E
458
.8
.S54
copy 2

Shellabarger, Samuel.
Speech . . 1862.

Class _____

Book _____

SPEECH

OF

HON. SAMUEL SHELLABARGER,

OF OHIO,

ON

THE HABEAS CORPUS;

DELIVERED

IN THE HOUSE OF REPRESENTATIVES, MAY 12, 1862.

WASHINGTON:
PRINTED AT THE CONGRESSIONAL GLOBE OFFICE.
1862.

EAST
SEA
UP

LL
562646
N 17. 39

SPEECH.

The House being in Committee of the Whole on the state of the Union—

Mr. SHELLABARGER said:

Mr. CHAIRMAN: At this time in our public affairs I earnestly deprecate all mere partisan contests. They are unworthy of us now in the midst of the struggles of a great people for national life. Surely, when the issues of life or death are imminent and impending in the deadly strife of battle, and when the existence of free institutions among men depends upon the events of a day of blood, it is fit that the Representatives of the people should comprehend the solemn dignity of the events by which God's providence has surrounded them. At such a time how mean, how vulgar, how intensely low are the tricks, the jugglery, and the grimaces of the political ring-master, exhibited within, or sent out from the Halls of the American Congress. What an appetite that must be which goes down now from the sublime mountains of responsibility and opportunity for our country's deliverance, to matten on the moor and feed upon the garbage of effete partisanship. This bad taste has a general application now to all parties. I apply it to individuals of neither.

But, sir, if this were a mere matter of taste, there should be no dispute. But, sir, it is not. Recently, distinguished members of this House have chosen to arraign before this country and the world the present Executive of this nation in language which is calculated, I would fain hope not intended, to destroy the power of that Executive for the deliverance of the nation from this unnatural and causeless rebellion. This cannot be overlooked by the friends of the Government. Among other grave charges contained in that address is one which alleges that "the history of the Administration for the twelve months past has been, and continues to be, a history of repeated usurpations of power and of violations of the Constitution, and of the public and private rights of the citizen." This address also alleges that "for sixty years from the inauguration of Jefferson, on the 4th of March, 1801, the Democratic party, with short intervals, controlled the power and the policy of the Federal Government;" and it avers that during all this time "public liberty was secure, private rights undisturbed; every man's house was his castle; the courts were open to all; no passports for travel, no secret police, no spies, no informers, no bastiles; the right to assemble peaceably; the right to petition; freedom of religion, freedom of speech, a free ballot, and a free press; and all this time the Constitution maintained and the Union of the States preserved." This address, moreover, avers that the "first step towards a restoration of the Union as it was is to maintain the Constitution as it is;" and that "neither the ancient principles, the policy, nor the past history of the Democratic party require nor would justify its disbandment. Is there anything in the present crisis which demands it? The more immediate issue is, to maintain the Constitution as it is, and to restore the Union as it was;" and afterwards declares, in alluding to certain proceedings to save the Union in the Thirty-Sixth Congress, that "at every stage, the great mass of the South, with the whole Democratic party, and the whole Constitutional Union party, of the North and West, united in favor of *certain amendments to the Constitution*—and chief among them the well-known "Crittenden propositions," which would have averted civil war and maintained the Union. At every stage, all proposed amendments inconsistent with the sectional doctrines of the Chicago platform were strenuously and unanimously resisted and defeated by the Republican party."

Now, Mr Chairman, I have neither taste, inclination, or heart to analyze or discuss the logic or truth of this remarkable paper. I allude to it for no such purpose. An allusion to a single feature will sufficiently indicate, to the intelligent American people to whom it is addressed, its masterly logic; and an allusion to another its character for veracity. It assures us first that the Republican party destroyed the Union by adhering to the Constitution "*as it is*," and by refusing to alter it; and second, that that Union is now to be re-

stored by doing the very thing which destroyed it, to wit, by "maintaining the Constitution *as it is!*" And this logic is so admirable, in the judgment of its authors, that it is honored and illuminated, in the address, by being set up in magnificent capitals! This is enough for the logic. Now for the truth. Notice again the already cited extract, solemnly averring to this nation that during the entire sixty years of Democratic rule, from 1801 and down to Mr. Lincoln's administration and including Mr. Buchanan's, "public liberty was secure, private rights undisturbed, every man's house his castle, the courts open to all, no passports for travel, no secret police, no spies, no informers, no bastiles, the right to assemble peaceably, the right to petition, freedom of religion, free speech, a free ballot-box, a free press, and all this time the Constitution maintained and the Union of the States preserved."

Now, glance at the results of sixty years of Democratic compromise with slave rule. Look at that century plant, so tenderly tended and watered for these sixty years of Democratic culture, which at last bloomed just as the sun went down on its golden age. Ay, sir, to use the language of this address, look at "the choice fruits of Democratic principles and policy, carried out through the whole period during which the Democratic party held the power and administered the Federal Government," and which the nation plucked, full ripe, from the hands of the last Democratic Administration, about every officer of which was of that party.

Sir, the Treasury had been literally robbed by its custodian. The vessels of the Navy, with, I believe, the solitary exception of two ships—the Brooklyn and the Relief—were either dismantled or sent to foreign seas as a preparation for the inception of the rebellion. The arms of the Government had been dispatched to southern arsenals and depots to arm the impending revolt. Senators were openly engaged in the Senate, and ministers in the offices of State in maturing and consummating the overthrow of the Constitution. The President had, in obedience to the demand of these conspirators, so modified his message to Congress as to virtually license the rebellion, as a thing which, though unlawful, the Government had no power to arrest. Senators on the floor of their Chamber had boasted that these Halls should soon be the "dwelling place of the owls and the bats." Others had, in the same Halls, boasted that the trees of Texas were then ornamented with the bodies of murdered citizens, hung for opinion's sake. Armies of murderers, assassins, and traitors possessed the capital, and hedged up all the approaches to it, so that the incoming Executive could only reach his seat at peril of life. Other armies were rapidly concentrating and rushing to the seat of Government, sworn to the total destruction and overthrow of the Government and all its constitutional ministers and officers. Every southern fort and arsenal and navy-yard and mint and custom-house and revenue ship had been either seized and wrested from the Government by the hand of the very leaders of that southern Democracy, or were in imminent peril of being so seized and destroyed. One half of the officers of the Army and Navy had taken perjury upon their consciences and the sin of Iscariot into their souls, by betraying and taking arms against the Government which fed them. The feeble bands garrisoning our forts were menaced with death and starvation by these same conspirators. About one third the States had avowedly withdrawn from the Union, and some others were about to depart. The courts of the United States were closed in every one of these States by violence or by the treason of the judges and marshals. Two hundred millions of indebtedness to northern citizens, contracted in a large part for the very purpose of being repudiated, was in fact totally repudiated in these seceded States, and all courts, agencies, and modes of collection were closed or destroyed. The Constitution of the Government was avowedly and practically superseded and annulled by another adopted by the conspirators; and that in total neglect or express violation of the votes of the people. The voice of the people against the treason was stifled by the use of arms stolen from the Government, and used to compel submission at the ballot-box. Tens of thousands of the loyal citizens of the South were stripped of all their estates and banished from their homes forever, for no other crime than of being suspected of loyalty to their beloved Government. Other thousands whipped, some with thongs, some with thorns, and some with wires of steel and iron, upon naked bodies, only for loving too well the Government of Washington. Other thousands were murdered sometimes before the eyes of their own wives and children for the same offense. Some hung, some impaled, some drowned, some suffocated by being inclosed in barrels, some starved, some shot, and some roasted alive at the stake; and all this, until not a single citizen whom murder and violence could destroy or banish was left in all this seceded South who was loyal to the Constitution. The freedom of speech and the press for the defense of the Government was totally destroyed and unknown, and every man who dared to even vindicate these, was either assassinated or banished from the land, upon edicts like that of a Democratic candidate for President—Mason, of Virginia.

