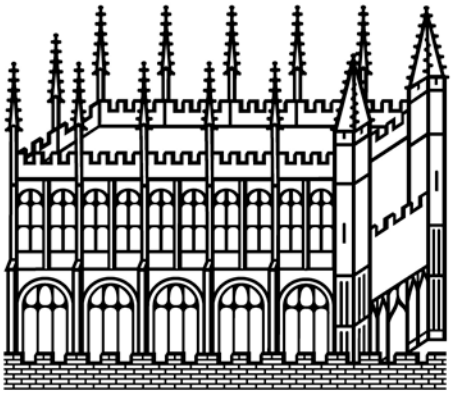
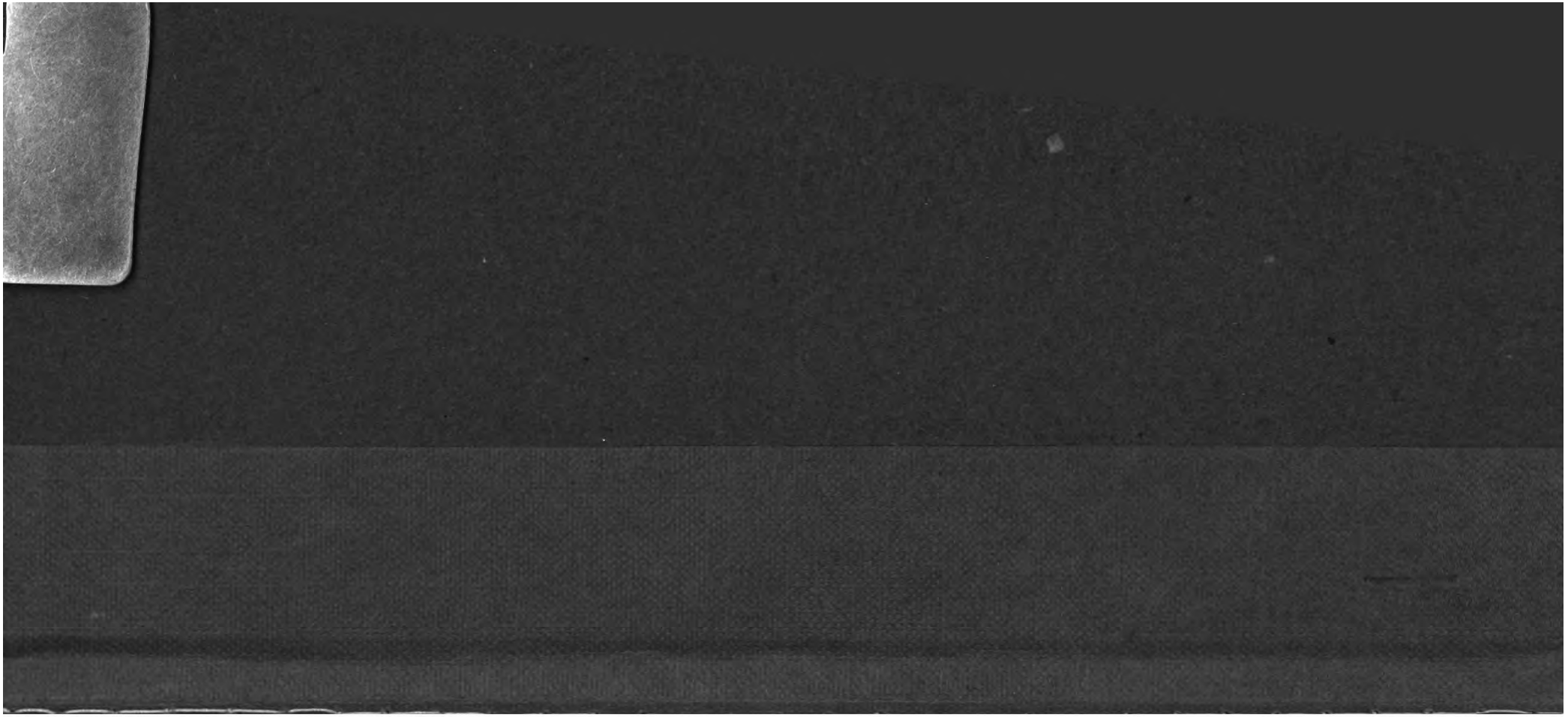


THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS UNDER THE CONSTITUTI

OF THE UNITED STATES



THE PRIVILEGE

OF THE

WRIT

OF

HABEAS CORPUS

UNDER THE

CONSTITUTION

OF THE

UNITED STATES.

