mr. Pinckney's original clause, which contained the word *Legislature*, as his second proposition did also, and rejected that feature of it without the least ambiguity. If these propositions of Mr. Pinckney intended to confer this power upon the Legislature, the substitute disclaimed the intention by rejecting it.

The clause has no phrase or word in it, which either directly or by any fair and reasonable implication, gives or confines this authority to Congress, or takes it away from the Executive. The whole question of deciding with authority, when in cases of rebellion or invasion, the public safety requires the suspension of the personal privilege of the Writ of Habeas Corpus, is left by this clause to the person, body, or power, invested by other parts of the Constitution, with the care of the public safety, to this intent and effect, in time of rebellion or invasion. There can be no reasonable doubt about this.

We may argue from the nature of the right, or from the guarantee which it receives from the fundamental law of the Union, or from the condition in which the government was to be placed by internal war, from rebellion or invasion, that the authority is to be exercised by this department of government, and not by

that or by another; but we cannot argue reasonably that the clause itself gives any color of authority to one department more than another, except as one department of the government and not another is more specially charged by other parts of the Constitution, with the care of the public safety upon the occasion referred to; nor can it be fairly argued upon principles of analogy, drawn from the English Constitutional or Parliamentary history, for the clause is entirely un-English as it is truly American. It is un-English, because it ties up the Legislative power, as well as all other power; and it is American, because it is of American origin, and is conservative of personal freedom in general, and also of the public safety in times of imminent internal danger of a specific character.

The present position of the clause in the Constitution is not of the least importance. According to the Journal of the Convention, the clause was offered as an amendment to the fourth section of the article on the *Judiciary*. If position as a section of an article carries power to the article, then the original motion as adopted carried power to the Judiciary, and must have regarded suspension of the privilege as a judicial act, and not as dependent on a Legislative act. The simple and clear language of the clause is, in what it directly expresses, restrictive of all power; in what it inversely expresses, it is permissive of some power,* and authoritative as to its application in the contingencies stated. It affirms the common law principle with an exception for the public safety, thus qualifying the absolute rule of

* If the negation of power by the clause had been complete, as according to Mr. Madison's Debates was desired by North Carolina, South Carolina, and Georgia, so much the weaker had been the Government of the United States to suppress rebellion, and the States none the stronger, except in ability to rebel, which is their weakness also. The affirmative or permissive power in the clause is simply a power to suppress rebellion, or to repel invasion. By attributing it to the Executive, the whole government of the Union is organically stronger in that arm which has the main labor and control in both the contingencies; and it is the only arm that is directed by a single eye. If it had been given to Congress, not only would it have wanted that single eye, but it would have been liable to sway from extreme rigor to extreme relaxation, by antipathy or sympathy for the constituents implicated in the internal war; and would, moreover, have been productive of those agitations which mark the suspensions of the privilege by Parliament, as they must necessarily mark every large representative body at such a crisis. There are some striking and impressive remarks upon the mere negation of power to government, in LIEBER's excellent work "*On Civil Liberty and Self-Government*," enlarged edition, 1859, p. 372.

the common law, and defending or withdrawing it from all other restrictions. It is not from restriction or contingent permission like this, that power can be fairly derived to Congress, by position in a section of an article which treats of Congress. The power must depend infinitely more upon the nature of the contingencies themselves, than upon position. It is a case, in which neither the clause itself points directly to the power, nor does the power given to any of the departments point directly to the clause; but the effect of both is like a *resultant* in mechanics, proceeding from the two forces of the clause and of that department, which, from *the nature of the contingencies*, must be one of the combining parties to produce it; and the Executive alone is that department.

For the reason probably that the clause is directly restrictive, the committee of Convention appointed to revise the style and arrangement of the articles agreed to, placed it in the ninth section of the first article of the Constitution, which is restrictive from beginning to end. With the exception of this clause, and one that precedes it, and prohibits the *prohibition* by Congress of the importation of slaves prior to 1808, there is not a paragraph in the section which does not begin with a restraining and disabling *No*. Most of these paragraphs restrain and disable Congress. One of them restrains the Executive department; another of them restrains all persons who hold an office of trust or profit under the United States, in whatever department.

In the first of the instances, the general negative of these restrictions is qualified by an express limited affirmation of the power of Congress, to prevent a sweeping or unqualified disability; and there is a limited affirmation which qualifies the general negative in the Habeas Corpus clause; but with this remarkable difference, that, while the power of *Congress* is expressly affirmed in the first, it is not expressly affirmed in the second. The word *Congress* is not there. It existed in Mr. Pinckney's proposition and was left out in Mr. Morris's. Considering the facility with which it might have been introduced or retained, we may say it was *struck* out. Position in the ninth section of the first article of the Constitution is not only of no avail, but the argument from position is more than countervailed by expression; and is emphatically overcome by the Journal of the Convention.

But no instrument, moreover, permits the interpretation of its clauses to be affected by position, less than the Constitution of the United States. The matter of arrangement, especially as to the independent propositions made and agreed to in Convention, and most especially as to the Habeas Corpus clause, which was not contained in the draft of a Constitution reported by the Committee of Detail on the sixth of August, when the great plan and principles of the three departments had been discussed and agreed to by a majority, had less consideration than any other subject. The Committee on Style and Arrangement was the best possible; but though several amendments to parts of their report were offered in the Convention, no articulate consideration was given to the order and position of the different sections and clauses, as reported by that Committee. From the manner in which the amendments were made to the Constitution after it was adopted, all but the 11th and 12th have no position at all. One of these was intended to abridge the judicial power, the other to alter the mode of electing the President. The whole must have the same meaning wherever they may be placed. Their most natural position is in the same section with the Habeas Corpus clause, as they are uniformly restrictive.

The most important differences between the Constitutions of England and the United States in regard to the Habeas Corpus privilege, and between the modes in which an exception to the privilege is authorized, may now be recapitulated.