Sir, if the sickening details of individual outrage were not too enormous in extent, and too shocking in brutality to admit of particularization, the chronicler of this despotism, would put Nero and Caligula to the blush. It would render Philip II eminently humane and hospitable, would record robberies at Wilmington, North Carolina; the murder of citizens of New Jersey at Charleston; imprisonments, robberies, and, at last, banishments at Savannah; murders of citizens of New Orleans, at Abbeville; roasting alive at a tree a man in Harris county, Georgia; the murder of Crawford, and the murder, robbery, or banishment of two hundred others in Tarrant county, Texas, including three Methodist ministers of the gospel; the imprisonment of women at Charleston; imprisonment and ultimate banishment of a citizen of New Hampshire at Charleston; the scourging almost to death of an aged man and his son at Enrico Mills, Georgia, and afterwards cruel imprisonment; the robbery, assassination, and murder of whole communities in East Tennessee;

and all this without even the suspicion of any other crime than loyalty to the Government of the United States.

But, sir, I have no inclination for such shocking recitals. The whole South was literally deluged with blood and assassination, until it vomited from it everything that was like free speech, a free press, or a free religion, and every man who was known to be loyal to the Constitution of the United States. One universal pall of unmitigated night of despotism settled down upon all that vast, beautiful, but God-forsaken land. And such was the condition of the Republic at the time when this address tells us "public liberty was secure, private rights undisturbed, every man's house his castle, courts open to all, no passports for travel, no spies, no informers, no bastiles, no secret police, the right to assemble peaceably, the right to petition, freedom of religion, freedom of speech, a free ballot, a free press, and all this time the Constitution maintained and the Union of the States preserved."

I put these startling facts of fearful and bloody history in contrast with the startling averments of this address, not to aver or intimate that the great mass of the loyal and patriotic Democracy of the North are intentionally responsible for these huge wickednesses, for they are not, and such an assertion would be most unworthy and unjust. But I do it in self-defense against the most reckless and unmitigated slander of this address, which imputes the authorship of all these horrors and of this ruin to those who elected and who support this Administration; a ruin which they brought by leaving "the Constitution as it is," and by declining again to compromise away the Constitution, under a threat of its destruction, at the bid of the slave power. But I especially and emphatically point to this history to say that that very southern Democracy, which held in its hand the powers of this Government during these sixty years boasted of in the address, and which controlled the national Democracy, is responsible for and is the infernal architect and author of all this hideous ruin.

Here, Mr. Chairman, I leave the logic and the veracity of this address to consider that other accusation which it contains, that the history of this Administration "has been and continues to be a history of repeated usurpations of power and of violations of the Constitution and of the public and private rights of the citizen." I shall consider now but one, but that the most prominent, specification usually pointed to in vindication of this denunciation of the President. It is that he has despotically and unconstitutionally deprived the citizen of liberty.

Mr. Chairman, in England and America, in this House and in the Senate, by the British minister residing at this Government, and by the London Times, by Jefferson Davis and my colleague, [Mr. VALLANDIGHAM,] the President of the United States has been denounced as a tyrant and despot, because he has ordered certain conspirators engaged in attempts to overthrow the Government to be arrested and detained in military custody. And my colleague proposes, by a bill now pending in this House, to imprison the President of the United States for not exceeding two years if he shall repeat the conduct of which he has been guilty in the imprisonment of Merryman and his confederates. And, sir, within a few days of the time I speak, in this House, this conduct has been declared to be, in the opinion of most distinguished members, illegal and arbitrary. These charges and the grounds of them I propose to consider.

The importance of these considerations cannot be overstated. They touch the heart of the Constitution; and decided one way or the other, they decide its life. I shall make no apologies for attempting to contribute my mite to what I deem the correct conclusions touching it. I shall, therefore, proceed without a single other preliminary remark to the question which this bill involves, to wit, to whom does the Constitution intrust the power of suspending the privilege of the writ of *habeas corpus*?

The clause which authorizes this suspension is in these words:

"The privilege of the writ of *habeas corpus* shall not be suspended unless when, in cases of rebellion and invasion, the public safety may require it."

One class of opinion maintains that Congress alone can suspend the "privilege;" another that the President may do so in the events stated in the Constitution when it may be done. I maintain the latter view, and proceed to consider, first, the arguments in favor of the former class of opinions; and second, those in favor of the latter.

The first argument generally presented ascribing this power exclusively to Congress is that section nine of article two of the Constitution is one exclusively devoted to restraints upon the powers of Congress, and that it would be unreasonable to suppose that one restraint upon the President's powers was wrested from its natural place in the Constitution in that second article which does relate to the President's powers, and was placed in a family to which it did not belong of the powers of Congress. This argument purports to be based upon what is a sound rule of legal interpretation, and which rule the law expresses in its technical language by the terms *noscitur a sociis*. If the facts upon which the argument is based were as they by this argument are assumed to be, it would be a very strong argument against the position I maintain. But it is singular that an argument should be based upon a state of facts which facts are disproved by simply reading the Constitution. This assumption of fact involves in it a double error: first, in assuming that all the other clauses of this section nine are prohibitions on the powers of Congress; and second, in assuming that there is no other quality belonging to this clause as to the *habeas corpus* which makes it like its fellows in the ninth section, and makes it, therefore, proper to be placed where it is. Both of these facts are assumed by this argument, and both are refuted by simply reading the Constitution.