IN WHAT IT CONSISTS.

HOW IT IS ALLOWED.

HOW IT IS SUSPENDED.

IS THE REGULATION OF THE LAW, NOT THE AUTHORIZATION OF AN EXERCISE OF LEGISLATIVE POWER.

PHILADELPHIA.

1862.

THE PRIVILEGE

OF THE

WRIT OF HABEAS CORPUS

UNDER THE CONSTITUTION OF THE U. S.

When? how? and by whom is the Privilege of the Writ of Habeas Corpus Suspended?

A true answer to these questions will relieve the public mind from an embarrassment, and at the same time constitute the performance of a duty, due to the public intelligence, suspended in doubt of the meaning of the Constitution.

Members of the Bar are not void of legal prejudices which operate, while they, through the principles of the English rights of personal liberty, construe and limit our Republican rights in analogy to the Common Law of England, by which "every freeman had the absolute and unqualified right to the liberty of his person," as they allege. Had he such right dependent, or independent, of the King, Parliament, and Statutes? If the first, then his right was so qualified, and the expression is inaccurate.

A Member of the Bar alleges that it would be quite as pertinent to tell us to study Theology without the Bible, or American Literature without Chaucer, Shakespeare, or Milton; or our own Language without an English Dictionary, as to require us to study,—or *even understand*,—that part of our own Constitution, without a knowledge of the privileges of Englishmen, and of the great Charters and Statutes in which they are recorded!

Are the above propositions statements of truth? or of rank and unseemly prejudices? Is there but one system of Theology? Is

not Bible Theology a matter of faith, rather than of study, reason, or philosophy? Is the Unitarian Theology that of the Hebrew? that of the Christian? or identical with the Trinitarian? Have not different Nations distinct Theologies? May not the Physico-Theologist "look through nature up to nature's God?" Trace MATTER, and its time and space through their indestructibility, up to an uncaused necessity, as eternal as Eternity, and the uncaused cause of all creations?

Have we no American Dictionaries, Literature, or Authors? Are those farmers, mechanics, and chapmen that legislate for us, without the capacity which that member of the Bar seems to want? that of perceiving that the Habeas Corpus Clause,

1st. Is a law.

2nd. That it expresses its own meaning, irrespective of English analogies.

3rd. That it gives no power, but recognizes and limits the privilege of the Writ of Habeas Corpus, then an established privilige in the several States, and

4th. That it regulates and establishes the right of personal liberty beyond the power of our American parliament, its great charters, and statutes,—in subordination alone to that national safety upon which it depends for security.

What a pregnant example do such members of the Bar afford of the force of bias or prejudice as error, reflected in mental conclusions, related to the subjects with which the error is associated. Prejudice is error. Error and truth are antagonists. Error assuming the throne of truth, banishes and falsifies it. How unfitted are those, who so biassed by their legal education, are, from that reason, unable to see the form of a simple law, or to distinguish between a gift of power, and a declaration of purpose; or who, because Parliament is possessed of power over English liberty, insist that Congress has the same over Republican liberty; and then affirm, that "those who argue for the President's suspending power, feel themselves sorely pressed by the *analogy* of the English law, and the better to get rid of it, insist," &c. The same author, on "the suspending power and the writ," &c. (page 33) says, "Hamilton has said that the essence of legislative authority is to enact laws!" or in other

words, "prescribe rules for the regulation of society"—while the "execution of the laws, and the employment of the common strength, either for this purpose, or for the common defence, seems to comprise all the functions of the Executive Magistrate." (Fed. No. 75.) In this we agree; it smacks of *common* sense. Again, page 31, he says, "Hence the order for denial alone, must be the act of suspension"—and again, "As a single order of the (legislature) founded on the authority of the Constitution, would be as effective suspension as a single order (of the President) founded on the same authority. Therefore an act of the legislature, viz. a legislative order, is all that is necessary to suspend the privilege;" and, consequently, it is "*suspension under the Constitution.*"

The Habeas Corpus Clause provides that "the privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion, or invasion, the public safety may require it." The learned sense derived from English literature, necessary to enable us to comprehend that part of our Constitution,—(not to be attained without a knowledge of the privilege of Englishmen, and of the great charters and statutes in which they are recorded)—is so strong in its bias against Republican forms as to be disabled from seeing the above clause as a law, "legislative order," or "rule prescribed for the regulation of society;" in the regulation of the limits of the privilege, and of the limits of the exception from the privilege, in subordination to the demands—in cases of rebellion or invasion alone—of the public safety, as plain American common sense sees it, and is satisfied with its latitude, policy, and wisdom.

