

of administration, through courts of justice," (1 Kent's Com. Sec. 24, paragraphs 13, 14.) The beginning of this due process is first the charge on oath, and the next step is the warrant describing the person to be seized. The third is the arrest, and until this takes place the *habeas corpus* has no status, and cannot possibly have any. At this point the writ springs into being, if not denied, and as here only its aid can be sought for the first time; so here for the first time can its privilege be derived. Yet the act involves with its suspension a suspension of the distinct and independent provisions which guard the citizen against a false charge and the dangers of a general warrant.

In my judgment Congress had the same power to suspend every other guard of civil liberty to be found in the constitution—the same to deprive the citizen of the guaranty that he should not be held to answer for a capital crime, unless on presentment or indictment of a grand jury—that he should not be compelled to be a witness against himself—that he should have the right to a speedy and public trial by an impartial jury, and a trial in the district in which the crime shall have been committed.

The writ of *habeas corpus* is peculiar to the English people and ourselves. And a complete illustration of the operation of a suspension of its privileges will be seen by supposing that it had no existence here. In such case no provision would have been found for its suspension. But the clause requiring a charge of crime to be made on oath and warrant to describe the person to be seized would have been not only very proper, but the more necessary to be inserted. These could not have been legally disturbed by Congress, and any legislation dispensing with them had been mere usurpation and void.

Such is the general view I have taken of the act as it is supposed to relate to crimes. But the statute is construed to reach cases involving no offence whatever, legal or moral; and though there is some difference of opinion upon the question whether paragraph 5 of sec. 1, embraces the case of a citizen not liable to military duty, who neither flies nor resists, but simply appeals or tries to appeal to the constitutional repositories of the law for a decision upon his rights; yet there is too much reason to believe that the language is susceptible of the interpretation that it does include such persons; and such is the interpretation put upon it by the military authorities. And as the suspension was asked by the President, it is but just to infer that it was drawn to suit him, and his exposition carries the intended meaning of the paragraph.

I am unable to see any reason consistent with the principles of a free and civilized government provided with a judiciary as a great and independent branch of its composition for suspending the *habeas corpus* in cases which involve no evasion or attempt to evade military service that is due, but which merely asks when honest opinions differ to have the point settled by those tribunals which settle all matters of controversy between citizen and citizen, and a citizen and his government. If a citizen owe not any military service to the government, he has as much right to refuse to render it, when wrongfully claimed of him, as he has to refuse to pay a debt to the government wrongfully claimed of him; and if in both cases he stands fairly up and submits to an investigation of the question before those tribunals learned in such matters and appointed because of their fitness and skill, it would be just as reasonable to suspend the writ in the alleged debt of money as in the case of the alleged debt of service. This course might, and likely would, hasten the payment of a debt just or unjust, and so it may serve to put men in the army exempt by the laws of the land.

There is no instance of a suspension at any time of the writ, or the privileges of the writ, if there be any difference between them, for any other cause, either in England or America. Many suspensions of the privileges of the writ occurred in England between the passage of the *habeas corpus* act and the Revolution, running through a period of almost a century, and they all empowered the King either to apprehend and detain, or to secure and detain without bail, such persons as are suspected of conspiracy against the King and his government.

There was a British act in 1777, which denied the writ to "persons taken in the act of high treason, committed in any of the colonies, or on the high seas, or in the act of piracy, or who were charged with or suspected of any of these crimes." (Hurd, 132.)

The other suspensions in England after our revolution commenced in 1794, and

continued at intervals till 1802 during the storms of the French Revolution. They are of the same character as those before, and affected those only who were charged with conspiring against the King and his government. The suspension during Shay's rebellion extended to crime or suspected crime. The attempted suspension in 1807 was confined to persons charged "with treason or other high crimes or misdemeanors, endangering the peace, safety or neutrality of the United States." The idea cannot be entertained for a moment that the power of suspending the writ was granted for any such purpose as that of depriving a citizen of the privilege of a legal inquiry into his obligation to perform military service, in order to fill the army with soldiers. If such a power exist the sovereignty of the States is at the mercy of the Confederate Government. Where lies the relief against the conscription of the entire body of State officers? By this act it is deposited with the President alone! His officers alone can give the discharge—Confederate officers chosen without even the consent of the Senate, and removed at will. The appropriate tribunals are entirely overlooked; the State Judges are thrust aside without ceremony, and even the Confederate Judge, who holds his office during good behaviour, is ignored, and in their room is placed an officer who lives on the breath of the Confederate Executive. If the State officers are not put into the army under such power in the Executive, it is because the incumbent does not will it; and when the rights of the State shall exist by such a courtesy, they will cease to have any existence at all. It is hard to divine a sufficient reason for displacing the civil tribunals already established, and substituting others so dependent upon the Executive for their existence. The assurance of public men, that the power will not be abused, can never remove the fears of freemen, who rely only upon written Constitutions to protect their liberties. History is too full of wrong to allow them to forget for a moment that *eternal vigilance is the price of freedom*.