Now, it is plain that if this ninth section does contain *one* other clause than that under consideration, which *is* a prohibition upon the acts and powers of the Executive, then this one exception totally annihilates the whole argument which is based on this family likeness; because it is simply

ridiculous to say that the framers of the Constitution would put *one* prohibition upon executive powers in this ninth section, but they would not put *two* in it. All these arguments, based like this one is, on associations of things similar, are destroyed by the establishment of one clear and admitted exception.

In this ninth section we find one clear and express prohibition upon the executive power, which prohibits money from being drawn from the Treasury except upon appropriations made by law. Who draws money from the Treasury to pay national liabilities? The President and his ministers, of course. Who then are prohibited from drawing except upon appropriations? The Department which is charged with the duty of drawing, of course. Can anything be more self-evident?

But to get rid of this, the gentleman from Ohio [Mr. PENDLETON] reads this clause in a twist. He makes it read: "Congress shall have no power to permit money to be drawn from the Treasury except in consequence of appropriations," which is equivalent to saying that Congress shall not permit money to be withdrawn unless it permits it; Congress shall not appropriate money unless it shall appropriate it. This reading, I submit, does not bring this constitutional clause up to the dignity of good nonsense. This clause has been repeatedly held to be just what it is, to wit, a prohibition upon all the custodians of the public money, whereby they are prohibited from using, or, by contract or otherwise, appropriating the public money, and whereby all liens on such moneys are excluded, and can be created by no executive act. The prohibition is therefore decided to be upon the Executive. (See 3 Opinions, 13; United States *vs.* Barney; 3 Hall L. 1., 130, &c.)

The argument, therefore, fails which assumes that there are in the ninth section no prohibitions on the executive powers, just because there are such prohibitions.

The other assumption of fact upon which this argument is based is, that this *habeas corpus* clause has no other quality which makes it like the family in the ninth section, and renders it proper to be placed there. It has such similar quality, and one which is common to every one of the clauses in this section—and it is the only quality which is common to them all—which is that it, like every one of its fellows, is a negation or prohibition of power. It is this common property of these clauses which brought them together in one section, and not the fact that they were all negations upon the powers of Congress, as distinguished from the negations upon powers of the other departments of the Government. To say that the ninth section contains no prohibitions upon the powers of any department of the Government except Congress, is to say that the President is not prohibited from granting—as the English Crown may—titles of nobility, because there is no prohibition upon granting such titles except in this clause. It is entirely evident that this section contains a collection of prohibitions of power which apply to all the departments of the Government—President, Congress, and all.

The same answer is to be made to the argument which assumes that the first article, in which the *habeas corpus* clause is found, is devoted exclusively to the legislative department of the Government. The fact is not as the argument assumes it is, and the argument fails when the fact does upon which it is based. The tenth section of this first article is devoted to prohibitions upon the powers of the States, and the first clause of that section contains ten distinct and express prohibitions upon the powers of the States, and has no earthly relation to the powers of Congress. Is that not a most strange argument which admits that the framers of the Constitution have put ten prohibitions of power into the first article of the Constitution which do not touch the powers of Congress, but argues that it is absurd to suppose they would put eleven such prohibitions in it?

But if any further fact be required to show the total worthlessness of the argument based upon the position of this clause in the Constitution, that fact is to be found in the history of the adoption of the clause. Where was this clause placed when it was adopted by the convention? The answer to that question, of course, shows the only sense of the convention, which is to be learned from the connections they gave the clause. Now, the fact is that the *habeas corpus* clause was, by the convention, made as being a part of and limitation upon the judiciary department of the Government. Its history in the convention may be condensed thus:

On the 29th of May, 1787, Charles Pinckney (Elliot's Debates, p. 148) reported a "Plan of a Federal Constitution," in the sixth article of which, concerning the legislature, the *habeas corpus* appeared in the convention for the first time in these words:

> "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."

This reported "plan" of Mr. Pinckney never came up again in the convention.

On the 20th of August (Elliot's Debates, p. 249) Mr. Pinckney moved several propositions to be referred to the committee of detail, one of which propositions was in these words:

> "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 was the second time a *habeas corpus* clause was before the convention. On the 28th of August (Elliot's Debates, p. 270) the convention was engaged in receiving and considering independent or new provisions, and also amendments to the Constitution, which were then before the convention from the committee upon detail, and the *habeas corpus* clause was brought up the third and last time, when Gouverneur Morris moved the clause which was adopted and which is now a part of the Constitution; and he moved it expressly, and it was by the convention adopted, as an amendment to, and a part of the fourth section of the eleventh article of the Constitution which had on the 6th of August been reported by the committee of five. And this fourth section of the eleventh

article related to the judicial department of the Government, and the fourth section to the place of criminal trials, (Elliot's Debates, p. 229.) This was the last act of the convention upon this clause, and this made it part of the judiciary article of the Constitution.

The present position of this clause was given to it by a committee "on style and arrangement," (Elliot's Debates, p. 295,) and whose duties did not touch the sense or substance of the instrument. They were to revise the style of and arrange the articles which were agreed to by the House, and no consideration was ever given by the convention to the arrangement of articles and sections which the committee on style reported, so that the only action of the convention on the *position* of this clause in the Constitution was the significant action of taking it out of the legislative article, where Mr. Pinckney had moved it, and putting it into the judiciary article, where Mr. Morris expressly moved it. And the convention, without considering or debating the matter at all, simply acquiesced in letting the report on style stand, which report grouped it with a family of negations, which apply to all the departments of the Government. This historical recital, I submit to every fair-minded man, totally refutes all inferences in favor of the legislative control over this writ which is sought to be derived from the position of this clause in the Constitution.