A transposition of the clause and sense announces its meaning. In cases of rebellion or invasion only, when the public safety so requires, the privilege of the Writ of Habeas Corpus shall be suspended. Page 31, the same author says, "An arrest (according to law) is an executive act." It is also as its effect, Imprisonment. Discharge from either, is a discharge of both. Imprisonment in executive custody, is of executive authority, and its act.

A Traitor, and therefore an Enemy, is arrested. He is entitled to the Writ as a matter of "original and inherent right."

His right is absolute, his privilege conditional. They are not the same entity or thing, however related. Until service of the writ, he is without practical advantage from it. Upon service of the writ, he is, with the cause of his arrest and detention, taken before, and submitted to, the Court. He is there in the position of asserting his legal rights; or, if it be so, his legal right to other privileges, otherwise named. If, on service of the writ, the officer returns, "Arrested and detained under the warrant of the requirements of the public safety, by the order of the President in defence of the Constitution." By endorsing it on the writ in due form, the Court or Judge is duly notified of the detention and its cause.

The Clause announces the law. It is the order of the People. "It is of the essence of legislative authority." "It is a rule prescribed by them for the regulation of society;" ordering the allowance of the privilege when consistent with the public safety, and suspending it when inconsistent with that safety.

The order to suspend follows, as it results from the occasion that gives it vitality, and operates as suspension under the Constitution. The order that prevents suspension, effects it unless when countermanded by the exception ordering suspension.

The suspension being authoritatively communicated to the Court, it is bound to recognise and respect it, as the order of the Constitution expressed in the Clause, executed in effect, and recognised and affirmed by the President.

In all which, common sense is in harmony with the learned sense, enlightened by a knowledge of the great charters, statutes and analogies, unfolding the rights of Englishmen.

The meaning of the sentences of the Clause, correlate and alternate in force, act, and suspension. As the one is active, the other is dormant. The activity of the first sentence, as it affirms privilege, negates suspension. The activity of the latter sentence affirms suspension, and negates the privilege. The vitality suspending, is non-vitality of the privilege suspended. The needs of the public safety expressed by suspension, supersede the privilege. As those needs vanish, the privilege is restored.

Privilege, and its suspension, alternate as the needs of public safety appear or disappear, in obedience to the order of the law.

Thus, without the aid of English analogies, and unbiassed or unblinded by their glare, we may unlock what has been so mystified, look beneath the surface, and see the form of the legislative order commanding suspension, and as such order, admitted to be *suspension under the Constitution.* We further see what the privilege is, by seeing what its enjoyment is, as distinguished from the writ, which conducts to, and works out, the privilege, when not suspended, and, from the right or privileges of the law, to which the privilege of the writ conducts the prisoner, when allowed, to be determined, adjudged, and allowed, as the Court orders and directs.

We also see the President's dilemma, until he determines through which horn the law directs his escape. In the nature of things, of necessity, the wants of the public safety at the same time cannot repel, and require, the privilege to be suspended; or that suspension and non-suspension can be concurrent at, and during, the same period of time, however close their connection, or rapidly they alternate in succession. It is impossible therefore, whatever be the legislative order, whoever be the prisoner's custodian, whether Congress or their appointee under its laws, (if other than the Executive can constitutionally be such appointee) can so act, as to allow and disallow the same privilege of the writ. In either event, who ever is to obey the order, consitutional or congressional, the writ must be obeyed or disobeyed. It is impossible that both can be accomplished.—The affimation of obedience negates disobedience, as the presence of positive implies the absence of negative electricity; or that of resinous, the absence of vitreous.

So the performance of the Executive duty in defence of the Constitution, negatives culpability, and ought to prevent censure, and receive and command approval and respect.

But who is to judge (say the captious) of the law? Is not the Court? Ought not Congress to make,—the Judiciary to interpret,—and the Executive execute, the law? Yes, we say; as it is made the duty of Congress to enact, of the Judiciary to interpret, and of the Executive to execute; they respectively have the right and power to give effect to, or execute their duties.

Are they authorized to go beyond the duties of their several functions? To run into abuses of their powers? To go beyond their legal rights? Do you not say, No! Then the duties of each department limits, and subordinates the powers and rights of that department.

Can either department execute its duties without employing the means necessary to such execution? Can it employ those means without judging of the occasion for them?—what it requires, in what manner, by what means, and when its requirements are supplied? So far, each of the departments are as coordinate, independent of, and irresponsible to, each other.

