(NO. 1 Montgomery)

THE

HABEAS CORPUS,

AND

MARTIAL LAW.

By ROBERT L. BRECK.

Prepared for the Danville Quarterly Review for December, 1861.

CINCINNATI:
RICHARD H. COLLINS, PRINTER,
25 West Fourth Street.
1862.

THE

HABEAS CORPUS,

AND

MARTIAL LAW.

By ROBERT L. BRECK.

Prepared for the Danville Quarterly Review for December, 1861.

CINCINNATI:
RICHARD H. COLLINS, PRINTER,
25 West Fourth Street.
1862.

PREFACE.

The Correspondence herewith given will explain, in large part, this publication.

To complete the explanation it is necessary to add: that the writer having received no reply to the request made toward the conclusion of his first letter; and the December No. of the Review having been issued with his name continued upon the cover as one of the conductors of the work, notwithstanding his expressed desire that his connection with it should be regarded as previously terminated; has seen no course left him but to disavow the connection in some other way. And further, that, of different methods of doing this, the one both least offensive to his brethren from whom he has differed and demanded in justice to himself, has appeared to him, to be, to lay the correspondence, together with the obnoxious Article, before the readers of the Review. If he shall also, hereby, direct the attention of any who have not heretofore investigated them, to the vital questions discussed in the Article, he will have another reason for satisfaction in the choice of this particular method.

He appears in this form before the public with regret and diffidence. First, because it is repugnant to his feelings to be brought into open difference with brethren, among whom are those whom from his youth he has regarded with admiration and affection, and whose friendship has been to him a prized and hereditary possession. Secondly, because the Article, being a non-professional discussion of great legal and Constitutional questions, and having been prepared in a way which the latitude and freedom of a Review allow, is not such as he would have volunteered before the public as an independent publication. He does not profess to have done much more than to bring together the leading views and main arguments of several papers; all of which are not likely to fall into the hands of any large number of the readers of a Review such as he was writing for. He would repudiate any design, in what he has done, to embarrass the Government in any of its legitimate ends and measures; and would express his earnest protest against the intolerance which seeks to fix this stigma upon any who venture to express their opposition to what they believe to be illegal acts and courses of our national administration — especially when these are held by them to be inimical to personal liberty and republican institutions. Freedom of discussion will not cripple or seriously embarrass any government or administration that is worthy of the confidence of the people.

Such is the excitement of the times and the effect of the intolerance alluded to, in closing the ear of a large portion of the public to every one upon whom a suspicion of unfriendliness to the Government may be, justly or unjustly, fastened, he deems it proper here to say this much of himself: That he professes and purposes to be a loyal citizen: that he knows no State government which has any claim upon his allegiance, but that at Frankfort; that he knows no national government that can properly claim his allegiance, but that at Washington: that of each of these he claims that it is his government; and that he will sustain them both to the extent of his ability and influence, in all measures which he believes to be just and Constitutional; that yet he does not consider it either incumbent on him, or patriotic, to approve, indiscriminately or without question, all the things that may be done by them. Of the wretched strife now prevailing in our country — as to its origin or merits or settlement — he has said nothing in these pages — and, therefore, can have said nothing discordant with the utterances which had been made upon these subjects in the Review. In his humble measure, and at the only time and in the only way he believes it could have been secured, he has labored for the preservation of the Union. Since the sword has been made the arbiter, he has felt that he can only stand in his lot and await the issue.

The Article which is now given to the readers of the Review, was, the large part of it, written and in the hands of the printer of the Association, and a portion of it in type, when the printing of it was arrested. The preparation of the manuscript, then discontinued, has, since the purpose of publication in this form, been completed after notes which had been preserved.

It only remains here to give the Third of the "Articles of Association," which were designed to state the chief heads of agreement amongst the persons who associated themselves for the purpose of establishing and controlling the Danville Review:

"Every member shall publish, of his own composition, whatever he pleases; without submitting it to the judgment of any one. All articles shall ordinarily be published in the order in which they are received by the printer: but articles of Members shall have preference of those written by persons not members; and no article of the latter sort shall be received by the printer, except through a member; and no member shall have credit on his 50 pages, for articles thus passing through his hands. No *direct controversy* between the Members, or between articles however furnished, shall be allowed in the pages of the Review."

CORRESPONDENCE.

DANVILLE, KY., OCT. 29, 1861.

REV. R. L. BRECK, Maysville, Ky.:

Dear Brother:

At a meeting of the Review Association, held at Danville on the 23d inst., for the purpose of considering the financial condition of our Magazine, and the material for the December Number, I, (as *pro tem.* Editor,) laid before the members present a letter from our Publisher, Mr. Collins, touching the above named interests. In this letter Mr. C., in enumerating the Articles on hand, or promised, mentioned that you were preparing one with the following caption: "Martial Law and the Writ of Habeas Corpus;" in which you propose to review two pamphlets by Judge Nicholas, and the decisions of Justices Treat and Taney. The members of the Association thinking a position taken upon this subject of vital importance to our interests, and fearing your conclusions might be adverse to the action of the General Government, directed me to request Mr. Collins to inform us as to the bearing of your article. To this request he replied that he was unable to tell. At another meeting, held Oct. 28th, the following resolution was adopted, *nem. con.*, and I was directed to communicate it to you:

"We are not willing to commit our Review to an authoritative declaration on the vexed law question, of the Right to suspend the Writ of Habeas Corpus: more especially, if the declaration be adverse to the action of the Executive; and would exceedingly regret if anything should now be published in the pages of our work, which might appear unfriendly to the action of the General Government. We, therefore, earnestly hope and request, (while acknowledging your rights, according to the terms of our original Articles of Association,) that if the sentiments of your Article are in any way hostile to, or of such a character as to embarrass, the action of the Government in our present political distress, you will withhold it: at least until such time as its publication will be looked upon only as affecting the discussion of an abstract principle."

It is proper to add that there were present at this meeting the following members: Drs. Breckinridge, Humphrey, Landis, Smith, Yerkes, and myself. At the previous meeting, Professor Matthews was present, and Dr. Humphrey was absent.

We may be entirely mistaken as to our fears in regard to the position you will take in your Article; and, therefore, all our anxiety may be unnecessary, as well as seem ungenerous to you. But, feeling as we do that an utterance in our pages against the Government, would be not only discordant with its previous deliverances, but certain death to its present prospects; we feel sure that, writing as we do in the spirit of brotherly kindness, you cannot be offended at our request.

I hope to hear from you soon.

In conclusion I remain,

Your brother in Christ,

JACOB COOPER.

MAYSVILLE, MONDAY, Nov. 4, 1861.

REV. JACOB COOPER:

My dear Brother:

Having been absent a few days from this place, I found this morning at the Post Office your communication of the 29th Oct. It occasioned some surprise, but no other feeling. I was ignorant of the views of the other brethren of the Association, upon the questions discussed in my Article; but had rather supposed they would agree in general with my own — at least had no reason to suppose they would be materially different. In a personal interview with Mr. Collins, however, after his return from Danville and after the suggestion of a possible discrepancy, I authorized him to make known to any of the brethren who might desire to know, the general drift of the article. I am not able to see that the grounds I have taken are discordant with any "previous deliverances" in the Review, as I regard the questions I have discussed perfectly separable and separate from others previously discussed, touching the state of the country. And I do not see how any "authoritative declaration" can be made, in a work in which we are required to publish over some permanent signature, and charged with an individual responsibility by written agreement. *

As to the article proving "certain death to the present prospects" of the Review, allow me to say — that I had supposed the object of the work was to form and lead public sentiment, and not to follow it — to seek after truth in free discussion, and not success by conformity to popular opinion; and further — that there seems to me a reasonable ground for difference of opinion, as to whether the mind of the reading public is such as that an expression of such views as I have put into the Article, would destroy or cripple the work.