But there is another view of this history which is exceedingly significant of the sense of this clause, and which is unanswerable as an argument against the legislative control of this writ. Mr. Pinckney's last proposition, of the 20th of August, proposed to do just what the English Parliament can now do, as will be noticed hereafter, to wit, give to the Legislature the full power to suspend the benefits of the writ whenever Congress should deem the necessity "most urgent and pressing," although there was no rebellion or invasion or war in the land. This legislative discretion was stricken out by Mr. Morris's amendment. The convention did its own legislation upon this matter, so vital to popular liberty, made the conditions of public danger which should authorize the temporary denial of the personal privileges of the writ known and fixed quantities in the Constitution, and forever withdrew them from the control of Congress. And then, in adopting the prohibition, the convention made it part of the judiciary article. The significance of this action may be thus fairly expressed: we will not let Congress determine when the occasion for suspending this high privilege is most "urgent and pressing," as Mr. Pinckney proposes. We will not let any urgency, short of that occasioned by rebellion or invasion, suspend the privilege. We will strike out Mr. Pinckney's plan of letting Congress judge of this urgent and pressing occasion, and we will legislate and define what facts shall constitute this general state of public danger; and we will put into the Constitution a legislative and unalterable definition of that "public danger;" and having so legislated, we will attach this prohibition to the article regulating the judicial department of the Government which controls and acts on this "privilege," and will take it out of the legislative article, where Mr. Pinckney proposes to place it

I shall have occasion again to refer to the effect of this defining by the Constitution of the general degree of public danger in which the privilege may be suspended, and only allude to it here as showing that the proposition to give Congress a general discretionary control over the writ, was actually presented to the convention, was considered, was rejected, and a clause inserted in its place by which the Constitution legislates upon and makes definite the general degree of public danger which alone shall authorize a temporary denial of this "privilege" to dangerous persons; and that having so defined and legislated, they took the clause out of the legislative and placed it in the judicial article of the Constitution.

Now, how irresistible is the answer furnished by the simple history of this clause to the argument which is based upon its being found in the first article of the Constitution!

But to make the argument, based on the position of this clause, appear in still stronger light of unreliability, let me glance at a few facts as to the arrangement and position of clauses of the Constitution. You not only find, what has been already noticed, a large number of clauses relating to the powers of the States and not at all of Congress, in the first article, which in the main relates to the legislature, but you find in the judiciary article a new power given to Congress, to-wit, to define and punish treason; also a new prohibition upon the powers of all the departments, to-wit, that prohibiting forfeitures and corruption of blood. You find a new power given to Congress in the third section of the fourth article: to admit new States. Also one giving power to make rules for the Territories. Also in the fifth article a new power is given to Congress to propose amendments to the Constitution. Also in the sixth article is a new prohibition on the power of Congress and all other departments, excluding the adoption of religious tests. Also in the third (judiciary) article a new power is given to Congress to create courts inferior to the Supreme Court. Also in the first (legislative) article is the new and important power of the President to veto the laws of Congress.

This history and these obvious facts show the singular force of a remark of one of the first living lawyers of the age, to whose learned opinions I am much indebted for parts of this argument, that "no instrument permits the interpretation of its clauses to be affected by position less than the Constitution of the United States."

I now proceed, Mr. Chairman, to consider the argument which is derived from the analogies of the English constitution. This argument may be thus stated: this writ, and many other features of our Constitution, are derived from England. The Parliament, and not the king, can suspend the writ in England. Our Constitution, which was aiming at making a freer Government, and one of less despotic power over life and liberty than the English, would not give to a President powers to suspend a law which even the English would not intrust to any power but their own representatives, and especially not an authority over the liberties of the citizen, which, by violent

struggles and civil wars, had been wrested from the executive in England.

I make a preliminary remark touching the reliability of all arguments by analogy. They are proverbially unreliable, and are the lowest grade of all methods of argumentation. The reason is, that if one material fact in one of the two things compared is different from its fellow fact in the other or parallel subject of comparison, then the whole argument falls; and this is nearly always in some degree the case. To illustrate: suppose a statesman in Russia were trying to prove from the history of the New York and Erie canal that a canal in north Russia would be a great and profitable work. He would show that the waters for its supply were as abundant, that the nature of the country would admit of as easy a construction, that the commodities for transportation were as great, that the skill and enterprise for its navigation were equal, and that, in short, in every particular the canal in north Russia would, in facilities for usefulness, be equal to the Erie canal; but he omitted to notice but one particular, but that one was that the water in the Russian canal would be eternal ice. Now, what kind of an argument by analogy would that be, in the case supposed, which would decide to build the canal in Russia because it paid in New York?

Now, it is a singular fact that in the argument from the English constitution, which we now consider, almost everything which is assumed as postulates, and upon which the whole analogy is based, is the veriest assumption, and totally untrue; and besides, the argument, as conducted, leaves wholly out of view conditions and vital parts of the two things compared, which, left out, totally reverse their characters. Let me state them.

The argument assumes that the position, which admits the President may suspend, for the public safety, in time of rebellion or invasion, the privilege of the writ, is liable to the following absurdities, namely:

1. Holding that the President may repeal or suspend a law of the land.

2. That to give this power to suspend the privilege to the President, as it is limited by our Constitution, would be giving him power which England does not give to the king.

3. That there is no legislative authorization and definition of the right to suspend, as claimed for the President, but which is required in England.

This argument, moreover, against the President's power, involves the following unwarranted and false assumptions of fact:

1. That the President's general powers and perogatives are such as to make it as unsafe to intrust to him this power to suspend, as it would be to intrust it to the King of England.

2. That the power of our Government over this writ is as great under our Constitution as under the English is that of Parliament.

3. That our Constitution provides no check upon the abuse of the powers of the President which are unknown to the English constitution.

Every one of these propositions is vital to this analogical argument, but every one of them is the merest assumption and wholly false.

If it is true that the President may suspend the privilege of the writ during rebellion or invasion, for the public safety, still, this gives him no power to repeal the law itself, or to modify it so as to deprive the people generally of the benefits of the law. It involves nothing more than suspending temporarily the "privilege" by which a man found to be dangerous to public safety may be discharged on bail or otherwise. It leaves the law in full force over the whole land, and does nothing more than authorize the President to arrest and hold such one or more men as public safety forbids to be at large during a rebellion or invasion.

Mr. Chairman, this precise power of temporarily withholding from dangerous men the right to be at large in the society which they endanger, is precisely what, by the uniform legislative practice in England, is intrusted to the king and his privy council. The Parliament does do just what our constitutional convention, by the Constitution, did, to wit, leave it to the Executive to find out, arrest, and detain temporarily in prison dangerous men. The *habeas corpus* act has been at various times suspended with respect to the power of imprisonment vested in the Crown upon occasions of public alarm. (2 Chitty's Statutes, 56, note E.) The act of 4th March, 1817, being 57 George III, is an example, by which the king and his privy council, in time of peace, were permitted to arrest and hold free of bail such men as they might suspect to be engaged in treasonable practices. The acts of Parliament, so far as relates to the authorization of the executive to select and detain dangerous men, do give the English executive just what our Constitution gives to ours, the difference between the two being that Parliament confers the power whenever it chooses and as long as it chooses, whereas our Constitution confers the power and makes it perpetual, but only confers it in two conditions of the country. Ours defines in advance the condition of the country authorizing the suspension; the English only when it comes.