It is manifest that the act contemplates that the military shall be vested with full powers to arrest any person who may be suspected of any of the vague and ill-defined charges mentioned; and such is the interpretation put on it by the general orders of Adjutant General Cooper, thus suspending the civil authorities throughout the land, and it is equally clear that it also contemplates that the order of the President for arresting or detaining citizens shall be a general order to arrest and detain all such as may come within the category of suspected persons—without naming or describing the individual—and each military officer who may be deputed for that purpose will be invested with a perfect discretion over the liberty of every citizen in the land. In substance and effect the President is intended to be empowered with authority to fill the land with military deputies who may seize any citizen without warrant or oath of probable cause, under a general warrant from the President to arrest all suspected persons. Such a warrant is without precedent in England for the last hundred years, and during the entire century past has been forbidden, denounced, and declared void.

In my judgment the President is vested by the Confederate Constitution with no part of the judicial authority, except in cases arising in the land and naval forces, or in the militia, when in actual service under his orders. If he is vested with a particle of civil judicial jurisdiction where is the grant of it, and how far does it extend? If he has the power to issue a warrant for the arrest of a civilian suspected of violating a law of the Confederate States, he may make it returnable and examinable before himself, and order a discharge or require a bail. It is certain that the mere suspension of the writ of *habeas corpus* does not invest the President with the powers of a civil judicial magistrate, and if it could have that effect it could not give him an authority while discharging his judicial jurisdiction to lay aside the restraints imposed upon the other judges.

The course adopted by the administration of allowing the writ of *habeas corpus* to issue, and of forthwith checking the action of the judge and suspending all his farther proceedings *ad libitum*, to await the reports of military officers having custody of the petitioner to their superiors, and finally subjecting the case to the decision of the war department in derogation of civil authority, is humiliating to the independent character of the judiciary, and tends to the great danger of liberty, to familiarize the people with a military supremacy.

It must be remembered, however, that these are merely my opinions. The Su-

preme Court, which alone has the power to decide upon the constitutionality of the law, has not yet spoken. When it does speak, we must give heed to its voice, so long as the law remains on our statute books. But whether for constitutional reasons or reasons of mere policy, the people have a right to demand the repeal of any obnoxious law. On both grounds I recommend that you urge Congress to repeal the act suspending the privilege of *habeas corpus*; or, should you concur in the judgment of Congress, that a suspension is required by the exigencies of the times, that it should at least be modified and stripped of its unconstitutional or (at least) obnoxious features.

My opinion on this subject is well known. In the first message I had the honor to send to your body, in 1862, speaking of the then existing act authorizing a suspension of the writ, I used the following language: "I have not seen an official copy of the act, but learn from the newspapers that Congress has conferred upon the President the power to suspend the writ of *habeas corpus* in all cases of arrests made by Confederate authority. If this be once admitted no man is safe from the power of one individual. He could at pleasure seize any citizen of the State, with or without excuse, throw him into prison and permit him to languish there without relief—a power that I am unwilling to see entrusted to any living man. To submit to its exercise would in my opinion, be establishing a precedent dangerous and pernicious in the extreme." &c.

There is nothing of this I am desirous of taking away or adding to. My earnest remonstrance against the passage of the present act is herewith transmitted, together with divers other letters to the Confederate authorities in relation to the execution of the civil laws, rights of the people, &c., and which will convince you, I trust, that I have been equally zealous to guard against the inner as well as the outer dangers which threaten us.

Many recurring dangers of serious conflict with the Confederate government, especially in relation to the seizure of principals of substitutes after the discharge by a judge, have been upon me since your session. They were fortunately avoided, however; but their solution would have been easy could I but have had the assistance of the Supreme Court. I greatly regret that you did not see proper to comply with my recommendation, when you were last in session, to authorize some one to convene that body in cases of great importance, and which admit of no delay. I can but repeat it now, for many obvious reasons.

Nor have I, amid all the embarrassments and perplexities of the situation, been unmindful of the great object of all our blood and suffering—peace, or neglectful of all proper and honorable efforts to obtain it—knowing the great desire of our people to save the precious blood of their children, if by any possibility an opening might be found for the statesmen to supersede the soldier. I approached the President on the first opportunity presented by the cessation of hostilities last winter, and urged him to appoint commissioners and try what might be done by negotiations. I had little hope, indeed, of those commissioners being received by the government of our enemy, but I thought it our duty, for humanity's sake, to make the effort and to connive our own suffering people that their government was tender of their lives and property and happiness.