I have written this much, however, not in the way of a plea for the Article — that I have instructed Mr. Collins to withhold — but because it seemed neces-

---

* The writer was under the impression that the obligation to use a signature or initial, or other uniform designation, was in the Articles of Association. Upon examination he finds that it was in a resolution adopted by the Association, since the organization. It is also stated in the Explanatory Note in the first number of the Review.

sary in justice to myself. I have regarded myself from the beginning as but little more than a nominal member of the Association, and consented to become connected, and have remained connected with it, not because I had any views to publish, but from my friendliness to the enterprise; and not because I thought I could be of service to it, but because, at the time it was begun, others thought I could be. I am sensible that I am of but little consequence to the Association, and have rendered but little service to it.

There have been some things in the Review from which I differed widely, and things, too, which I thought would greatly impair its popularity; but I have not believed that I had the right, and have not had the disposition to challenge them.

Under all the circumstances, the action of so many of the brethren — and in the form in which it has been taken — is as binding on me as any written agreement, to the same effect, could be. The article, therefore, has been promptly withdrawn.

I see, and have seen from the beginning, the difficulty of conducting a work upon the nominal plan of the Review. In spite of articles of agreement guaranteeing the freedom of discussion, there must be some restraint; and I am satisfied it would be better for one or two persons to assume the entire responsibility. As to myself, it seems plain to me that I ought to withdraw from the Association; and, accordingly, request that my connection with it may be regarded as now terminated. This is done in perfect kindness to the members, all of whom I have reason to regard as friends and Christian brethren; and some of whom, whom I know better, I admire, and am warmly attached to.

I would like, also, to be allowed to withdraw in a way that will put me right before my friends. For whilst the circle is small in which the matter will receive any attention, yet I desire as much as brethren whose influence and reputation are wider, that my record, in relation to the tremendous events that are passing, shall correctly represent me to any who now have interest enough in me to observe my course, and to my children in after years. I do not wish, by an abrupt and unexplained termination of my connection with the Review, to leave room for incorrect and injurious inferences. I would like to be allowed a statement, of a dozen lines on the cover — and which shall be made perfectly acceptable to the brethren — of the simple fact in relation to the matter; which will leave me under no necessity ever after to make an explanation.

I desire to assure yourself, and, through you, the brethren in Danville, of my kind and fraternal regard.

Truly yours,

ROB'T. L. BRECK.

DANVILLE, KY., Nov. 8, 1861.

REV. R. L. BRECK:

Dear Brother:

Your letter of Nov. 4th, has been laid before the Association, and I am directed by the members present to say to you, that they are much pained at your determination to withdraw from us; and to express their earnest desire that you will reconsider it.

We remain in ignorance of the drift and intention of your Article; and are, therefore, unable to do more than to disclaim all purpose of any interference beyond making a fraternal request prompted by the reasons we gave you, and warranted, as we supposed, by the relations of all kinds existing between us.

You state in your letter that you had directed Mr. Collins to withdraw your Article. He informs us that by your direction he stops the printing of it till further orders. We, of course, are not either authorized or inclined to give him any orders on the subject, and recognize your perfect right to do as you think best on mature reflection.

By order of Association.

With the kindest regards, I remain most sincerely,

Your friend and brother,

JACOB COOPER.

MAYSVILLE, WEDNESDAY, Nov. 13, 1861.

REV. JACOB COOPER:

My dear Brother:

Yours of the 8th inst. was received last night.

I do not see any reason for altering the decision I communicated to you.

Mr. Collins, probably, has written to you before this, that he was directed, a few hours after the notice to suspend, wholly to withdraw the article.

Very truly yours,

ROB'T. L. BRECK.

THE HABEAS CORPUS AND MARTIAL LAW.

Martial Law. By S. S. Nicholas. Part of a Pamphlet first published in 1842, over the signature of "A Kentuckian." Bradley & Gilbert, Printers, Louisville.

A Review of the Argument of President Lincoln and Attorney-General Bates, in favor of Presidential Power to suspend the privilege of the Writ of Habeas Corpus. By S. S. Nicholas, of Louisville, Ky. Bradley & Gilbert, Printers.

Decision in the United States District Court, Missouri, in the Matter of Emmet McDonald. The Opinion of the Court delivered by Justice Treat. American Law Register, vol. 9, pp. 661–695.

Decision in the United States Circuit Court, Chambers, Baltimore, Maryland. Before Taney, Chief Justice. Ex Parte John Merryman. The Opinion of the Court delivered by the Chief Justice. American Law Register, vol. 9, pp. 524–538.

The American people are engaged in a great struggle, in the progress of which they begin to be, for the first time, thrown upon the serious discussion of the most fundamental and vital principles of enlightened and constitutional liberty. It is an evidence of their past happy exemption from tempests such as have rocked other great nations, that these very elementary principles, these rudiments of liberty, are so little known and so feebly apprehended by them. They have lived in the almost unparalleled enjoyment of liberty,

but have realized no occasion to study it, and have not analyzed or defined it. They have sailed upon a smooth sea, without the experience of a single storm to awaken serious apprehensions for their safety, and have never examined the vessel that has borne them, to understand the great timbers and braces that hold it together. Yet this which is the evidence of the serenity of their past enjoyment, is one of the features of peril for the future, in that they may unconsciously part with the rights they have but poorly studied and little understand, and may be able to regain them, if ever recovered, only at the expense of great suffering, and treasure, and blood. The struggle for the preservation of the Union of our States, in the manner in which it has been conducted on the part of the Government, is awaking many of the more thoughful of the nation to the serious consideration of the great underlying principles of our liberty, and is inaugurating another conflict—a conflict for constitutional liberty against the encroachments of arbitrary power—the issue of which is not less uncertain, and is even more momentous to us as a people, and to the world, than the issue of the other. Valuable as is the Union, it is yet not above estimation. There are inalienable rights the loss of which would be poorly compensated by its preservation—without which it would not be worth preserving. It may be that the fearful struggle for the integrity of the nation—if it must go on—does not necessarily involve the sacrifice of those rights, if the people will but gird themselves for the other conflict which their preservation demands. But the time has come when they must array themselves in their majesty, and offer a firm and prompt resistance to the invasion.

The papers before us embody the issues which are now being thrust upon the nation by the new and startling claims of executive prerogative, and the actual exercise of powers before unprecedented in our history. Judge Nicholas, the author of the first two, is widely known in Kentucky as one of the ablest jurists and one of the most patriotic and loyal

citizens in the Commonwealth. The first of his pamphlets, the greater part of it, was written nearly twenty years since, having been occasioned by a speech of Mr. Adams in the House, and the discussion in the Senate of the United States Congress, upon the refunding to General Jackson the amount of the fine inflicted upon him by Judge Hall, for refusing to obey the writ of *habeas corpus*, and violence to the Court, under the martial law proclaimed by him in New Orleans. In the speech of Mr. Adams and the remarks of leading Senators, doctrines were advanced which were justly regarded as striking at the roots of our liberty, of which the present monstrous usurpation of power by the Executive and Military departments of the Government, are the full and complete development. A portion of the pamphlet then published without the name of the author, possessing a singular fitness to the present time, was republished with an Appendix in June last.