1. The Constitution of England, properly speaking, authorizes nothing in this respect, nay, negatives suspension, by the universal principle of the Common Law, that there is no exception under any circumstances to the right of bail, trial, or discharge, without delay.

The Constitution of the United States affirms that principle, with one exception, and authorizes a departure from it in that excepted case.

2. The voice of Parliament, equal in the ears of the English Courts, and more than equal, to the voice of the unwritten Constitution, authorizes Parliament, and under what circumstances it pleases, to authorize a denial of the privilege.

The Constitution of the United States, unchangeable by Congress, declares by its own will, an exception to the privilege, and

authorizes it to be made, and the privilege to be denied for a season, in the excepted cases and in no others.

In other words, Parliament authorizes *an* exception to be made, dependent for execution on the pleasure of the Crown. The Constitution of the United States, establishes *the* exception of rebellion or invasion, and the requirement of the public safety, and authorizes the exception to be executed by the body that is under the Constitution empowered to declare these facts; but without saying by what department it shall be made.

3. Under the Constitution of England, a law of Parliament alone can make an exception in England, to be applied as Parliament directs. In the United States the exception is made by the Constitution, with authority to one of the departments to apply it, without expressly saying which.

4. In England the denial of the right of bail, trial or discharge, is the joint effect of the Statute and of the Act of arrest and detention by the Crown.

In the United States it is the joint effect of the Constitution and of the arrest and detention by the department, which is competent to order it.

If the clause in the Constitution had said of the WRIT of Habeas Corpus, or of a Habeas Corpus ACT, enacted or to be enacted, what it says of the PRIVILEGE of the Writ, there would have been some ground for the Argument, that a Writ of Habeas Corpus, and a Habeas Corpus Act, being the work of the Legislature, the suspension of the Writ or Act should be made by the Legislature also. But the *privilege*, the *personal* privilege being alone spoken of, an act of arrest and detention by the department which is competent to ascertain the conditions of the exception, together with the effect imparted by the Constitution, is sufficient, and no legislative Act is necessary,—*unless*, and this is the *gist* of the whole question, a legislative Act is necessary to ascertain the conditions of the exception.

The *gist* of the question seems then to be this, whether it requires an Act of the Legislature, to declare that Rebellion or Invasion exists in the Country, and that the public safety requires the suspension of the privilege. If it does, then Congress alone has the power to pass such an Act: if it does not, then the power of enforcing the execution falls necessarily to the

Executive. The judicial department cannot be the body to interpose, because its functions are not directly pointed to any of the facts, either Rebellion or Invasion, or the demands of the public safety on such occasions. Indirectly, and in cases, or judicial controversies, they might take cognizance of each of them.

This question of the power of Congress over this matter, has never been decided, authoritatively; and it has never been argued with any care, or perhaps argued at all, by a Court, or by Counsel in Court. So far as authority goes, it is at this time, a question of the first impression. There probably has been, and still is, a strong professional bias, in favor of the power of Congress, perhaps a *judicial* bias, if that be possible. It was not easy to avoid the bias under the influence of English analogy, which some preceding remarks were intended to disqualify; but there is nothing on the point, that is judicially authoritative.

Chief Justice Taney's opinion in Merryman's case is not an authority. This of course is said in the judicial sense. But it is not even an argument, in the full sense. He does not argue the question from the language of the clause, nor from the history of the clause, nor from the principles of the Constitution, except by an elaborate depreciation of the President's office, even to the extent of making him, as Commander-in-Chief of the Army called from the States into the service of the United States, no more than *an assistant to the Marshal's posse:* the deepest plunge of judicial rhetoric. The opinion, moreover, has a tone, not to say a ring, of disaffection to the President, and to the Northern and Western side of his house, which it is not comfortable to suppose in the person who fills the central seat of impersonal justice. But this may be the apprehensiveness of the reader.

The remarkable feature of this opinion, is that for proof of the President's exclusion from the power, the Chief Justice dwells upon the President's brief term of office—his responsibility, by impeachment for malfeasance in office—the power of Congress to withhold appropriations for the Army, of which he is Commander-in-Chief, and to disband it if the President uses it for

improper purposes—his limited power of appointment—his limited treaty-making power—his inability to appoint even inferior officers, unless he is authorized by Congress to do so. Chief Justice Taney has elaborately stated all this, without appearing to perceive, that these very considerations may have, and certainly ought to have, induced the Convention to devolve upon the President, exclusively, the trust and power of suspending or not suspending the privilege in time of rebellion, as he should think the public safety required. The constitutional limitations of the office make the President the safe and the safest depositary of such a discretion. There can be little danger of abuse from an office of such powers. It was the great power of a King of England, that was the operative motive with Parliament for taking the power of suspension from him; and they have left it in a body that is of equal power under the Constitution, and apparently on its way to greater.

Chief Justice Taney quotes the language of one whom he justly calls his "great predecessor," as standing in place of argument and of other authority with him; and if that predecessor, in a case properly bringing up the point, had discussed it after argument by counsel, as he discussed all other constitutional questions so brought up for judgment, all would have been silent; and, *factoque hìc fine*, there would have been rest to the question. He too, that great judge and statesman, had his bias, though it was all on the side of the Constitution, and of its due operation in all parts; but, with his vigorous mind and pure heart, he drew himself up erect, to the elimination of that and every other bias, when he pronounced judgment. There was nothing *thwart* in his nature. The same straight and long limbs of body and mind, which he had when he first drew his youthful sword in defence of his country, he continued to have to the last sands of his patriarchal life. It is the occasion of deep grief, that he did not live to handle this and another question of Constitutional Law, that, more than all others, have agitated this nation. His analysis and authority would have settled them both forever.

But the language of Chief Justice Marshall, whatever be its meaning, was not used in a case which brought up the question. The case of *Ex parte Bolman* in 4 Cranch, could not bring up

the question whether the President or Congress had the power of suspending the privilege of the Writ in cases of rebellion or invasion. There was no rebellion nor invasion at the time; and no suspension of the privilege by either Congress or the President.