Abuse or perversions of authority in neither department, can be foreknown in time to prevent them, if prevention were otherwise practicable. The performance of the final act, discharging the duties of the several departments of Government, cannot be prevented where they have authority over the matter, whether right or wrong. The rightful performance respectively of those duties is enforced by an oath. The strongest presumption of law is in favor of the rightfulness of the motive, and against the presumption of perjury in the act. Within the scope of their respective authorities, their acts are the acts of Government, and equally to be respected as such. To the veto power, whatever the unseen motive therefor, To the act of Congress over-ruling it, To the final decision of the Court of final resort, whatever the motive therefor, and to the final act of the President in executing the law of his duty, irrespective of motive, no prevention can be applied. The act of Congress takes effect as a law,—of the Court as a decision of the law in the case,—of the President as the act of Government in the case. Either may be impeached, indicted, tried, convicted, and punished for a crime, or high misdemeanor, enacted under a pretext of official duty.

Where, between litigants, a right to property is claimed through such an authorized law, decision, or executive act, the authority of the department to perform the act is questioned, the act may (for want of authority to enact the law, the decision, or the executive act, as they are presented as obstacles to the execution of the duties of either of the departments) be disregarded,—as such department shall understand and know its duty,

with power, means, and force to perform it, as the embodiment of the authority of the Government.

The department thus obstructed may repudiate the unauthorized act of another department, when without authority to perform it on account of being beyond its jurisdiction; but not for error of judgment as to the effect of facts, or the policy of such act, when *within* the scope of the authority of the department enacting it.

The President, as Executive, executes, and takes care that the laws are faithfully executed. As President, presiding over the laws, he employs the authority of the constitution and laws, and the means furnished under them, with such other as the exigencies of occasions require, *for prevention* of harm to the common defense and safety. He is commander and chief of the army, navy, militia of the States, and executive agents employed in the common defense. He may direct secret and avowed, overt or covert, enemies, and their aids, to be arrested; and if resisting arrest, or attempting escape, to be shot. Or, if arrested in defense of the Constitution, that they be confined in close and safe custody. If they cause writs of Habeas Corpus to be served, requiring his authority (as the Executive or as President, authorized to defend the common safety, if these offices be viewed as distinct) to subordinate itself to the Judicial, he, in defense of the common safety, may refuse obedience. The cause that justifies refusal, is the law that orders the act, and is, consequently, *suspension of the privilege under the Constitution.*

Arrests, seizures, and suspensions of privilege, authorized and executed through the President by the army, navy, militia, or other agents, directed to search, seize, and arrest, are not unreasonable searches under the meaning of the Constitution, or where the President finds probable cause therefor. The destruction of public enemies resisting such seizures and arrests, by rebelling against the agents employed in making them, or in attempting to escape, are as lawful when the enemy is a secret one, (often of the most dangerous character) as when openly under arms they assault the power of Government; and the occasion equally authorizes the arrest or seizure, when made by secret agents appointed therefor, as when made by the army.

No warrant under oath is necessary to authorize the Executive authority to search, seize, capture or arrest the property or persons of enemies, secret or open; and no performance of the duty of the President, under and within his authority, resulting in the arrest and destruction of enemies, is a deprivation of life or liberty, contrary to the Constitution. Obedience to the demands of the public safety, has its warrant in its duty, to which all legal rights are subordinated as necessitated for its preservation.

The arrest of a spy, or other dangerous confederate, on what shall appear to the Executive as probable cause, and his confinement in close custody under an order of suspension, is not an unreasonable arrest, requiring a warrant to be first issued upon oath, nor is his destruction, in order to prevent his escape, a deprivation of life without due process of law, if done in the defense of the Constitution, or for the preservation of the public safety.

The same author, (page 18,) insists that his opponents must prove three things, two of which he admits,—1st. The grant of power. 2nd. That those who granted it, *changed* it from the legislative department, in which, under the English and American constitutions, it always had been, and but for this specific change, would have remained to the executive department of the Government; and 3rd. That this power to suspend, is a limited one. The 3rd not admitted—He says "is not declared; there is not in the whole instrument (the Constitution) the gleam of an intention to change the old accustomed and only organ of this power." If Parliament be meant as the organ of this power, it is true that it was not meant to change that old organ. But it is not true that the People intended to make the authority of the public safety, and that of the right of personal liberty, dependent upon the authority or caprice of faction, as it might rule in Congress in time of rebellion, as it may in Parliament in England. If they had so intended, we would see the power given after the words, "Congress shall have power to suspend," or provide for the suspension, perhaps arranged by the committee of classification with those of Sec. 8, Art. 1.