The other pamphlet of Judge Nicholas is, of course, a recent publication. We give his introductory definition of his political status—deemed necessary by him probably on account of the severity of his strictures—that we may, so far as our influence can reach, clear the way for the circulation of the pamphlet, by showing that the trumpet note of warning comes from no disloyal quarter:

"It may be necessary with those to whom the writer is not personally known, to premise, that he claims to be a thorough and devoted Unionist. He has manifested his right to make that claim by having, during the last five years, written and published more, probably, than any other man to arouse the nation to a perception of the proximate danger to the Union from the treasonable machinations of secessionists and abolitionists. For all that time he has been constantly predicting the present state of national affairs. He has assiduously assaulted the secession heresy with argument and denunciation. He has done what he could to portray the inestimable value of the Union, and the endless, numberless evils of its dissolution. Could there be such a thing as a dictatorship, he should deem its powers rightfully employed in decimating leading

secessionists and abolitionists, in decimating the members of secession conventions, and especially in decimating the secession members of the Virginia Convention, the Tennessee and Missouri Legislatures, who so signally betrayed popular trust.

"He believes the present civil war will be long protracted; that we are marching with rapid strides to that military despotism predicted for us by the fathers of the Republic; that the preservation of the Constitution with those principles of civil liberty which it consecrates and secures, is the very highest obligation of patriotism, far above the mere preservation of the Union; that the entire destruction of the Constitution and civil liberty is a price the nation cannot afford to pay for preserving the Union, even if it were not absurd to suppose that the preservation of the one requires the destruction of the other; that it is a gross calumny on the structure of our government, to charge that it is too weak to put down the present rebellion; and that if it can not be put down with an army of five hundred thousand men, and a large navy, without trampling on the Constitution, it will be because of the incompetency of the President and his Cabinet, and not from any fault in the structure of the government. With these views, the writer means perseveringly to use his very humble efforts to stay the march to despotism, and earnestly entreats the co-operation of the thousands of far abler and younger men scattered through the country. The opinions, as to principles now to be vindicated, were all matured and published near twenty years age."

The decision in the United States District Court, Missouri, is an utterance honorable to the ability and the fidelity of that high tribunal. The case was one of very general interest throughout the country. It is not necessary to narrate all the facts and circumstances connected with it. Emmet McDonald, a citizen of Missouri, being a prisoner in the United States Arsenal in St. Louis, petitioned the court for a writ of *habeas corpus*, alleging that he was held in unlawful confinement; that he was so held under no law or authority, civil or military, of the State, but under or by color of the authority of the United States; that yet his confinement was by no order of, nor by any process issuing from any tribunal of the United States. The writ having

been issued, on a demurrer to the return, and a submission, by the counsel for the respondent, of the question of jurisdiction, the decision of the court was rendered. It decides that the Federal courts have exclusive jurisdiction to issue the writ of *habeas corpus* whenever the applicant is illegally restrained of his liberty under or by color of the authority of the United States, and that any Federal judge may issue the writ when the applicant is so restrained, though without any formal or technical commitment; reviews the acts of Congress—the "Judiciary Act" of 1789 and the "Force Bill" of 1833—and the decisions of the United States Courts, by which the question of jurisdiction is to be determined; gives the history of the *habeas corpus* under these Acts of Congress, drawn from the adjudicated cases, which are cited and commented on; and concludes by pronouncing the court's jurisdiction in the case "clear, positive and ample."

The opinion of Chief Justice Taney at Chambers in Baltimore, is pronounced by the profession "a high, finished specimen of luminous, convincing judicial disquisition"—"an enduring monument of official fidelity"—"a proud evidence of octogenarian ability." It is more than all this. It is probably the most important judicial opinion ever pronounced in this country. It is the highest and most authoritative challenge known under our Constitution, of the exercise of despotic power, and of sweeping, destructive precedents of Executive usurpation; and given at a time when the question of the supremacy of law in our land, and of the sanctity of constitutional guarantees of personal liberty, possibly for all time to come, is being settled. It is such a challenge as must check the progress toward despotism, or else make it more rapid and resistless, by the exposure of its lawlessness, and the natural acceleration of evil when it has once broken through the most powerful restraints, and begins unblushingly to trample under foot the sacred authority of law. It has already been set at defiance by the Executive, but it is to be hoped that it will

yet arouse the nation, at least when the people have suffered more and have been put more upon the study of the rudimental principles of their liberty.

The case eliciting the opinion is thus strongly stated by the Chief Justice:

"A military officer, residing in Pennsylvania, issues an order to arrest a citizen of Maryland, upon vague and indefinite charges, without any proof so far as appears. Under this order his house is entered in the night; he is secured as a prisoner, and conveyed to Fort McHenry, and there kept in close confinement. And when a *habeas corpus* is served on the commanding officer, requiring him to produce the prisoner before a justice of the Supreme Court, in order that he may examine into the legality of the imprisonment, the answer of the officer is that he is authorized by the President to suspend the writ of *habeas corpus* at his discretion, and, in the exercise of that discretion, suspends it in this case, and on that ground refuses obedience to the writ."

The arrest was made by Gen. Keim, of Pennsylvania, and the prisoner was in the custody of Gen. Cadwallader. A copy of the writ or order of arrest was refused to the prisoner's counsel. And it appears that there was no charge of any specific act of violation of the laws of the United States, but only a general charge of rebellion and treason, without the testimony supported by oath, or even the names, of witnesses. It is not necessary, however, to go into detail of the circumstances, both because they are well known, and because such cases have since become very numerous. The country has become familiar with that by which it was at first so much startled. Political prisoners are now numbered by the hundred, and even by the thousand—seized in the same disregard of the provision of the Constitution that no person "shall be deprived of life, liberty, or property, without due process of law." Torn suddenly from their families—in many cases refused the poor privilege of bidding their wives and children adieu, or of procuring a change of clothing. Denied the right which the Constitution guar-

antees to the person accused in all criminal prosecutions, "to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense." The officer of the law bearing the great writ of *habeas corpus*, for their protection in this right, dismissed with contempt, or repelled at the point of the bayonet. Transported to some distant state, where no assistance of friends can reach them. Lying now in remote prisons, soon to be forgotten in the rapid succession of exciting public events, save in the appalling gloom of their desolate homes and the hearts of their stricken families—until the jealousy of the people shall begin to inquire for them, and their indignation burst in tones of thunder upon the ear of the oppressor.