But let us look for a moment at the character and foundations of this argument drawn from the assumed analogies between our own and the English constitution.

The king creates the upper House of Parliament, including lords spiritual and temporal. The President does not.

The king has the sole power of convoking the legislature. The President has not.

The king can dissolve or prorogue Parliament at pleasure. The President cannot.

The king has an absolute veto on acts of Parliament. The President has not.

The king's presence at the opening of each Parliament is necessary to give it life as a legislature. The President's is not.

The king regulates all commercial intercourse, coins money, regulates the standards of weights and measures. The President does not.

The king appoints and removes at pleasure all judicial officers of the Government. The President cannot.

The king is the head of the Church, appoints twenty-six bishops and archbishops, who are lords spiritual, convokes their councils, dissolves

them, and annuls their canons. The President cannot.

The king is the depositary of the collective majesty of the realm as to all foreign relations. He forms alliances, makes treaties, declares war, makes peace, raises and equips armies, fleets, and navies, builds forts, sends and receives embassadors. The President does none of these, or none which are not subject to the control of the Senate, or of Congress.

The king creates all military commands free from any review by other departments of the Government. The President does not.

The king's tenure of office does not come from the people. The President's does.

The king's office is for life. The President's for four years.

The king can do no wrong, and cannot be impeached. The President can be impeached, and can do wrong.

Such a mere glance at the want of analogy between the executives of the two Governments shows how utterly fallacious every argument by analogy becomes which assumes that it would be unsafe to the people to intrust this carefully defined power and care of the public safety to the President, because it is unsafe to intrust the unlimited power of Parliament to the king. The President is made by the people; holds his power, at longest, but for four years; may be impeached by the Legislature of the people for its abuse; creates no part of the Legislature; can give, without the Senate's assent, no judicial or other office; makes no wars nor alliances nor treaties nor armies; and in every one of these respects is totally unlike the king, and yet it is unsafe to intrust to him the power in question, because it is unsafe to intrust it to the king holding such absolute, vast, irresponsible, and hereditary prerogatives! (See 2 Story's Constitution, sec. 1427.)

But, sir, it was not necessary to attempt to show the utter fallacy of this analogical argument, just because the doctrine which admits the power to suspend this privilege to be in the President does not, as is asserted, give the President powers greater than are given by the legislative practice under the constitution of England to the king. But, on the other hand, with this power in the President, the liberties of the people are far more jealously guarded than are the liberties of the people of England under the English constitution.

The radical difference between the two constitutions is that under the English constitution the Legislature can, at its pleasure, in times of profound peace, as well as in war, wholly suspend or repeal "the privilege" of the writ, or the writ itself. And this power of Parliament not only may be, but, whenever exercised, (as in 19 George II, chap. 1; 34 George III, chap. 50; 38 George III, chap. 36; 41 George III, chap. 26; 57 George III, chap. 55,) has been exercised to confer upon the king the power of arresting and detaining without bail dangerous or suspected men; whereas under our Constitution no such discretion or power is lodged with any or all the departments of the Government. For neither the President nor Congress can ever repeal or suspend, at any time, either of peace or war, the law itself; cannot even suspend its "privileges" or benefits to any citizen in times of peace; cannot suspend "the privilege" to any, even the worst citizen, in time of any war except the two of "invasion" or "rebellion," and, even in these times can only select out of the great body of society such ones for arrest and detention as endanger "the public safety." Can an argument be conceived more baldly and palpably fallacious than one which totally falsifies the facts presented by this contrast of the English and American constitutions? So supremely solicitous has our Constitution been of the liberty of the citizens that it has wrested from the very sovereignty of the nation—as well from Congress and the President as from the judiciary—all power ever, in any case, to repeal or suspend the law giving the writ. It has also deprived the supreme sovereignty of all power to deprive any man, however dangerous, of the "privilege" of the writ except in two specified cases and conditions; and even in these two conditions it has deprived that sovereignty of all power over the "privilege of the writ," except as against the men whose liberty endangers "the public safety," and even against these, and in these carefully defined conditions of invasion and rebellion, it has only permitted the "suspension," or temporary hanging up of the privilege, and not its total abolition.

I ask if it be possible to conceive of any form of human language or ingenuity which would more effectively guard this "privilege," without virtually depriving the Government of all power to detain men engaged in the destruction of the Government? And yet, sir, in the face of the facts of this contrast—a contrast furnished by the mere reading of the English and American constitutions—we are told that the intrusting to the President, for the public safety, the detention of dangerous men in time of rebellion or invasion, is giving him powers over personal liberty which it is deemed unsafe to yield to an English king!

Sir, the only other argument against the doctrine ascribing this power to suspend the "privilege" of this writ to the President, is the one founded upon authority of Judges Marshall and Story. The eminence of these authorities in all matters upon which they have judicially passed, but which they have never done at all in the matter now under consideration, as to whether it is the President or Congress to which this "suspending" is, by the Constitution, intrusted, makes me unwilling to submit to this House or to the country a single remark of my own upon what they have said touching this question. I therefore avail myself of the just and forcible remarks upon this point of a great lawyer, of whom it is not too much to say that he is not inferior in legal learning, in ability, or the wisdon coming from long experience and observation in the working of our Government, to either of those truly eminent American judges. I quote from Horace Binney, of Philadelphia. As to the dicta of Judge Marshall and the commentaries of Judge Story, he says:

"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 re-

bellion 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." * * * * * * * *

"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 establishment 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 anybody to suspend the writ. There is more in the same sentence, on which it is not necessary to remark."

I now proceed to notice some considerations which show that this power to "suspend" is by the Constitution intrusted to the President. As the basis of the affirmative argument has necessarily been brought into notice in considering the arguments against the President's power, it will not require so much time to state these considerations.

It already appears, by a mere reading of the Constitution, that no power exists in Congress or elsewhere, ever, either in peace or war, to suspend or repeal the law or the writ of *habeas corpus;* that all that can ever be done, whether done by Congress or the President, in our Government, is to select out of the mass of society such ones of the citizens as shall be discovered in fact to be engaged in acts which so endanger the public safety as to demand that they should be held for a time deprived of the "privilege" of being bailed out by those who are engaged with them in the overthrow of the Government. We have also seen that this can never be done, even against the worst men, except at two specified periods or conditions of society; and these two conditions of society, rebellion or invasion, are conditions of fact and not of law, and their existence or non-existence is wholly out of the reach of any legislation to affect. Congress cannot change the fact of the existence or non-existence of a rebellion by enacting that there is or is not one in the land. To this must now be added the fact that, at this precise juncture, namely, in times of insurrection and invasion, the Constitution provides for Congress calling out the militia to execute the laws. Then in article two, section three, it provides that the President shall take care that these laws (which the militia are called out to execute, and all others) are faithfully executed; and then it makes the President (article three, section two) the commander of the militia called out at this juncture of insurrection or invasion.