The question then before the Court, the first question in *Ex parte* Bolman, was whether the Supreme Court, having no original jurisdiction of the case, could issue a Writ of Habeas Corpus to bring up the body of Bolman, and the record of his commitment by the Circuit Court for the District of Columbia. The Court was somewhat divided upon the point, and the writ was issued, two judges out of the five dissenting; but the manner in which it was argued, not at all the necessities of the case, induced the Chief Justice to say, "that if at any time the public safety should require the suspension of the power vested by this Act (the Judiciary Act of 1789), in the Courts of the United States, it is for the Legislature to say so. That question depends on political considerations, on which the Legislature are to decide. Until the Legislative will be expressed, this Court can only see its duty and must obey the laws."

Perhaps there is nothing in this language that, taken with reference to the case, is open to exception. The power to *issue the Writ* was the question; and as the Legislature had given this power to the Court, it was apparently reasonable to say, that the Legislature only could suspend that power. The whole language does however say further, that if the *public safety* should require the suspension of the powers vested in the Courts, adverting, perhaps, to the language of the Habeas Corpus clause in the Constitution, it was for the Legislature to say so.

But there was nothing before the Chief Justice to raise the distinction between Congress and the President; nor between the *privilege* of the Writ as descriptive of a personal right, and the *Writ* itself as authorized by law; nor between the operation of the Constitution itself, and the operation of a law of Congress. Certainly Chief Justice Marshall would not have said, that if the Constitution, either expressly or impliedly, had given to the President the power to suspend the privilege, his Act would not be as effectual upon the Courts, and upon the law of Congress which gave power to the Courts to issue the Writ, as any Act of

Congress would be. The proper question would then have been between the Constitution and Congress, and not between an Act of Congress and the Court. It was however altogether *obiter*, whatever was the Chief Justice's meaning; and was no authority, though it is all that Chief Justice Taney cites as of *judicial* decision.

Judge Story's remarks, which are also referred to in Merryman's case, are of even less weight; not from personal considerations, but as they are those of a Commentator, and not of a Judge in his place. The point of them however is easily taken away.

In commenting very briefly upon abuses of personal liberty in England, including abuses by Parliament, and of the restraint placed upon them by the clause in the Constitution of the United States, Judge Story remarks: "Hitherto no suspension of "the Writ has been authorized by Congress, since the establish- "ment of the Constitution.—It would seem, as the power is given "to *Congress* (sic) to suspend *the Writ* of Habeas Corpus in case "of Rebellion or Invasion, that the right to judge whether the "exigency had arisen, must exclusively belong to that body."— As this is printed in Judge Story's work, the last clause, which begins diffidently enough, proceeds at once to do something more than to beg the question. It demands or extorts it. The very question, is whether the power is given to *Congress*. Certainly no power is given in terms to any body to suspend the Writ. There is more in the same sentence on which it is not necessary to remark.

In the absence then of authority upon the point, it is necessary to repeat,—that the clause in the Constitution uses a well-understood phrase, to express a well-known meaning, independently of all legal forms. It means that bail, trial, or discharge from imprisonment shall not be denied to any freeman, except in a certain description of case; but that when that case shall occur, it may be denied for a season, if the public safety requires it.

Congress, under the Constitution, might adopt any form of judicial relief, and endow its judicial department accordingly— the civil law process, "*de homine libero exhibendo*," or the Spanish "*el despacho de manifestacion*." If Congress had taken

either, it would not have altered in the least the effect of the clause in the Constitution. The privilege of "the Writ of Habeas Corpus" must necessarily have been understood to assert the privilege of relief from imprisonment by bail, trial, or discharge.

The writ of Habeas Corpus was better known in the States, and therefore most appropriate; but the privilege is not inseparably bound to that or any other specific remedy. The reference to the Writ, was to describe the privilege intelligibly, not to bind it to a certain form.

The privilege is guaranteed to all freemen generally by the Constitution; and the denial, for a season, authorized.

The question is, by whom the denial or interruption may be made; and this must be decided by the constitutional powers of the different departments, as that instrument has established them, and as the nature of the conditions requires.

The clause does not by its necessary implication give power to any department to *authorize* the suspension of the privilege, but it gives power to *suspend* it in the cases conditioned,—that is to say, to deny it temporarily, with the effect declared by the Constitution. The Constitution itself authorizes the suspension under the appointed conditions.

The suspension of the privilege under this constitutional power, becomes an executive act, and not a legislative act. A power by the Constitution to *authorize* the suspension of a privilege, would be a power to authorize it by legislation, and then the suspension would be an executive act, under the legislative authority. The Constitution itself authorized the suspension under conditions, and therefore the suspension in the cases supposed, is an Executive Act. The same well-understood meaning of "*the privilege of the Writ of Habeas Corpus*," makes the guarantee of the privilege mean what it does, though not expressed, and also makes the "*suspension*" of the privilege mean what it does, though not expressed, namely, a denial for a season of bail, trial, and discharge. Under the power given by the Constitution, this denial is an executive act, and it can never become anything but an executive act.

If the *conditions* under which the Act of denial for a season is executed, do of themselves require legislation, or are legisla-

tive in their character, then so far, it must be admitted, that legislation must enter into the execution of the power; but Congress, personally, can never suspend the privilege, by act on the person to be affected.

Parliament never does this. It authorizes the Crown to do it, or declares the effect of what the Crown shall do. This is all that Congress can do—give effect to an Act by the President or somebody else—and this the Constitution does already.

The question is whether the conditions of rebellion and invasion, and the demands of the public safety in such a conjuncture, require declaratory legislation to establish them. If they do, then it would seem that Congress alone has the power to establish them. If they do not,—if in this *special* conjuncture they are within the proper functions of the Executive Department of our Government, then the President may establish them, and the power of denying the privilege for a season, belongs wholly to his office, with the effect which the Constitution allows.

The *special* conjuncture is referred to, because the authority of the Legislature to provide by law for the general safety of the nation, will not be brought into question. But the conditions under which this privilege may be denied, are peculiar, and demand consideration.