It only remains to be added, to complete the statement of the case before Chief Justice Taney, that at the time of the arrest of Merryman, the United States District Judge of Maryland, Commissioner, District Attorney and Marshal, all resided in Baltimore, a few miles from the house of the prisaner, offering a sure and speedy mode of apprehension and commitment by "due process of law," if there had been the proper evidence to authorize it, and amplest security against any detriment to the public interest by delay. Further, that after the arrest had been made, and the petition for a *habeas corpus* was presented to Chief Justice Taney at Washington, he did not order the prisoner to be brought before him there, but repaired to Baltimore, which is in his circuit, that Gen. Cadwallader might not be withdrawn from his military post. Under these circumstances, the disobedience to the writ was the most direct, deliberate and violent resistance to judicial authority, in its most august form in this land, and in a matter involving one of the most vital principles of the Constitution, and one of the most sacred rights

of every citizen; presenting a case of surpassing interest and moment to the American people.

The Chief Justice examines the monstrous claim of the President, of the right "not only to suspend the writ of *habeas corpus* himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey the judicial process that may be served upon him." He holds that the President can not in any emergency, or in any state of things, authorize the suspension of the privilege of the writ, or arrest a citizen, except in aid of the judicial power; that this is an authority belonging exclusively to the Legislative department of the Government—to Congress. He supports this opinion by an examination of the Constitution of the United States; of the English Constitution, which gives the power to suspend the writ of *habeas corpus* to Parliament only, and the analogy between the English Government and our own; of the Judiciary Act of 1789; and of the history of the *habeas corpus* in England and in the United States. He, further, charges that in this case the military authority had gone far beyond the mere suspension of the privilege of the writ of *habeas corpus*. It had "by force of arms thrust aside the judicial authorities and officers to whom the Constitution has confided the power and duty of interpreting and administering the laws, and substituted military government in its place, to be administered and executed by military officers." A military officer in Pennsylvania had assumed judicial power in Maryland; had caused an arrest in the immediate presence of the competent United States judicial authorities and officers; had undertaken to decide what constitutes the crime of treason or rebellion; and had imprisoned, without even a hearing before himself, a citizen of Maryland, to remain in confinement during the pleasure of those who committed him. Fundamental laws had thus been suspended which even Congress has not power to suspend. For even if the privilege of *habeas corpus* be suspended by the only constitutional power that can suspend it, it still

remains among the indestructible rights guaranteed in the Constitution, that "no warrant shall issue, but upon probable cause, supported by oath or affirmation"; that the accused shall be "confronted with the witnesses against him"; and shall have "a speedy and public trial, before an impartial jury of the state and district wherein the offense shall have been committed."

The venerable Chief Justice thus concludes:

"Such is the case now before me, and I can only say, that if the authority which the Constitution has confided to the judiciary department and judicial officers may thus, upon any pretext, or under any circumstances, be usurped by the military power at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose district he may happen to be found.

"In such a case my duty was too plain to be mistaken. I have exercised all the power which the Constitution and laws confer on me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions and exceeded the authority intended to be given him. I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the Circuit Court of the United States for the District of Maryland, and direct the Clerk to transmit a copy, under seal, to the President of the United States. It will then remain for that high officer, in fulfillment of his Constitutional obligation, to "take care that the laws be faithfully executed," to determine what measure he will take to cause the civil process of the United States to be respected and enforced."

The melancholy conclusion of the whole matter was the sustaining of the military authority by the President, in the continued disobedience to the judicial process and retention of the prisoner, thus fixing the initial and the final responsibility in this violent procedure, upon the highest executive officer of our Government.

The papers which have now been noticed cover the whole

ground of the questions to which they relate. It were well if they were put into the hands of every citizen of the United States. We can only recommend them to our readers, while for those under whose eye they may not fall, we develop some of the arguments and present some of the authorities which they furnish to our hand.

The writ of *habeas corpus* has been the great instrument for the protection of the personal liberty of freemen, wherever men have been free. Its history down to its engrafting from the common law into our own Constitution, is thus sketched by Judge Kane, of the United States District Court, (4 American Law Register, 13:)

"The writ of *habeas corpus* is of immemorial antiquity; it is deduced by the standard writers on the English law from the Great Charter of King John. It is unquestionable, however, that it is substantially of much earlier date; and it may be referred, without improbability, to the period of the Roman invasion. Like the trial by jury, it entered into the institutions of Rome before the Christian era, if not as early as the times of the Republic. Through the long series of political struggles which gave form to the British Constitution, it was claimed as the birth-right of every Englishman, and our ancestors brought it with them, as such, to this country. At the common law it issued whenever a citizen was denied the exercise of his personal liberty, or was deprived of his rightful control over any member of his household, his wife, his child, his ward, or his servant. It issued from the courts of the sovereign, and, in his name, at the instance of any one who invoked it, either for himself or another. It commanded, almost in the words of the Roman edict, '*de libero homine exhibendo*,' that the party under detention should be produced before the Court, there to await its decree. It left no discretion with the party to whom it was addressed. He was not to constitute himself the judge of his own rights or of his own conduct, but to bring in the body, and to declare the cause wherefore he had detained it; and the judge was then to determine whether that cause was sufficient in law or not. Such in America, as well as England, was the well-known, universally recognized writ of *habeas corpus*. When the Federal Convention was engaged in framing a Constitution for the United States, a proposition was submitted to it by one of the mem-

bers, that '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.' The committee to whom it was referred for consideration, would seem to have regarded the privilege in question as too definitely implied in the idea of free government to need formal assertion or confirmation; for they struck out that part of the proposed article in which it was affirmed, and retained only so much as excluded the question of its suspension from the ordinary range of Congressional legislation. The Convention itself must have concurred in their views, for in the Constitution, as digested and finally ratified, and as it stands now, there is neither enactment nor recognition of the privilege of this writ, except as it is implied in the provision that it shall not be suspended. *It stands then under the Constitution of the United States as it was under the common law of English America, an indefeasible privilege, above the sphere of ordinary legislation.*"

The benefit of this writ has always been the privilege of Englishmen from the earliest history of the common law, and the earliest period of their national existence—obscured, violated, trampled upon, indeed, it has been by arbitrary and despotic power, but never relinquished by them. It was not created by the Magna Charta nor by the celebrated statutes of 25th Edward III, or 31st Charles II. These were but recognitions of the privilege by the crown—extorted securities of a right already existing—the latter more decisive and final, putting an end to abuses and to the long controversy respecting it. The severest and longest struggles between the English Crown and the people related to the privilege of this writ, and each issued in a more distinct recognition of it, and an ampler security for its undisturbed enjoyment, until finally the entire control of it was removed entirely beyond the reach of the crown.* Our fathers brought it to this continent with the English blood circling in their veins. It stood in the common law, which was their heritage.

---

* Hallam's Constitutional History, vol. 3, p. 9.
C. J. Taney, Ex Parte Merryman, p. 531.

And when they came to make a government for themselves, they put it into their Constitution.

This great writ, of immemorial antiquity: the right to which our English ancestors, through all the period of their history, steadily and unswervingly asserted; which they vindicated with their blood; the guarantees of which they wrung from royal despots; which our fathers brought with them to this continent and put into their Constitution—this great writ the President of the United States now assumes to control; and claims the authority *ex officio* to suspend the privilege of it at his discretion, and even to delegate this discretionary power to inferior military officers in every part of the country; and acting under this assumption of authority he has caused to be arrested hundreds of citizens who now lie in prisons, to continue there during his pleasure. And this which might not be done by kings—by Plantagenets, Tudors and Stuarts—without challenge by a jealous people, is done by a Republican President, about whom the framers of our Constitution seem to have been at pains to throw restrains to check his power, in view of which an eminent member of the British Parliament pronounces him "the feeblest executive perhaps ever known in any civilized community."* A claim of authority and an exercise of power so extraordinary, surely should awaken the jealousy of the American people.