Putting now together the whole of these constitutional provisions, and reading them in their proper relations to each other, and they are thus: "No power in this Government shall ever repeal or suspend, as against the body of the people, the writ of law of *habeas corpus*. All that shall ever be permitted is, that 'the privilege' of being set at large shall temporarily be denied to such one or more of the members of society as by their acts are endangering the public safety; but I will not permit even this, except upon the happening of one or other of two facts, to wit, rebellion or invasion; and whether these facts have happened, I make the President exclusive judge, as is settled by legislation and decision. (See 7 Howard, 1.) Just when these facts have happened I authorize the militia to be called out for the purpose of enforcing the laws, which duty of enforcing the laws I give to the President; and to enable him so to do, I make him the Commander-in-Chief of this militia."

Now, I beg to know who, that had not prejudged the case, would not say instantly, from the simple reading of these cognate parts of the Constitution thus brought together, that it was the President only who had the power to arrest and detain these dangerous men? He would be compelled so to conclude, first, because the act of finding out and "suspending" is strictly an Executive, and not a legislative one. It does not at all suspend a law, but only hunts out, arrests, and holds a dangerous man. It is an act done only to enforce the laws, and that duty to see that they are enforced is expressly and exclusively confided to the President. It is an act which can never be done except in the two conjunctions, and these are the very two in which the militia are called out, and the President is given the exclusive command of them. The fact is that this presents one of those cases in which the simple statement of the case appears like demonstration.

Why, sir, what man would say that any power, either that of Congress, the President, or both, can ever, in peace or war, repeal or suspend, as to all the people, the right to this writ, or can suspend the existence of the remedy to the whole country? No one dare so affirm. Then, sir, all that can be done is to hunt out of cellars, dens, caves, mountains, alleys, and military camps such individuals

as, in rebellion or invasion, endanger the public safety. What man that is not mad will say that Congress can ever do this hunting up of dangerous men, which hunting must thus penetrate the plots of conspirators, enter their midnight conclaves, comprehend and keep upon the track of shifting and infinitely complex military schemes, movements, and combinations? And yet this is all that the Constitution permits anybody to do. It permits the "privilege" to be taken from dangerous men, not the law to be repealed as to the people at large. Whether the public safety do demand that any given man ought to be arrested and deprived of bail depends upon what he is doing, and the character, state, and progress of his designs affecting the public safety. Will you talk, Mr. Chairman, of Congress doing the police duty of watching and detecting and determining upon the propriety of arresting any one conspirator? The proposition is so totally absurd and at war with, not common sense only, but with the principles of the Constitution, which made the President exclusive commander of the Army, that its absurdity renders it incapable of refutation by argument. But to avoid this absurdity, it is insisted that what Congress must do is, not to determine what individuals endanger the public safety, but, leaving that to the President, it is the office of Congress to determine, by law, whether the general condition of the country requires the suspension. But so far as this is not already answered, I propose now to consider it.

My colleague, [Mr. PENDLETON,] in his speech upon the subject, says, after quoting this *habeas corpus* clause:

"This is certainly a provision, as the President well remarks, that, in case of rebellion or invasion, when the public safety may require it, the privilege of the writ may be suspended."

It is entirely evident that in this the President and my colleague are right, and that this clause is equivalent to a command that when in rebellion or invasion the public safety requires it, this privilege shall be suspended by somebody. It is a legislative definition, and an affirmative grant of power to somebody. That is, the Constitution itself has legislated upon and has definitely ascertained, defined, and fixed the only two conditions of the country in which any one can be denied this privilege. It has prohibited its being denied in any other state of the country than these two defined; and has enjoined it to be denied in these two, not as to the body of the people at large, for that cannot be done at any time, but as to such ones as the public safety requires should be deprived of it. It thus is made evident that the state, degree, or standard of the *general* danger of society which alone authorizes this "privilege" to be denied to any individual, is as unalterably fixed and defined by the legislation of the Constitution as it is possible in its nature to be. It is just because this general degree of danger is thus defined and fixed by the Constitution, that the power of Congress over the matter of what shall be the *general* state of public danger which shall authorize this suspension of the privilege to individuals is excluded totally. How perfectly evident this is. Could Congress say that the public danger which shall permit this suspension shall be rebellion "and" invasion, instead of rebellion "or" invasion. No one will so assert. Therefore, so far as the *general* safety of the country is concerned in authorizing this suspension, a rebellion or an invasion existing furnishes the only standard of public danger which any power in the Government can establish relating to the *general* state of the Republic.

The only condition which is left, therefore, unfixed by the Constitution, and as to which any power in the Government has any discretion or choice to exert, is that one as to who shall be denied the "privilege" of discharge on bail. And the rule fixed by the Constitution for controlling that, the only discretion and choice left by the Constitution to be exercised, is that the suspension must be of the privilege to those who endanger the public safety. As the general danger is fixed by the Constitution to be in "rebellion" or "invasion," Congress cannot legislate as to these. These are conditions of fact and not of law, and that fact that there is or is not a rebellion in the land cannot be changed by an act of Congress enacting that there is or is not one. If, therefore, there is anything for Congress to do, it is not to enact that although there is a rebellion yet I enact that no one, however much he may endanger the public safety, shall be denied bail; for that, we have seen, the Constitution prohibits Congress from doing. All there is left for Congress to do is to declare whether there is any man who now endangers the public safety, and to find him out and to authorize, not the suspension of the general law giving the writ, for that cannot be done, but the suspension of the "privilege" as to that dangerous man. This analysis of plots and conspiracies, this scrutiny of dens, caves, mountains, and military combinations and camps, which must be constantly and minutely resorted to in order to decide who it is that must, for the public safety, be denied this privilege, Congress must practice and perform, if it be Congress which must decide this the only matter of discretion and choice which is in the Constitution. To say that Congress could, if always in session, when these times of danger, requiring instant action, occur, discharge this mere police, military, or Executive function of detecting, arresting, and holding dangerous conspirators, is supremely absurd. But this is all there is for Congress to do. Congress cannot enact that although there is rebellion no one, however dangerous, shall be arrested and held when the public safety requires; because the Constitution says he shall be held who is so dangerous. Then if Congress legislate at all there are only two acts it can pass, one ordering particular men to be arrested and held; the other ordering that during the rebellion all who endanger the public safety be so arrested and held. The former Congress cannot do, unless Congress turn constable to find out who are dangerous; the latter it need not do, because the Constitution itself has done it long before. For Congress to meet and do this last, would be precisely the same, and as senseless, as for Congress to enact that the President be authorized to veto an act of Congress and to give his reasons therefor.