There are two conditions by the clause in the Constitution, which are to precede the exercise of the power to suspend the privilege. Speaking with reference to the present day, they are rebellion and the requirement of the public safety, that is, that the public safety requires the suspension of the privilege. It is not public safety in general, but public safety in that conjuncture of rebellion that is referred to by the Constitution; for the clause has connected inseparably the suspension of the privilege with rebellion, or with invasion when that happens. Rebellion and the suspension of the privilege are contemporaneous and conterraneous. They occupy the same country at the same time. They are indissolubly connected as cause and consequence. They have a necessary relation, not only to give existence to the power of suspension, but in the exercise of it; and to such a degree, that if the power were exercised except for the defeat or suppression of rebellion, it would be the widest possible departure from the spirit of the Constitution, and from official duty.

If this power is devolved by the Constitution upon the President, no one can doubt, that if the President were to suspend the privilege of any person, except upon reasonable ground of belief, that to bail, try, or discharge him in that conjuncture, would prejudice the public safety, in the very matter of the rebellion, it would be unconstitutionally suspended, and be attended by the grave responsibility which the Constitution asserts.

This is the Constitutional aspect of the suspension of the privilege of the Writ of Habeas Corpus, and of the public safety which is concerned in the exercise of the power.

Now to ascertain whether as to these two matters of rebellion and the public safety as affected by it, the President is officially competent to decide and declare them, there is no necessity to analyze the powers of the Executive with any elaboration. That the duties of the President to take care that the laws be faithfully executed, and to defend and protect the Constitution as well as to support it, and both to decide the fact of rebellion, and to measure the danger of the public arising from it, and what the public safety requires in this behalf, do belong to the Executive office of the President, we have the constant and continued voice of the Legislature, the voice of the law itself, for sixty-five years, from the very next session of Congress after the suppression of the Western Insurrection, in 1794, down to the present insurrection, raised to its highest power of rebellion against the Government.

That voice is to this effect, that not only is it the President's power to declare the existence of rebellion, and what the public safety requires in regard to it, but that it is his duty.

The power to do this is not granted to him by Congress, but it is assumed by Congress to be both his power and his duty to exercise it; and very large power is given to him upon that hypothesis, to assist in the execution of what is manifestly a Legislative power, namely, the calling forth the Militia.

It was the assumption of the Legislature in regard to *invasion*, from the very first moment that Congress, in the dawn of the Government, provided for calling forth the Militia to repel invasion or to suppress insurrection; that it was the President's duty to declare and decide its existence. It was the assumption of Congress also, in regard to the President's power and

duty to say what the public safety required, both in *rebellion* and invasion. But in this first Act of 1792, in one of those spasms of jealousy, by which party sometimes throws legislation out of its Constitutional path, when the bill was before the House of Representatives, an amendment of the most absurd kind was proposed to the section which provided for the case of *Insurrection*, deviating from the course adopted by a preceding section in regard to *invasion*, namely, that before the power given to the President by the Act to call forth the Militia should arise, an Associate Justice or a District Judge of the United States should notify the President, that the laws of the United States were opposed, or the execution of them obstructed, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the Marshal by the Act,—the *posse* of the districts.

It was an absurd provision; for the judges could have no materials for their judgment, except what they derived from the Executive department; and in point of fact, before President Washington could call out the militia to suppress the Excise Insurrection in Western Pennsylvania in 1794, the Executive department was obliged to exhibit the evidence of the fact to Justice Wilson of the Supreme Court, to obtain his *fiat;* he at the same time, as a Justice of the Supreme Court, knowing no more about the matter personally or officially than any other reading man in the country. The insurrection had no relation to his office. As one of the movements adverse to Washington in that session of Congress, when persons, whom we may remember, were laying the foundation of the State Rights party under a different name, the amendment was carried, and this strange feature given to the law. But in the very next session which followed the Western Insurrection, the Act of 1792 was repealed; and by an Act of 28 February, 1795, which is still in force, and was President Lincoln's authority for his recent calling forth of the militia, insurrection and invasion were placed, in respect to the President's decision, upon the same footing.

And the footing is quite remarkable. The Act does not refer the decision to the President *nominatim*. It does not *grant* to the President the power of deciding the question of fact. It *assumes* that it belongs to his office to decide each of these facts;

and simply enacts, "that when the United States shall be invaded or be in imminent danger of invasion," and "that whenever the laws of the United States shall be opposed, or the execution thereof be obstructed in any State, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshal by this Act, it shall be lawful for the President of the United States to call forth the militia of such State, or of any other State or States, *as may be necessary to suppress* such combinations, and to cause the laws to be duly executed." The President, from the very nature of the facts, and the duty of his office, decides them himself; and in the case of *Van Martin* v. *Mott*, 12 Wheaton, the Supreme Court decided that the President's judgment upon the facts was conclusive upon everybody. He decides the fact of rebellion. He declares the number of militia necessary to cope with the insurrection.

And what other department can officially declare these facts? Which department is to take care, directly and universally, that the laws be faithfully executed, and officially to know that the execution is obstructed by combinations too powerful to be suppressed in the ordinary course of judicial proceedings, or can anticipate the necessity for armies to suppress rebellion, and the number required to that end, or is bound to devote his functions constantly to the defence and protection of the Constitution? Which department has the whole Executive power of the United States, and with it the primary duty of deciding the facts which regard the execution of the laws and Constitution of the country?

It is manifest then that there is no necessity for a *law* of Congress to determine the great fact of rebellion or invasion, or the general or particular danger to the public arising from it, upon which the suspension of the privilege of the Writ depends. From the dawn of the Government, Congress has left these facts with the President, and with him alone.

The President's *means* of acting upon his decision, the Army, Navy and Militia, and their numbers, duration and support, must depend upon Congress. This is their department. But, if Congress were to take from him the power of deciding upon the extent and necessity of these means, it would invade the Executive Department, which is to sustain the execution of the

laws. And if they were to deny him the means, the responsibility would be with Congress.