The privilege of the *habeas corpus* is, of course, not removed entirely beyond Constitutional restraint. The exigencies of the State are imperious, against which no private interest can stand. To such cases our Constitution limits the suspension of this privilege. It provides, Art. I, sec. 9: "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." But the authority to judge of this necessity—in the opinion of the most eminent authorities, among whom are all our Federal Courts, and, we

* Sir Edward Bulwer Lytton.

believe, in the opinion of all but those who would justify themselves in the usurpation of this authority, and their partisan supporters—it has not confided to the Executive, against whose abuse of power the writ is designed to be a protection, but to Congress. The decision of the question of necessity, and the suspension of the privilege of the writ, are legislative acts, and competent only for the National legislature.

The evidence in support of this view may be reduced to three heads.

1. The analogy between the English Government and our own. By the English Constitution the authority to suspend the *habeas corpus* is limited to Parliament. Hallam, in the outset upon his great work, The Constitutional History of England (vol. I, p. 2),* enumerates five "essential checks upon the royal authority," which were found firmly established as early as the accession of Henry VII to the throne, of which the last three are as follows:

"(3.) No man could be committed to prison but by a legal warrant specifying his offense; and by an usage nearly tantamount to constitutional right, he must be speedily brought to trial by means of regular sessions of gaol-delivery. (4.) The fact of guilt or innocence on a criminal charge was determined in a public court, and in the county where the offense was alleged to have occurred, by a jury of twelve men, from whose unanimous verdict no appeal could be made. Civil rights, so far as they depended on questions of fact, were subject to the same decision. (5.) The officers and servants of the Crown, violating the personal liberty or other right of the subject, might be sued in an action for damages, to be assessed by a jury, or, in some cases, were liable to criminal process; nor could they plead any warrant or command in their justification, not even the direct order of the King."

Upon this point the authority of Blackstone (1 Com. 135) will be conclusive:

* The edition to which our references are made, is that of Paris, 1841, which does not correspond in form to that to which the references in the papers before us are made.

"Of great importance to the public is the preservation of personal liberty; for if once it were left in the power of any, the highest magistrate to imprison, arbitrarily, whomsoever he or his officers thought proper, there would soon be an end of all other rights and immunities. Some have thought that unjust attacks even upon life, or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth than such as are upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole kingdom; but confinement of the person by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, or less striking, and therefore more dangerous engine of arbitrary government. Yet sometimes, when the State is in real danger, even this may be a necessary measure. *But the happiness of our Constitution is, that it is not left to the Executive power to determine when the danger of the State is so great as to render this measure expedient; for it is the Parliament only, or legislative power, that can authorize the Crown, by suspending the habeas corpus act for a short or limited time, to imprison suspected persons without giving any reason for so doing.*"

Such is the English Constitution, from which our fathers derived most of their ideas of constitutional liberty. It is not probable that they meant to put into the Constitution they made for themselves and for their children, fewer guarantees of personal liberty than existed in the one under which they had before lived. Especially having just emerged from the struggle for Independence, in which they had thrown off the old government on account of the abuses of power by the Executive, it is not probable that they meant, in the new government which they constructed for themselves, to enlarge the power of the Executive. They were not dissatisfied with the English Constitution, but with its abuses; nor with the Government, but with the tyrannical and oppressive acts in its administration. In their Declaration of Independence nearly all their complaints are directed against the King, the Executive head of the Government. This was the power, then, they would be expected to guard

most jealously in making a government for themselves, being the power from the abuse of which they had suffered most in the past. It certainly cannot be supposed that they would give to their Executive a more than regal power over the liberties of the citizen—a power deemed unsafe, and denied to the King under the English Constitution.

2. The position and natural relation of the clause of the Constitution in question—which is the only one in the instrument that relates to the suspension of the privilege of the writ of *habeas corpus*. Here the exposition of Chief Justice Taney is so luminous and concise, that it would be presumption to attempt to give it in any other than his own language.

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

"The power of legislation granted by this latter clause is by its words carefully confined to the specific objects before enumerated. But as this limitation was, unavoidably, somewhat indefinite, it was deemed necessary to guard more effectually certain great cardinal principles essential to the liberty of the citizen, and to the rights and equality of the States, by denying to Congress, in express terms, any power of legislating over them. It was apprehended, it seems, that such legislation might be attempted, under the pretext that it was necessary and proper to carry into execution the powers granted, and

it was determined that there should be no room to doubt where rights of such vital importance were concerned; and, accordingly, this clause is immediately followed by an enumeration of certain subjects to which the power of legislation shall not extend; and the great importance which the framers of the Constitution attached to the privilege of the writ of *habeas corpus* to protect the liberty of the citizen, is proved by the fact that its suspension, except in cases of invasion and rebellion, is first in the list of prohibited powers—and, even in these cases, the power is denied and its exercise prohibited, unless the public safety shall require it. It is true that in the cases mentioned, Congress is, of necessity, the judge of whether the public safety does or does not require it; and its judgment is conclusive. But the introduction of these words is a standing admonition to the legislative body of the danger of suspending it, and of the extreme caution they should exercise before they give the Government of the United States such power over the liberty of a citizen.

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

That a clause standing in the Constitution before the clause providing that there shall be a President, and before the office has even been named, except in the most incidental way, in defining the functions of other departments as they connect with it—and put into an article devoted to another department—should relate to powers of the President—seems hardly possible to be believed by persons having the common capacity for the interpretation of written language, much less by those trained in our courts and at the head of our Government. It is certainly a desperate shift, to base the Executive usurpation of this power upon this clause of the Constitution.

3. The opinions of our highest Federal Courts, and of the most eminent expounders of Constitutional law. We have before us the opinions of Chief Justice Taney and Justice

Treat, in two of the courts of the United States. We will add only two other authorities, which cannot be surpassed in weight with any intelligent American citizen. The first is the opinion of the Supreme Court of the United States, pronounced by Chief Justice Marshall. In 4 Cranch, 95 and 101, referring to the Judiciary Act of 1789—and delivering the opinion of the Court—that illustrious ornament of the American Bench uses this language:

"It may be worthy of remark, that this act was passed by the first Congress of the United States sitting under a Constitution which had declared that 'the privilege of the writ of *habeas corpus* should not be suspended, unless when, in cases of rebellion or insurrection, the public safety might require it.' Acting under the immediate influence of this injunction they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they gave to all the courts the power of awarding writs of *habeas corpus*. * * * * If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the Legislature to say so. The question depends on political considerations, on which the legislature is to decide. Until the legislative will be expressed, the Court can only see its duty and obey the laws."