It will be seen, from what has been now said, Mr. Chairman, how great the fallacy is which attempts to reason as to the powers of Congress over this writ from the analogies of the English constitution. The fact is, our Constitution has done what Parliament does do. It has enacted and defined when the country is in the condition to authorize conspirators to be deprived of the "privilege" of bail. Our constitutional convention, under our system, did the legislation which, in England, Parliament (which is both a constitutional convention and a legislature) can and does do; and in both countries these supreme legislatures do all that the nature of the case admits of being done, to wit, authorizes the executives, in times of defined and specified general danger to the State, to arrest and hold those who endanger that State. The only difference in the two countries is that in ours the supreme legislation of the Constitution permits this denial of the privilege only in two kinds of war, and never in peace, and this is unalterable and irrepealable by Congress; whereas, in England, Parliament can, at any time of peace or war, authorize the executive to do the same. And this is English practice.

Mr. Chairman, the relations of the departments of this Government to each other, furnish another very conclusive consideration in support of what I argue. That within their spheres the three departments of our Government, executive, legislative, and judicial, are coördinate and independent, and that "the powers of one ought not to be exercised by either of the others," (2 Story's Constitution, sec. 1416,) is simply a truism of our governmental theory. To require that Congress or the judges should assent before the President shall "see that the laws are executed," or to compel him to adopt the plans of Congress for the exercise and execution of his constitutional military powers, is not merely to deprive this Government entirely of an Executive and to substitute the old "committee of Congress" of the Confederation, but it is to force upon the Constitution a legislative usurpation of executive functions a hundred fold worse than that proposed and voted down in the constitutional convention. (Federalist, 70, &c.) The President alone commands the Army and militia in enforcing the laws and suppressing rebellion. He must swear that to the best of *his* ability he will do this. His command of these forces can "not be exercised by either of the other" departments. (Story.)

Now, all this being the plainest and the universally admitted law of the Constitution, I inquire whether it shall be permitted that Congress shall say to the President, you shall not arrest, without my leave, a single conspirator who is engaged secretly in planning and heading the rebellion, although you may deem it absolutely essential to the fulfillment of your constitutional oath, and to the overthrow of the rebellion? You shall not arrest this conspirator without the leave of Congress, although you know that his arrest is necessary to deliver the capital of the Government and the Government itself from destruction, which Merryman and his confederates have planned, and on the memorable 19th of April began to execute in the blood with which they have drenched the streets of Baltimore. No, sir, you must let the capital and the Government fall, and await a meeting of Congress, and at its feet beg leave to obey your solemn oath to protect and defend the Constitution. And if you do, by your Army, of which you alone are commander, deem it necessary to arrest one of these arch-conspirators and traitors, then some Chief Justice of the United States, although one of the conspirators, shall have the right to discharge his fellow conspirator, and replace him at the head of the rebellion, the Chief Justice, as he discharges his fellow traitor exclaiming, "in no emergency shall you arrest any citizen except in aid of judicial process," and that although the only power who has jurisdiction to issue the process is at the head of the rebellion! Well might Justice Taney exclaim, as he did, that such law reduces our Constitution to "a guarantee of anarchy." If such be the dependence of the Executive upon the other departments of the Government, then verily has the President not only ceased to be a coördinate branch of the Government, but he is become the mere toy and plaything of anarchy and rebellion.

But, sir, the power and duty of the Executive as a civil magistrate to employ the militia and Army in executing the laws independently of and without judicial process has been uniformly acknowledged by Congress ever since we had a Government. This is expressly done in the act of 1795, which empowers him, whenever he thinks best, to call out the militia to suppress insurrection, and makes him the exclusive judge as to the necessities of resorting to military force, (7 Howard, 1.) This is also done in the act of March 3, 1807, section one hundred and seventy-one, which authorizes the President to defend against intruders the public lands by the use of the Army and without any judicial process. It is also done in the act of 30th June, 1834, by which persons and property in the Indian country may be seized and removed by the Army without any process of law, under the direction and regulations of the President of the United States. All this legislation, as old and well-established as the Government itself, is based upon the assumption that the Executive may without judicial process employ the Army in executing the laws without violating the Constitution; for if this employment of the Army by the President thus to enforce the laws be against the Constitution, then manifestly Congress cannot authorize any such unconstitutional employment of the military forces of the Government; and all this long and uniform and unquestioned legislation which began with the very formation of the Constitution, and continues to this day, is unconstitutional and void.

Mr. Chairman, this legislative interpretation of the Constitution furnishes one of the most conclusive refutations of this monstrous assertion of the Chief Justice that the military can never, "in any emergency," be employed by the President except to aid in the execution of some process which has been issued by the courts. It is at war with the whole current of American legislation.

I now consider the affirmative argument which is based upon judicial authority. That the pre-

cise principle, and also the full force of the authority I shall cite may be seen and felt, it is proper here to state the legal position those assume who deny the power of the President to arrest and hold these dangerous men, in time of rebellion. John Merryman, of Baltimore, was, by order of the military authority of the United States, arrested and confined in Fort McHenry, upon the 25th of May, 1861. This was after one third of the States of this Union had declared their withdrawal from that Union, and their adhesion to a foreign and hostile government; after all the judicial powers of the Federal Government in every one of these States was completely stricken down, and not only powerless for the defense of the laws and Government of the United States within these revolted States, but the officers of these Federal courts, the judges, marshals, and juries, were leading or aiding in the overthrow of the Government. It was after the capital of the nation was invested and beleaguered by vast armies marched upon the capital with the declared purpose of totally overthrowing the Government of the United States, of taking possession of the seat of its power, destroying all the constitutional officers of the Government, seizing upon and appropriating to its rebel government all the archives, insignia, and instruments of the sovereignty of the United States. It was after Merryman and his co-conspirators had—as there is the highest reason to believe—destroyed the bridges and roads by which alone the armies of the United States could, and were seeking to, reach the capital of the nation for its defense against these armies so menacing the very existence of the Government. It was after these conspirators in Baltimore had secretly prepared the arms and powerful combinations of rebel conspirators to carry their State over to the rebellion; after their Legislature had planned the treason by which this conspiracy was to be sanctified by the forms of law, declaring the adhesion of the State to the rebellion; and after the blood of the patriot, who was rushing to his country's deliverance, had, on the 19th of April, A. D. 1861, rendered the streets of Baltimore holy as the soil of Lexington, on which was sprinkled the first blood of the Revolution. And it was just when every loyal heart in our land was crushing in the agonies of grief and fear for the utter overthrow of our institutions, institutions consecrated to freedom and to God, not by the blood of the Revolution and the prayers and benedictions and memories of revolutionary ancestors alone, but by the blessings of the friends of human hopes and human liberty in every land where God has children. Just then it was that Judge Taney uttered the sentiments—in a diatribe delivered in defense of one of these arch-conspirators, and in denunciation of the President's struggles to save the Government—which I now quote. To appreciate what I quote, it must not be forgotten that when he uttered it the judicial authorities of the Federal Government were then not only overthrown in the States where the rebellion was, but the officers of that judiciary were engaged in the rebellion.