The President does not decide the facts conclusively upon Congress, so as to command the means, or so that Congress must follow him by providing the means; but he decides them officially; and that is all that is necessary to give effect to a warrant of arrest by him, and a temporary denial of the privilege of the Writ of Habeas Corpus.

There is no necessity for supposing, in regard to the safety of the Country, generally and at large, the great measures which are to express the wisdom of the Legislature in providing for the stability and security of the Country, and for the extension of its power, to make it safe against both Invasion and Rebellion, that these measures are not to come from the Legislature. They are Legislative measures, and must come from the Legislature alone; though when they are consummate as laws, they must fall within the Executive department in every particular in which that department has anything to do with them, by force of the laws or the Constitution. But in the case of *actual* rebellion and *actual* invasion, the declaration or proclamation of the facts, is not Legislative, but executive; and so is the decision of what the public safety requires, for that is a conclusion of fact from other facts, within the range of the same Executive duty.

The perfectly untrammelled judgment of the President, has been resorted to by Congress, not by their own Legislative prescription, but under the Constitution, to estimate the dangers of insurrection in all degrees of force up to rebellion, and to estimate the military forces which safety requires. What does safety require, but that the offending force of every description, overt and in ambush, shall be unmasked, assailed, and overpowered, by a greater force on the side of the Government and the law? And these are facts, and conclusions of fact, which it is specially and officially the power and duty of the Executive office to investigate and make. Congress may abide by his judgment or not in regard to the amount of military forces, and may supply the means of safety or not, at its pleasure; though this only saying that they may be untrue to their trust at pleasure. These are *their* powers under the Constitution, and they have many others. But it is impossible fairly to deny, that the

department which holds and directs the Executive power of the Government—which is charged with the execution of the laws, and with the command and disposition of the military force—with the whole Executive power of the nation, subject to the exceptions and qualifications which are expressed in the Constitution, of which there are none that touch this question—is trusted by that instrument with the supervision of the Union, with the power to estimate what is its danger and what is required by the public safety in time of rebellion, and of deciding and executing his decision, to the extent of all the means at his lawful command.

These remarks meet the objection, if it shall be raised, that any of the conditions under which the suspension of the privilege of the Writ, or the denial of that privilege for a season, is authorized by the Constitution, require legislation or the exercise of the power of the Legislature except as to the means. They do not require it as to the subject. Both the fact of rebellion and what the public safety requires, to the defeat or suppression of rebellion, are of Executive cognizance and decision, and of execution also, to the whole extent of the lawful means of that department. It is a breach of the President's duty, not to declare the fact, when the laws are opposed, and the execution of the laws is obstructed by combinations too powerful to be suppressed by the usual course of judicial proceedings, and the Marshal's posse. It is his special function and obligation under the Constitution to decide it, and to the extent of his means, to provide for the safety of the public, which he cannot do without saying what it requires.

From this plain and natural view of the Executive department, there is a most obvious and just deduction in regard to his power to suspend or deny for a season, the privilege of the Writ of Habeas Corpus in time of rebellion. The course of justice is at such a time obstructed. Courts of justice execute their office imperfectly. In some instances they are closed, and their officers are put to flight. In some, their judges and officers are parties to the rebellion, and take arms against their government. In other instances, the people, the jurors, the officers of courts, are divided in their opinions, attachments, families, affinities. Calmness, impartiality, and composure of mind, as well as unity of

purpose, have departed. It is not a season for the judicial trial of all persons who are implicated in the rebellion. It cannot be while the rebellion lasts. To arrest and try even those who are openly guilty, and are taken with the red hand, would, in many places, be fruitless, and only aggravate the evil. The methods and devices of rebellion are infinite. They are open or covert, according to necessity or advantage. In arms, or as spies, emissaries, correspondents, commissaries, proveditors of secret supplies and aids, their name is sometimes *legion;* all treasonable, and many of them disguised or lying hid. A part of this disguise may sometimes be detected, and not often the whole. An intercepted letter, an overheard conversation, a known proclivity, an unusual activity in unusual transactions, in munitions, or provisions, or clothing,—a suspicious fragment and no more, without the present clue to detection, may appear—not enough for the scales of justice, but abundantly sufficient for the precautions of the guardian upon his watch. Such are the universal accompaniments of rebellion, and constitute a danger frequently worse than open arms. To confront it at once, in the ordinary course of justice, is to insure its escape, and to add to the danger. Yet the traitor in disguise may achieve his work of treason if he is permitted to go on; and if he is just passing from treason in purpose to treason in act, his arrest and imprisonment for a season may save both him and the country.

The obvious and just deductions from these observations is, that the power of suspending or denying for a season, the privilege of the Writ of Habeas Corpus in time of rebellion, is a most reasonable attribution to the Executive power, such as the Constitution of the United States has made it; and so indispensable to that branch of the Government, that without it, the very arms of the Government might be baffled and its worst enemies escape.

The Legislature cannot execute the power itself. If the power is limited to them, they must delegate it to somebody. All that is claimed for Congress to do, is upon some judgment of the facts which constitute the danger to the public, to commit the discretion to the Executive. But why form a judgment, and then leave the whole judgment to the Executive as they must? Why claim for Congress the power to suspend, when

the actual and efficient power as an Executive act, must be with the President? It is claiming a power for Congress *invidiosé*, which the Constitution did not feel, or it would have spoken. The Parliament of England delegates it to the Crown, because Parliament alone can surmount the Constitution, or restrict the operation of the Habeas Corpus Act, or declare an exception to it. Parliament must act; why must Congress act? But connecting the exception inseparably with rebellion, as the Constitution of the United States does, and leaving the exercise of the power to that body which can best execute it, and is the paramount director of the public force in time of rebellion, it is a reasonable conclusion from the whole, that the Executive department is the body to which the Constitution leaves it, and not the Legislature. The power to *authorize* suspension is legislative. If Congress has the power to authorize it, they may possibly authorize the President to execute their law. They may authorize him *perhaps*, if the Constitution does not authorize him. And if Congress shall authorize the President to execute their law by his warrant against the persons he shall think within its purview, then, be it remarked, Congress by their law will leave to the President, the very power of deciding whether the *public safety* requires that the privilege of those persons shall be suspended. Congress cannot do otherwise if they pursue the course of Parliament, or the only example in their own body, of a bill to suspend the privilege. No Act of Parliament has ever passed to deprive arrested persons of bail or trial, which did not leave to the King the power, by his Privy Council or Secretary of State, to decide whether the public safety required the arrest to be made. Unless Congress shall, by the act itself, designate by name the persons to be arrested, A. B., C. D., E. F., and make that body itself the executive officer, the question of what the public safety requires, in regard to the suspension of this personal privilege, must be decided by the President, and can be decided by no other person.