The remaining authority is that of Judge Story, also an illustrious name in connection with the Supreme Court of the United States. In his Commentaries on the Constitution, (3, sec. 1836.) Judge Story says:

"It is obvious that cases of emergency may arise, which may justify, nay, even require the temporary suspension of any right to the writ. But as it has frequently happened in foreign countries, and even in England, that the writ has, upon various pretexts and occasions, been suspended, whereby persons apprehended upon suspicion have suffered a long imprisonment, sometimes from design, and sometimes because they were forgotten, the right to suspend it is expressly confined to cases of rebellion or invasion, where the public safety may

require it. A very just and wholesome restraint, which cuts down at a blow a fruitful means of oppression, capable of being abused in bad times to the worst of purposes. Hitherto no suspension of this writ has ever been authorized by Congress since the establishment of the Constitution. *It would seem, as the power is given to Congress to suspend the writ of habeas corpus in cases of rebellion or invasion, that the right to judge whether the exigency had arisen must exclusively belong to that body.*"

In the face of such evidence and authorities, it is very great hardihood to contend that the clause in the Constitution authorizing the suspension of the privilege of the writ of *habeas corpus*, confers this power on the President. It seems the plainest thing possible that it confides it exclusively to Congress.

But the present Attorney General, who is the constitutional legal adviser of the President, and must be regarded as the exponent of his views and claims in this matter, argues that this power is conferred on the President by the official oath required of him, by the general charge the Constitution gives him to see that the laws are faithfully executed, and by the acts of Congress making it his duty to prevent and repel invasion and to put down insurrection. And the Secretary of State, in his recent correspondence with the British Minister touching the arbitrary arrest and imprisonment of British subjects, boldly renews the Presidential claim of this power on substantially the same grounds. Attorney-General Bates says:

"All the other officers are required to swear only 'to support this Constitution,' while the President must swear 'to preserve, protect and defend it,' which *implies the power to perform* what he is in so solemn a manner to undertake. Then follows the broad, compendious injunction, to 'take care that the laws be faithfully executed.' This injunction, embracing as it does all the laws, Constitution, treaties, statutes, is addressed to the President alone, and not to any other department or officer. This constitutes him in a peculiar manner, and above all other officers, *the guardian of the Constitution*—its preserver, protector and defender."

Secretary Seward to Lord Lyons says:

"The President of the United States is, by the Constitution and laws, invested with the whole executive power of the Government, and charged with the supreme direction of all municipal or ministerial civil agents, as well as of the whole land and naval forces of the Union; and invested with these ample powers, he is charged by the Constitution and laws with the absolute duty of suppressing insurrection as well as preventing and repelling invasion; and for these purposes he constitutionally exercises the right of suspending the writ of *habeas corpus*, whenever and wheresoever, and in whatsoever extent the public safety, endangered by treason or invasion in arms, in his judgment requires."

Alas, that an official oath which by its peculiar solemnity, greater than that of any other in the Constitution, indicates the jealousy and distrust of executive power felt by the framers of the instrument, should be used to uphold the usurpation it was designed to guard against! That a charge of the Constitution framed with cautious limitation of the power of the President, should be made a plea for grasping unlimited power! That acts of Congress which express the national sense of the designed limitation of the authority of the executive in the Constitution, and of its deposit of supreme power with the Legislature, should be held to justify the claim and exercise of power that over-rides that of the Legislature itself! Mr. Clay, upon the appearance of Gen. Jackson's famous Protest, in the Senate expressed unaffected astonishment that an official oath should be regarded as containing a grant of power, and declared that such a thing was never before heard of. The charge of the President in the Constitution is expressed with singular clearness and caution. It is not "broad" and "compendious," but explicit and definitive. It clothes him with no power to make or judge of laws, or to carry on the government according to his wisdom or discretion, but enjoins upon him simply "*to take care* that the laws be faithfully executed." He is not by the Constitution "charged with the absolute duty of suppressing insurrection as well as preventing and repelling invasion." There is not

one word of such a power, or a shred of authority for it, in the Constitution, but it is expressly given to the Legislature; and in so far as he possesses it, it is by grant of that body. The Constitution, in Art. I, Sec. viii, says, that "*Congress* shall have power to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions"—"to provide for the common defense and general welfare of the United States"—"to declare war"—"to raise and support armies"—"to provide and maintain a navy"—"to make rules for the government and regulation of the land and naval forces"—"to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States." Congress, in order to enable the President effectually to "take care that the laws be faithfully executed," has, indeed, in the supreme control which the Constitution gives it, put the military and naval power of the Government at his disposal for suppressing insurrection and repelling invasion; but then it has in the most explicit and emphatic way withheld the power over the *habeas corpus*, to establish the Presidential claim to which, all this array of his other powers is made. A bill, drafted probably under the advisement of Mr. Jefferson, for the suspending of the privilege of the writ, was during his administration and the conspiracy of Aaron Burr, passed by the Senate, but indignantly rejected by the House. Neither Mr. Jefferson nor the Congress of his time, thought the suspension of the privilege of the *habeas corpus* was a right *ex-officio* of the President, but evidently regarded it as belonging to Congress, without whose authority it could not be exercised by the President. And at no subsequent time has Congress conferred this power on the President. It remains, therefore, where the Constitution has lodged it—with the National Legislature.

We desire, however, against this claim preferred by the eminent men in the Cabinet, that the President by his oath and office is constituted "in a peculiar manner, and above all other officers, the guardian of the Constitution—its pre-

server, protector and defender"—the custodian of our liberties—to hurl the eloquent and burning words of the great Webster, in his speech in the Senate against the Protest of Gen. Jackson. Their elegance and force, the solemn warning they utter, their singular fitness to the arguments which are now being used in favor of arbitrary power, and their pertinence to this whole discussion, will justify the length of the extract:

"Would the writer of the Protest argue that the oath itself is any grant of power; or that because the President is to preserve, protect and defend the Constitution, he is, therefore, to use what means he pleases, or any means for such preservation, protection and defense, except those which the Constitution and laws have specially given him? Such an argument would be preposterous; but if the oath be not cited for this preposterous purpose, with what design is it thus displayed, unless it be to support the idea that the maintenance of the Constitution and the preservation of the public liberties are especially confided to the safe discretion, the true moderation, the paternal guardianship of executive power?

* * * * * *

"Mr. President, *the contest for ages has been to rescue liberty from the grasp of executive power*. Whoever has engaged in her sacred cause, from the days of the downfall of those great aristocracies which stood between king and people to the time of our own independence, has struggled for the accomplishment of that single object. On the long list of the champions of human freedom, there is not one name dimmed by the reproach of advocating the extension of executive authority. On the contrary, the uniform and steady purpose of all such champions has been to limit and restrain it. To this end all that could be gained from the imprudence, snatched from the weakness, or wrung from the necessities of crowned heads has been carefully gathered up, secured, and hoarded as the rich treasures, the very jewels of liberty. To this end popular and representative right has kept up its warfare against prerogative with various success; sometimes writing the history of a whole age with blood—sometimes witnessing the martyrdoms of Sydneys and Russells—often baffled and repulsed, but still gaining on the whole, and holding what it gained with a grasp that nothing but its own extinction could compel it to relinquish.

"Through all this history of the contest for liberty, *executive power has been regarded as a lion that must be caged.* So far from being the object of enlightened popular trust—so far from being considered the natural protection of popular right—it has been dreaded as the great object of danger.