My letter to the President last December and his reply are sent herewith for your information.

I respectfully recommend that you, as the representatives of the people of North Carolina, should lay down what you would consider a fair basis of peace, and call upon our Representatives in Congress, and those to whom is committed the power of making treaties, by the Constitution, to neglect no fitting opportunity of offering such to the enemy. These terms in my judgment should be nothing less than the independence of these States, whose destinies have been fairly united with the Confederacy by the voice of their people, and the privilege of a free choice to those which have been considered doubtful.

I presume that no honorable man or patriot could think of any thing less than independence. Less would be subjugation, ruinous and dishonorable. Nobody at the North thinks of reconstruction, simply because it is impossible. With a constitution torn into shreds, with slavery abolished, with our property confiscated and ourselves and our children reduced to beggary, our slaves put in possession of our lands, and invested with equal rights, social and political, and a great gulf yawning between the North and South, filled with the blood

of our murdered sons, and its waves laden with the debris of our ruined homes, how can there be any reconstruction with the authors of these evils, or how can it be desirable if it were possible? Lincoln himself says it is not possible; so does Mr. Fillmore, a man whom we once respected, and so do nine-tenths of their orators and presses. The only terms ever offered us contained in Mr. Lincoln's infamous proclamation, were alike degrading in matter and insulting in manner, being addressed not to the authorities, Confederate or State, of the South, but to individuals, who by the very act of accepting its terms would bear from themselves the vilest of mankind.

I cannot too earnestly warn you, gentlemen, and the country, against the great danger of these insidious attempts of the enemy to seduce our people into treating with him for peace, individually or by the formation of spurious States or parts of States. Indeed I might add, that I look upon any attempts to treat for peace, other than through the regular channels provided by our constitution, so long as our government is maintained, as almost equally dangerous. It is the real peril of the hour. The long continuance and bloody character of the war, have so exhausted the patience of our suffering people that many of them are in a condition to listen eagerly to terms of peace, without duly considering what the results would be, or how they are to be acquired. An example of this great danger is to be found in the attempt of the British ministry in 1778 to seduce the loyalty of our forefathers, from the cause of independence, by sending peace commissioners to the colonies with the propositions contained in Lord North's "conciliating bills."

These bills proposed to abolish all taxation whatever upon the colonies, except what might be necessary for the conveyance of commerce—the nett proceeds of which were to go to the use of the colonies, to suspend the operations of all obnoxious statutes in reference to said colonies passed since 1763, and authorized these commissioners to pardon all such persons as they saw proper, and to treat with "the existing governments or individuals." Here almost all the principal matters of dispute were conceded; but our fathers had an organized government and had set their hearts on independence. Yet the terms offered were so fair, that but for the firmness and wisdom of the great and good George Washington, and the unflinching patriotism of Congress, the fate of this continent might have been changed; so great was the weakness of the people and so gloomy were the prospects. The danger of allowing commissioners to address themselves to anybody but Congress was so great as well as such a violation of the laws of war and international courtesy, that that body, after promptly rejecting the propositions and declaring that "the only solid proof" of a disposition on the part of the crown to make an honorable peace with the colonies, "would be an explicit acknowledgement of the independence of these States, or the withdrawal of the fleets and armies"—went on solemnly to declare the measure "to be contrary to the law of nations, and utterly subversive of that confidence which could alone maintain those means which had been invented to alleviate the horrors of war; and that, therefore, the persons employed to distribute such papers were not entitled to the protection of a flag."

General Washington was so astonished and indignant, that on its first appearing he was induced to regard it as a forgery, and in a letter to the President of Congress, he used the following language, remarkable for its severity, coming from him: "The enclosed draft of a bill was brought to Headquarters yesterday afternoon by a gentleman, who informed me that a large cargo of them had just been sent out of Philadelphia. Whether this insidious proceeding is genuine and imported in the pockets, or contrived in Philadelphia, is a point undetermined and immaterial; but it is certainly founded on principles of the most wicked, diabolical baseness, and meant to poison the minds of the people, and detach the wavering at least from our cause." And again: "The necessity of putting the army on a respectable footing, both as to numbers and constitution, is now become more essential than ever. The enemy are beginning to play a game more dangerous than their efforts by arms (though these will not be remitted in the smallest degree,) which threatens a fatal blow to the independence of America, and of course to her liberties. They are endeavoring to ensnare the people by specious ultimatums of peace. It is not improbable they have had such abundant cause to be tired of the war, that they may be sincere in the terms which they offer, which, though far short of our pretensions,