Perhaps if Congress has the exclusive power to *authorize* the suspension, it may assign this duty to the President; but this, *perhaps*, if we may advert to an objection which we find in the *Federalist*, is constitutionally the subject of as much question as anything in the case.

Between the report of the Constitution to the old Congress, and the adoption of it by the required number of States, among other objections to it of State Rights origin, was one that the power of pardon had been given to the President instead of Congress, and the reply to this was by Hamilton.

"But the principal argument for reposing the power of pardoning in this case in the Chief Magistrate is this: In seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels, may restore the tranquillity of the Commonwealth, and which, if suffered to pass unimproved, it may never be possible afterwards to recall. The dilatory process of convening the Legislature or one of its branches, for the purpose of obtaining its sanction, would frequently be the occasion of letting slip the golden opportunity. The loss of a week, a day, or an hour, may sometimes be fatal. If it should be observed, *that a discretionary power, with a view to such contingencies, may be occasionally conferred upon the President*, it may be answered in the first place *that it is questionable whether, in a limited Constitution, that power could be delegated by law.*" Federalist, No. 74. Perhaps it might have been added—especially to the President, the limitations of whose office were as much the effect of deliberation by the Convention, as the limitations of Congress.

The whole of the paragraph from the Federalist, is as applicable to the power of arrest and detention in time of rebellion, as it is to the power of pardon.

There are some other objections to this conclusion, which will be briefly noticed. None of them are of the least weight, except so far as they may serve to make it improbable that a power of this nature would be placed by the Constitution in the hands of the President. If the Constitution has placed it there, that is to say, if it falls to that place by the nature of the Government, and by the language of the clause, they avail nothing. Forget the analogies of the English Constitution, and reason from our own, and it will be seen that it falls to that hand, and to no other in time of rebellion or invasion, when alone the power can be exercised.

How natural and easy—indeed how inevitable it was—that

the original form of the proposition, which included the *Legislature* only, should be preserved, if the power was intended finally for Congress, and not for the Executive department.

In opposition to an intention to leave the power to Congress, observe the striking departure from parallel, of the *second* clause of section nine, article one, from the *first* clause of the same section.

First clause: "The migration or importation of such persons, &c., shall not be prohibited by *Congress* before the year 1808, but a tax or duty" (expressly within the power of *Congress*, section 8) "may be imposed on such importation."

Second clause: "The privilege of the Writ, &c., shall not be suspended, unless when, &c., the public safety may require it."

The word *Legislature* in Mr. Pinckney's proposition, abandoned in the second clause, after the express insertion of *Congress* in the first.

If there is anything in *present* position, this change of language is more than a counterpoise.

The Constitution has for obvious reasons *enumerated and specified* the powers of Congress. If Congress was to have the power of suspending the Writ, why not specify it with the other powers in the eighth section?

If it is asked, why not have done the same, if it was intended for the *President*, the answer is this: The Executive power is vested in the President by *general* terms, by one concise and comprehensive sentence; those powers of the office are alone specified or enumerated, which the President exercises in connection with the exercise of powers by other departments and officers, or in control of them, as in the case of making treaties, commanding the army, navy, and militia, appointing to office, requiring written opinions from his secretaries, granting reprieves and pardons, adjourning Congress in case of disagreement, and the like.

The question comes back—Does *suspended* in the Habeas Corpus clause mean suspended by *law*, or simply suspended, *denied*, *deferred*, *delayed*, *hung up* for a season? Is it to be carried into effect by a law of Congress, or by an act of another department, to which, as an executive authority, it appertains?

The position taken sometimes in regard to other provisions of the Constitution, that what a Constitution of government ordains generally, it means to be carried into effect by law, fails in a great variety of cases.

It fails of course, when, what the Constitution ordains on a subject, is all the law it requires; as where a power to perform an executive act is given, and the Constitution by its own terms declares the effect of the act; which is the case with suspension of the privilege of the Writ of Habeas Corpus. The word "suspended" gives effect to the act when it is executed under the authority of the Constitution, and by the competent authority under it. It is the only word that could be used to give character to an Act of Congress to this effect.

It is an illogical proposition to assert that whatever a Constitution ordains, is to be carried into effect by a law. Such a proposition is founded on an absurd postulate, namely, that everything ordained by a Constitution can be carried into effect *only* by a law. It must be untrue to a considerable extent of every written Constitution. There are numerous provisions in the Constitution of the United States, which execute themselves, or are to be executed by acts *in pais*, without the aid of a law of Congress,—the choice of senators and representatives—the choice of officers of each house—the trial of impeachment by the Senate—the appointment of officers by the President with consent of the Senate—the mode of passing bills to become laws —extradition betwen the States, and the like. In the election of a President, the course is striking: the Constitution ordains most of the ceremony itself, and it ordains expressly what Congress may do and what the States shall do.

There is no such principle; and the last clause of the eighth section of the first article is a proof of it. Congress can pass only such laws as are *necessary and proper* to execute the powers given to themselves, or such other powers as are vested by the Constitution in the government, or in some department or officer. The law must be necessary as well as proper; and it is neither when the Constitution is the law.