First, I quote a proposition he cites from the sixth article of the Constitution, which declares that—

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

I next quote what is on the following page of that opinion in *ex parte* Merryman as follows:

"I can see no ground whatever for supposing that the President, in any emergency or in any state of things, can authorize the suspension of the privilege of the writ of *habeas corpus*, or arrest a citizen, except in aid of the judicial power."

He then goes on to show that the Government of the United States has not the power of self-preservation, and to prove that it has not, he says:

"Nor can any argument be drawn from the nature of sovereignty or the necessities of government for self-defense in times of tumult and danger. The Government of the United States is one of delegated and limited powers."

This meaning, if it means anything, that the powers of the Government are so limited that it has not the power of self-defense. He also says the President "is not empowered to arrest any one charged with an offense against the United States and whom he may, from the evidence before him, believe to be guilty; nor can he authorize any officer, civil or military, to exercise this power." This he declares the President cannot do "in any emergency" or "in any state of things." These propositions have the merit of being plain and unmistakable. The President can, in no rebellion or "danger" or "tumult," "in no emergency" "or state of things" ever arrest, or "authorize any officer, civil or military, to arrest, any citizen." I want my countrymen to mark well these words, and the condition of the country at the time they were uttered; and having done so, proceed with me to the consideration of the doctrines and language of this same man upon another occasion, and touching the powers of the President in the suppression of another rebellion, but one in a more northern latitude.

Martin Luther was a citizen of Massachusetts, and Captain Child and his company of infantry were ordered to arrest him, and, if necessary, to break open his house for that purpose, as one accused of aiding and abetting the Dorr rebellion in Rhode Island. The President of the United States had taken measures to call out the militia of the States to aid the Governor of Rhode Island in putting down the rebellion in which Luther was "abetting," and Chief Justice Taney (7 Howard, 44) declares that this interference of the President, "by announcing his determination, was as effectual as if the militia had been assembled under his orders, and it should be equally authoritative." It does not appear that this Luther had actually been in the army. He, in the plea justifying his attempted arrest, and breaking his house, is only accused of having "aided and abetted" the insurrection. No judicial process was ever issued for him. The order for his arrest was made by a mere military officer, who acted under the sanction and authority of the President as stated above by Judge Taney. Luther sued these military men for breaking his house to ar-

rest him, and the question which came before the Supreme Court of the United States was whether the military authorities, by order of the President, and without any judicial process, had the right to arrest this man and to break his house open for that purpose in order to suppress this insurrection which Luther was abetting, and whether the courts or judges of the United States could meddle with this authority of the President. It was the precise constitutional and legal question which was before Taney in the Merryman case. And how did he then decide it? He not only decided that the President had the right to use the militia to arrest this "abettor" of insurrection, and to break open his house for that purpose, and that without any judicial process being issued for his arrest, but he went on to lay down the doctrines which I now quote, and which I set in contrast with those he promulgates now in aid of this rebellion for the total overthrow of the Government upon whose bounty he feeds. He declares, (page 45:)

"Unquestionably a State may use its military power to put down armed insurrection too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions."

I put this declaration of the Supreme Court, from the lips of Chief Justice Taney, in contrast with his denial of the powers of the Government of the United States now to arrest men when necessary for self-preservation, which I quote above. But the part of this opinion to which I invite special attention is expressed as follows:

"After the President has acted and called out the militia, is a circuit court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the Government, call witnesses before it and inquire which party represented a majority of the people? If it could then it would become the duty of the court, provided it came to the conclusion that the President had decided incorrectly, to discharge those who were arrested or detained by the troops in the service of the United States or of the Government which the President was endeavoring to maintain. If the judicial power extends so far, then the guarantee contained in the Constitution of the United States is a guarantee of anarchy and not of order."—7 *Howard*, 43.

Here, then, we have it set down in a solemn opinion of the highest judicial tribunal of the United States, and that opinion pronounced by the author of this Merryman opinion, not only that the President, by a military force, may arrest a citizen abetting a rebellion, by a military order and without judicial process—not only that the courts cannot interfere with these arrests by the President or discharge his prisoners who have been arrested by the troops in the service of the United States—not only that this power is essential to the existence of every government, but we have it solemnly urged that if the judicial power did extend so far as to discharge those arrested by the President in quelling a rebellion, then the guarantees contained in the Constitution by which the President may suppress such rebellion become guarantees of anarchy and not of order.

Mr. Chairman, the Supreme Court of the United States have decided this important question, and have wisely accorded to the President this power "essential to the existence of every government."

It is no answer to this decision to say that it derives this power of the President from the act of 1795; because, first, it does not derive it alone from that act, but from the "guarantees contained in the Constitution," as is expressly stated by the court; and second, because, if the Constitution does not permit the President to arrest "any man" "in any emergency," except in aid of some judicial process, then the act of 1795 had no right to authorize Luther to be arrested without judicial process, and the law of 1795, which gave the right, must have been held unconstitutional. Besides, if the act of 1795 authorized the President to arrest Luther without process and by mere military orders, and to hold him so that the "court could not discharge those who were arrested or detained by the troops in the service of the United States," (7 Howard, 43,) then I beg to be informed why Merryman and his co-conspirators could not also be so arrested and held in virtue of the same act of 1795.

Mr. Chairman, the English drama has written upon the stones of the forum where conspirators stabbed Cæsar that sentiment which English morality has transcribed upon the dishonored tomb of Jeffreys—

"Judgment, thou art fled to brutish beasts,
And men have lost their reason!"

And, sir, history will have done for posterity her highest offices but poorly should she not record as headlines of that chapter where she writes the judicial history of Merryman's treason some such sentiment of warning as this: the arrow meant for the heart of the Constitution was barbed by the head of its own judiciary.

LIBRARY OF CONGRESS
0 012 026 550 7