"Who is he so ignorant of the history of liberty at home and abroad—who is he from whose bosom all infusion of American spirit has been so entirely evaporated—as to put into the mouth of the President the doctrine that the defense of liberty naturally results to executive power, and is its peculiar duty? Who is he that is generous and confiding towards power where it is most dangerous, and jealous only of those who can restrain it? Who is he that, reversing the order of State and upheaving the base, would poise the pyramid of the political system upon its apex? Who is he that declares to us, through the President's lips, that the security for freedom rests in Executive authority? Who is he that belies the blood and libels the fame of his ancestry by declaring that they, with solemnity of form and force of manner, have invoked the executive power to come to the protection of liberty? Who is he that thus charges them with the insanity or recklessness of thus putting the lamb beneath the lion's paw? No, sir—no, sir. *Our security is in our watchfulness of executive power.* It was the constitution of this department which was infinitely the most difficult part in the great work of creating our government. To give the executive such power as should make it useful, and yet not dangerous—efficient, independent, strong, and yet prevent it from sweeping away everything by its military and civil power, by the influence of patronage and favor—this, indeed, was difficult. They who had the work to do saw this difficulty, and we see it. If we would maintain our system, we shall act wisely by preserving every restraint, every guard the Constitution has provided. When we and those who come after have done all that we can do, and all that they can do, it will be well for us and for them if the executive, by the power of patronage and party, shall not prove an over-match for all other branches of the Government.

"I will not acquiesce in the reversal of all just ideas of government. I will not degrade the character of popular representation. I will not blindly confide where all experience admonishes to be jealous. *I will not trust executive power, vested in a single magistrate, to keep the vigils of liberty.*

"Encroachment must be resisted at every step. Whether the consequences be prejudicial or not, if there be an illegal exercise of power, it must be resisted in the proper manner. We are not to wait till great mischief come—till the Government is overthrown, or liberty itself put in extreme jeopardy. We should not be worthy sons of our fathers were we so to regard questions affecting freedom."

If the majestic form of the eloquent advocate of constitutional liberty were raised from the dust, where it sleeps, to behold the gigantic strides executive power is now making, what would be the inspiration of those lips? If then his words so glowed, how would they now flame!

Chief Justice Taney seems to hold that even Congress cannot give to the President, in any circumstances, discretionary power over the writ of *habeas corpus*. That body, however, may, clearly, suspend the privilege of the writ, but only in times of rebellion or invasion—and then only when the public safety may require it. The framers of the Constitution thought it safer to entrust this power to a body consisting of a number of men chosen from all parts of the nation, than to one man. If Congress abuse this power—if it be exercised arbitrarily and tyranically, for the oppression of citizens on account of their political opinions, or for other causes not within the provisions of the Constitution—the remedy is easier from the shorter term of office of Representatives. If Congress use this power to prevent the exercise of the right of free suffrage, to perpetuate itself, or for effecting any other great change in the Government, which must be immediately arrested to prevent the liberties of the people being put permanently beyond their control—then there is left only the last resort of an oppressed people, which is revolution.

The conclusion of all we have said, and of all we have made others to speak in these pages, in this part of our discussion, is that the power to suspend the privilege of the writ of *habeas corpus* has been most jealously guarded by the Constitution and confided solely to Congress; that its

exercise by the President is a pure and gross usurpation; that it is a usurpation of a nature that tends to the destruction of all our liberties; and, finally, that if the nation has acquiesced in it, we live no longer in a free republic, but under a despotism.

We have now to notice yet greater usurpations by the President and the military power he commands. The suspension of the privilege of the *habeas corpus*, when it is legally accomplished, merely leaves under arrest and without a remedy for the time being, the citizen seized to prevent his aiding the rebellion or invasion; but leaves him the right when the exigency shall have passed, to a fair trial by a jury of his peers; and when abused, only subjects him to such tyranny as may be effected through the unjust confinement of his person. Martial law—which is nothing else than the enforcement of the arbitrary will of the commander-in-chief, or of any subordinate to whom he may see fit to delegate absolute power in a particular district—destroys the legal guarantees of all rights, and exposes them all to invasion. Safety in the estate, the person, personal liberty, and even life itself, is made dependent upon the mere pleasure of the dictator. This enormous power has been exercised by the military authorities under the President. Martial law has been established in populous cities and over extensive districts of country, in States which have not been proclaimed to be in insurrection, and in which the Federal Courts had continued loyal and uninterrupted in their sittings. Arrests by military authority, and without civil process, have been common all over the loyal part of the country. Freedom of speech and of the press have been destroyed. The people have not been allowed to say or read what they pleased. Newspapers have been suppressed, forcibly by the military authorities, or not less effectually by the withdrawal of postal facilities. A servile press, *lettres de cachet*, and the Bastile, in place of free discussion, have been the instruments for controlling public sentiment. Large sums of money have been levied off of citizens

remaining at their homes, designated for their political opinions. The police of one of our largest cities, occupied by the Federal troops, have been dismissed, and others appointed in their place. The members elect of the Legislature, regularly elected by the people, of a State remaining in the Union, have been seized before qualifying for their legislative duties, and incarcerated for months. A member of the Missouri State Convention, in the city of St. Louis, in the course of the debates of that body, made a speech against the military despotism under the name of martial law, which had been established in that city and in that State, though avowing himself against the secession of the State; the next day he was lodged in the barracks, the Bastile of the place. A judge issuing the writ of *habeas corpus*, and attorneys professionally making application for it, have been imprisoned. And if the reports of newspapers can be credited, citizens not taken in arms, have suffered capital punishment without judge or jury, upon a charge (of destroying a railroad) cognizable and easily established or disproved in the courts. All rights and all authority—personal, municipal, judicial and state—have alike come under the crushing tread of the military power.

What we have to say upon the subject of martial law, may be compressed into a few points.

1. It is complete and utter lawlessness. It is the overthrow of all law, and of a class with mobocracy. There is, therefore, no authority for it, since there is no authority above and beyond the Constitution and the laws. It is something which any man has as much right to proclaim as another—which is no right at all.

2. It is a form of lawlessness which, besides being immediately an invasion of all rights, is disruptive of society in the permanent demoralization it tends to produce. It breaks down popular reverence for law. The people cannot be expected to venerate it when their rulers set it at defiance whenever it suits their convenience or pleasure. One such scene of violence as has been witnessed in our streets, of

resistance to the laws by the arms of the Government—of the presentation of a row of bayonets to the civil officer bearing the great writ of *habeas corpus*, for the protection of citizens seized in their homes by the military power—is more demoralizing than a dozen mobs.

3. It has not been known in Great Britain for a period of nearly two centuries. The courts have decided that it is "contrary to the Constitution," and has not "any place whatever within the realm of Britain."

4. There are but two instances of the proclamation of martial law in the history of our own country, previous to the present civil war. Gen. Washington passed through the long struggle of the Revolution, without finding any necessity for the assumption of this extraordinary power. The first of the two cases alluded to, was the establishment of martial law in New Orleans, by Gen. Jackson, in 1815, during the war with Great Britain; "which was first condemned as illegal and void by an intelligent court martial, then by the District Court of the United States, and afterwards by the Appellate Court of Louisiana." The act of Congress refunding to Gen. Jackson the amount of the fine incurred by him for that offense against the laws, whatever might have been the design in its passage, could not affect those decisions. But that act, notwithstanding Gen. Jackson previously expressly declared he would not accept the money unless it were understood to be an exoneration of himself, cannot fairly be regarded as anything else than a tribute to a popular favorite, or a generous extenuation of an offense of one who had rendered eminent service to his country. It was not the judgment of Congress, or of the nation, upon the question in relation to martial law. And the act did not pass without the strenuous opposition and eloquent warnings of members of the House and Senators, who, now that they are dead, are regarded unanimously as among the greatest and wisest statesmen their country has ever produced; who were not unwilling to unite in any suitable tribute to great public service, but saw with appre-

hension the bearing of the act upon this vast question, and the destructive precedent it would seem to establish.