In this matter of suspension of the privilege of the Writ of Habeas Corpus, the Constitution of the United States stands in

the place of the English Act of Parliament. It ordains the suspension in the conditioned cases, by the act of the competent department—as Parliament does from time to time. Neither is mandatory in suspending, but only authoritative. Each leaves discretion to the executive power. The difference is, that Parliament limits a time and provides for the effect by technical terms. The Constitution connects the suspension with the time of rebellion, and provides for the effect, as it did for the privilege, by words that comprehend the right, and deny for a season the enjoyment of it.

It is further objected that this is a most dangerous power. It is fortunately confined to most dangerous times. In such times the people generally are willing, and are often compelled, to give up for a season a portion of their freedom to preserve the rest; and fortunately again, it is that portion of the people, for the most part, who like to live on the margin of disobedience to the laws, whose freedom is in most danger. The rest are rarely in want of a Habeas Corpus.

But be the danger what it may, the safety with which such a power is placed with the President, to be exercised upon his own responsibility, is greater than if it were lodged with Congress, and greater than if it were devolved by Congress upon the President. Congress are irresponsible. Congress, in sympathy with the President by the grant, lessen the President's responsibility. The President, directly and personally responsible for his own judgment and acts, makes the guarantee more complete than any other provision. The Executive is confessedly the weakest department in the government, weaker than is known in any other national government. Receiving from Congress all the dangerous strength the President can have, the public apprehension should look to what he thus receives, and not to what he derives directly from the Constitution. For the use of powers which Congress may give him, to be exercised according to his own judgment, it is only in flagitious cases of wanton oppression, that we can expect Congress to be his accuser, or the Senate his judges. When his own judgment brings the power into exercise, and his own application of it works a wrong in any degree, he has nothing to fall back upon but his patriotic intentions. As a theorem of republican polity, a most dangerous

power, if this be most dangerous, should be lodged in the feeblest hands. In suspending the privilege of the Writ of Habeas Corpus upon his own judgment, the President can have no support but from his integrity and his patriotism; and he stands directly before accusers and judges who have had no part in his acts.

We have a striking page of history in our annals to remind us of this distinction. In the winter of 1807, when there was neither invasion of our country nor insurrection in its lowest stage, much less rebellion, not an armed force being proved by competent testimony to exist in any part of the country, to make Aaron Burr's few followers take the least complexion of treason from their movements, Mr. Jefferson, favoring the theory that Congress alone had the power of suspending the privilege of the Writ of Habeas Corpus, and that he might safely exercise it under their wing, sent a message to Congress, representing that an emissary of Burr, whom General Wilkinson had arrested and imprisoned, had been discharged upon a Writ of Habeas Corpus; and then followed the phenomenon,—we might say the portent,—a Senate representing free States under the Constitution, passed, within closed doors, a bill suspending the privilege of the Writ for three months, as to any and all persons charged on oath with treason or other high misdemeanor, endangering the peace, safety, or neutrality of the United States, and arrested by the warrant of the President of the United States, or by any one acting under his direction or authority. There was not one word in the bill like rebellion or invasion, the terms in the Constitution, nor any words that adumbrated either. There was nothing like either in the land. Happily there was virtue enough in the House of Representatives, or enough of alienation from Mr. Jefferson, to make the House reject the bill by an immense majority, and to open their doors. But we may ask with all confidence, whether Mr. Jefferson, even with a consciousness of his own power under the Constitution to suspend the privilege, would have executed such a purpose, at such a time, upon his own responsibility? We may confidently say *no*. But if a majority of the House had acquiesced, and there were nineteen who voted for it, we may recollect whose sentiment it was, upon being told that his friends were willing to ignore a breach of the Constitution, which he had expressly acknowledged, replied, that "*if his*

friends were satisfied, he would acquiesce with satisfaction." This getting power from friends in Congress who *are satisfied*, is a prodigious corroborative in the exercise of it, whether it be Constitutional or not. All experience teaches us that the only safe depositary of the power of suspending the privilege of the Writ of Habeas Corpus in time of rebellion, is that feeble Executive, which the Constitution has made for us, standing upon the only basis of the Constitution, with no other support than the integrity and patriotism of the man who has been elected to it by the people.

It is also objected that if the President holds the power under the Constitution, the exercise of it has no *limitation of time.*

Here again the English analogy breaks in. What the objection requires, is an Act suspending the privilege from session to session, renewable as Congress shall see fit.

The limitation in England is practically worth nothing. It is either a show of supervision without the reality, to please the discontented, and to disarm party opposition; or it is a manifestation of the superiority of Parliament to the Crown; or it is the *cantilena* of Parliamentary jealousy of the Crown. The ministers who pass it, can always renew it if they are in power; and if they are not, a perpetual Act would be repealed upon their downfall. There was not, it is believed, a single suspension Act in England, in the time of any of their rebellions, that was not renewed from session to session, until the rebellions were suppressed.

It would be even more a form, and an unnecessary form, here. The *power carries a limitation of time with it.* It depends for its existence upon the existence of rebellion. The instant the rebellion is suppressed, the power is extinguished. While rebellion lasts and the public safety is in danger, the power is indispensable; and the Constitution supplies it for the whole of that occasion.

There is, moreover, the ever present liability to impeachment, to arrest it at the first occasion that it is used corruptly or tyrannically for the purposes of ambition. The office itself is a short taper, which shines not very brightly for a brief term, and then goes out of itself. The exercise of the power would probably be continued longer by renewable terms, from Congress to

the President, than the President of his own judgment would exercise it under the Constitution.

A technical objection to the exercise of the power by the President, is, that it will stay the issuing of the Writ of Habeas Corpus by the Federal Courts and Judges, or arrest proceedings under a writ expressly authorized by Act of Congress, which can only be stayed or arrested by a subsequent Act.

This is English analogy again. If the power of the President is derived from the Constitution, it is above the authority of an Act of Congress. It is the power of the Constitution, together with the authorized act of denial, that arrests the proceedings or stays the Writ for a season. But it is quite unnecessary that it should prohibit the issuing of the Writ. The Writ may issue to ascertain the cause of the commitment. The return of the commitment by the President, if he possesses the power, will stay further proceedings, as it now does in our Federal Courts, when the commitment is by the authority of a State.

It is also said, that the exercise of the power by the President, without oath or descriptive warrant, violates one of the amendments to the Constitution.

It would be the same if the power were exercised by Congress.

Non constat, that the President will not require an oath,—warrant there always is. The President may provide for the oath as well as Congress. If the amendment applies, he must do it, or the commitment will be irregular. But does the amendment apply to this kind of arrest in a time of rebellion and internal war? In *Luther* v. *Borden*, the Supreme Court, Chief Justice Taney delivering the opinion, held that it did not apply to a seizure by military authority under a State law, which declared martial law. If it did not do that, it does not apply to a power of arrest given by the Constitution, to be exercised in the time of rebellion and internal war, and intended to aid in its suppression.

Either the language of the amendment, though general, speaks in reference to the normal condition of the country only, when there is no rebellion or invasion and consequent war, foreign or civil; or under such circumstances, rebellion or invasion supersedes the amendment for the time. The former seems to be the preferable conclusion.

The democratic tendency of the Constitution, has so completely done its work in enfeebling the Executive office, that very able men appear to think, that to attribute to the President the power of suspending the privilege, is to deprive the Legislature of a power which naturally belongs to that body. That body has in no respect a natural title to it. Strictly speaking it belongs naturally to no department of the Government. Discretionary imprisonment, however necessary in times of extraordinary danger and internal disorder, is an arbitrary *ouster* from all the benefits of Government; benefits which belong to every citizen, until he is accused and convicted of crime. If the Constitution had not ordained the exception, no department of the Government could have enforced it, without violating the fundamental principle of every free Government; and it can only be enforced now, by that department of Government, which can alone execute the ordinances of the Constitution, that are executive in their character, unless some other department be expressly named.

Yet this seems to many the most irregular exercise of power that can be conceived. The objection itself is one of those evils which the Executive department is exposed to, from the predominance of the legislative power under every Democratic Constitution.

"*Maitresses de faire les lois, on doit craindre qu'elles ne lui enlèvent peu à peu la portion de pouvoir que la constitution avait voulu lui conserver.*" De Tocqueville, I, 204.

"*Cette dépendance du pouvoir exécutif, est un des vices inhèrens aux constitutions républicaines. Les Americains n'ont pu détruire la pente qui entraine les assemblées législatives à s'emparer du gouvernment, mais ils ont rendu cette pente moins irresistible.*" Ibid.

"*Dans tout ce qu'il fait d'essentiel, on le soumet directement ou indirectement à la legislature. Où il est entièrement indépendant d'elle, il ne peut presque rien.*" I, 215.

The most intelligent men in our country, have come at length to be apprehensive of the attribution of power to the Executive, and have no apprehension whatever of seeing it claimed for that branch, whose greatly preponderant strength, according to the opinion of eminent men and lovers of freedom, is the vice of the Constitution.

Very singular results from this cause are manifested in the present day by men of the first ability in the country.

One of them, abstaining from a direct assertion of the President's *civil* authority to suspend the privilege of the Writ, claims a *military* power of equal import for the Commander-in-Chief of the Militia called into service.

Another claims to limit the military power to the capture of rebels in arms, or of those *proximately present* and aiding, without arms, and *only such*, and handing them over to the civil tribunals for trial—expressly denying the President's civil power, in rebellion, to detain anybody under the Habeas Corpus clause, and reducing his military power over captives in arms, to those of a district marshal, whose duty is to arrest for immediate trial before a court.

A third prefers asserting an authority by martial law, to capture and detain at military discretion, superseding the municipal laws and authorities, *ad libitum*, during the prevalence of war in the country.

A fourth denies all authority to the President, or to anybody but Congress, and the laws they ordain over the citizens and freemen of the country, even in a war of rebellion or invasion, precisely as in time of full peace. This is the Parliamentary doctrine before adverted to.

It is impossible to imagine stronger evidence of the influence of a democratic Constitution upon the political opinions of men of great acuteness, some of whom at least are probably not democratic in the radical signification, as the Constitution certainly is not, though its spirit is largely democratic, fortified for the purposes of war, and for self-defence, with some pretty strong organic power. They withdraw by an acquired prejudice, from asserting a civil power in the President, the most clearly executive in its character,—the most clearly indicated in the Constitution by the conditions of its exercise—but the last to be thought of by them, because it carries power in that direction, which is against the *gulf stream* of Legislative authority, the great channel of the popular will of the moment.

No apprehension of that nature has prevented the writer of this paper from expressing with moderation, and deference for contrary opinions, the suggestions of his own mind.

The conclusion of the whole matter is this: that the Constitution itself is the law of the privilege, and of the exception to it; that the exception is expressed in the Constitution, and that the Constitution gives effect to the act of suspension when the conditions occur; that the conditions consist of two matters of fact, one a naked matter of fact, and the other a matter-of-fact conclusion from facts, that is to say, rebellion and the public danger, or the requirement of public safety. Whichever power of the constituted government can most properly decide these facts, is master of the exception, and competent to apply it. Whether it be Congress or the President, the power can only be derived by implication, as there is no express delegation of the power in the Constitution; and it must be derived to that department whose functions are the most appropriate to it. Congress cannot *executively* suspend. All that a Legislative body can do, is to authorize suspension, by giving that effect to an Executive act; and the Constitution having authorized *that*, there is no room for the exercise of Legislative power. The Constitution intended, that for the defence of the nation against rebellion and invasion, the power should always be kept open in either of these events, to be used by that department, which is the most competent in the same events to say what the public safety requires in this behalf. The President being the properest and the safest depositary of the power, and being the only power which can exercise it under real and effective responsibilities to the people, it is both constitutional and safe to argue, that the Constitution has placed it with him.