The other case of martial law in this country, was its proclamation in Rhode Island, by the Legislature of that State, during the Dorr Rebellion. The decision of the Supreme Court in relation to this case, is claimed to recognize the right to establish martial law in the United States. We, therefore, give at length the observations of Judge Nicholas upon it.

"It may be said of that case, or, at least, of the opinion delivered in it, without fear of contradiction from any intelligent lawyer, that it is crude, ill-considered, and most loosely expressed.

"The question presented for decision was the validity of a statute of the Legislature of Rhode Island which professed to 'establish martial law over the State,' and whose validity had been recognized by its courts. The Supreme Court decided that this being a matter of pure local statute law, its decision, according to uniform usage, must conform to the decision of the local courts. This being decided, there was nothing left in the case, and the remainder of the opinion is mere *obiter dictum*. So far as the *obiter dicta* of Chief Justice Taney, in delivering the decision, may be construed into an implied concession that Congress may establish martial law, they are in direct conflict with his recent decision in the Merryman case. But it is due to him to say that there is not the slightest intimation of any such power in the President or other military commander, and the recognition of the power in the Rhode Island Legislature was, no doubt, caused by the fact of the people of that State living then under the old colonial charter, without the protection of a written Constitution or bill of rights. From this fact, he and the State Court most probably inferred a power, like that of the omnipotent Parliament, to establish martial law.

"He seems to have labored under some loose impression that there was some other and different kind of martial law intended by the Rhode Island Legislature than that formerly in use in England, known under the significant definition of the will of the 'military commander'—something between that and the law of Congress, or of a State, for the government of the army or militia; for he says: 'No more force, however, can be used than is necessary to

accomplish the object; and if the power is used for the purposes of oppression, or any injury willfully done to person or property, the party by whom, or by whose order, it is committed, would undoubtedly be answerable." There is nothing of arbitrary power in this, but the reverse. It is nothing but the kind of power which the military may lawfully use, and must use, when called in aid of the civil authority to suppress rebellion, and entirely within the limits of the military law as prescribed by Congress. Again, he says: 'We forbear to remark upon the commissions anciently issued by the king to proceed against certain descriptions of persons by the law martial. These commissions were issued by the king at his pleasure, without the concurrence or authority of Parliament, and were often abused for the most despotic, oppressive purposes. They were finally abolished and prohibited by the petition of right. But they bear no analogy in any respect to the declaration of martial law by the legislative authority of the State, made for the purpose of self-defense, when assailed by an armed force.'

"This shows he must have labored under the delusion referred to; yet he could scarcely have committed a greater mistake. There is not, never was, any such intermediate kind of martial law. The books furnish no trace or intimation of anything of the kind. The old martial law is the only one known or ever heard of. Consequently that and none other must be what is meant whenever martial law is proclaimed by statute or military order under that name or designation. Consequently, also, what he seemingly makes the Court say can have no bearing on the matter under discussion, except as a strong intimation against the power of even an unrestrained Legislature to establish the old, the only martial law in this country.

With these exceptions, martial law is without precedent in this country; and our readers must judge how far these go to sustain it. These apart, the whole course of American history is against it. Our fathers passed through seven years of foreign and civil war without once resorting to this violent measure. In the war of 1812–15, other cities were as much threatened as New Orleans, and the National Capital actually fell into the hands of the enemy; yet nowhere else was martial law proclaimed.

5. It is the highest treason against the Constitution. It is not only a violation of its special provisions for the protection of citizens, that no person shall be "deprived of life, liberty or property, without due process of law;" "that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized;" that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed"; that "no person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open Court"; that "no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted"; that "no capitation or other direct tax shall be laid, unless in proportion to the census"; that "no soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law"; and that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." It is not only a violation of these particular provisions, and of the parts of the Constitution which define the functions and limit the power of the different departments of the Government—and, indeed, it might be said, of every separate article and section of the Constitution, which is a nicely adjusted system of checks and balances, no part of which can be violently disturbed without derangement extending to every other part. It is

more than this. It is a conspiracy against the Constitution as a whole. It denies its supremacy, by setting a power above it. It abolishes it. It strikes at the life. It is treason. The blood-vessels may be one by one wounded or severed, and a skillful surgeon may possibly cicatrize them or tie them up; but a stab in the heart is a wound without remedy, and fatal.

It scarcely requires the citations we have made from the Constitution, to prove that martial law cannot consist with it. It is manifest that an instrument designed to be the supreme law of the land cannot require any law above it; and that that which assumes to be above it, is treason. In officers of the Government who have sworn to sustain the Constitution, it is the highest crime—compared with which the offense of those who, openly flinging away the Constitution, have sought to vindicate their claim to separate self-government in Revolution, cannot, certainly, be a greater wickedness, or result in greater calamity to the country.

All that has now been said upon these great questions, the demagogue or partisan advocate may treat simply with a sneer; and it may serve as well his ends, and be as effective upon those who follow him in blinding admiration, as the most solid argument. But with serious, thoughtful and patriotic men, who have no end but the welfare of their country to subserve, and have an intelligent appreciation of Constitutional liberty, the deliberate and official opinions of the ablest jurists of England and America, and the apprehensions and warnings of our greatest statesmen, cannot be so disposed of. There is another class of persons who, being not without apprehension for the future effects of the present extraordinary measures of the Administration, yet filled with a sense of the exigency upon the Government, are for holding these questions in abeyance until our national difficulties are settled. They urge that we should first save the country, and then settle questions of Constitutional law. We may ask, what is it they will save? What will be a mere

integrity of external union, if the country shall come out of the contest with the Constitution shattered, the people demoralized by lawlessness, and destructive precedents for the exercise of arbitrary power established which can never be recalled? A third class advocate without qualification the principle of despotic power, that State necessity is a law higher than the Constitution and all legislative enactments, which sweeps away all legal restraints by abolishing all other law, as long as the necessity exists. This principle belongs to the French Revolution, from which it is derived. It cannot be that the American people are prepared to accept it. It cannot nestle amid Republican institutions. It cannot be brought near the Constitution without mutual repulsion. What is the worth of the Constitution if it be of force only in peaceful and tranquil times? It is precisely in times of great agitation and peril the citizen needs, and it was designed to give him, protection. It is from the storm and tempest he needs a shelter. And what is to stay the onward march to despotism, if we lower this last rampart of freedom before it, and pave a way for it over the Constitution itself? Will our countrymen uphold this sacrilege, or stand calmly and silently by and see it perpetrated?

We conclude the whole of what we have to say, with the expression of the deliberate conviction, that if it were demonstrated that the alternative to the invasion and prostitution of the Constitution, is a partition of the country, painful as it is, it were better to accept the alternative; not as an acknowledgment of the particular weakness of our Government; but in recognition of the inherent weakness of all the works of man; and in submission to the ordination of Providence—that the power and stability of the Almighty cannot be imparted to human institutions.