The mode of argument he thus adopts, is ingenious! It begs

a power, that it must be limited, and a change of an organ, where none exists until by the instrument created. The Clause as an execution of a legislative power regulating, refutes all his positions th assumed, and proves the non-existence of a power to regulate, in the Clause or elsewhere, to do what the People, by the Clause, declare and order.

On page 21, he tells us, "The privilege of a thing, means the right to a thing, and the privilege of the writ of Habeas Corpus means the right to the writ of Habeas Corpus." He tells us that *the right* to the writ is an original and inherent right. Does he mean that the privilege of the writ is granted by the clerk when he issues the writ, and feeds the right? A right to a thing comprehends all its appliances for use, and feeds all the uses of it granted to others; as in case of a way, to which the owner has granted others privileges. The right to the privilege of highway, is not a right to obstruct it, or ownership of the highway. A person's privilege of a thing, is the right to the specific use imparted by the privilege, and so far as the privilege presents a qualified right to a thing. It is not a right to the thing, but merely to the privilege of the thing.

It is agreed with him, that the right to the writ is original and inherent. The authority to issue the writ, is a debt or duty due to the right of personal liberty. Is it a power to be executed or not? or an absolute right to issue, subordinate to absolute duty, due to the right of personal liberty? Then as between the Judicial and Executive authorities, does the Judicial in issuing the writ, exert under the Clause, an absolute duty due to the Judicial authority, entertained as a right by the Court, as it is absolute, or a privilege, as it is dependent on the Executive authority and duty to deny it. Has the Court, having a privilege of the writ in its use, in demanding the custody of the prisoner, the right to the writ? As a right to a privilege is a right to the writ, until the writ is issued. Is the privilege demanded or demandable of the Executive? Can it be allowed or disallowed before service of the writ? On service, the right to demand the privilege of being transfered from close confinement, under the duty of one department, into the custody and control of another department, is, in one aspect of the Habeas Corpus clause, a duty due to the prisoner.

But in the other aspect of the case, it is the duty of the Executive, under that law, to refuse obedience to the Court, under the order of that law, in negation of the right entitling the prisoner to the privilege of the writ. The privilege of the writ consists in such transfer. The prisoner's right to the privilege is a right to such transfer.

Suppose Congress had given to it a power to provide for the suspension, would they not be restrained or confined in their power by the terms of the Clause? Could they under any power alter the terms, meaning, or sense, or legal effect of the Clause, by enlarging or diminishing the privilege, the security of the safety, the nature of the Executive office, the authority, the duty of the Executive, or the law as it now stands, in any one aspect?

Can unbiassed American judgment then doubt that the Clause is an order, authorizing the Executive authority to obey its precepts, and requiring the other departments of government to support him therein, as his knowledge of his duty shall determine him, in cases as they arise, and as the law awards or denies the privilege of the writ.

They who, from analogy, suppose Congress an original source of power, or who, in comparing Congress with Parliament, forget that to exert a power, it must have been delegated to Congress; and forget that the clause in question limits by disabling, instead of enabling Congress with power. And that Parliament, "the old accustomed, and only organ of this power," is not limited in the extent, or in the exercise of its inherent powers by Constitutional clauses. Parliament may repeal or modify the English Habeas Corpus act at pleasure. Congress is without power to repeal or modify our Constitutional Habeas Corpus Act, as it was enacted by the primary legislative authority, and declared in that *clause as a fundamental law.*

If there were a Clause to this effect in the Constitution, viz: "The privilege of export of munitions of war, or of salt-petre, shall not be suspended, unless when in cases of rebellion, or invasion, the public safety may require it;" or "The privilege of exemption from conscription, as soldiers, to serve in the armies of the United States, shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it;" would

it be necessary that Congress should first enact authority for the President, or make it his duty, by proclamation, to enable him to command the withholding of permits to export salt-petre in the one, or a levy, by conscription, in the other, to secure or supply the demands of the public safety?

The declaration preventing the exportation, and that authorizing a conscription, or a levy, by requisition from the States or people, of volunteers, would authorize the President to meet the emergencies, under his authority to preserve and enforce the common defense.

A clause that prohibits an act, is a law, not a power to make a law. Such is the first sentence of the Habeas Corpus clause. A clause that limits a prohibition is a law, whether done by one mode or form of exception or another; as if the second clause or sentence were thus: Unless when, in cases of rebellion or invasion, the enemy shall take up arms, and threaten with arms the public safety.

Would it then *suspend its own and the functions* of the President, until Congress should assemble, and authorize Executive action? Does not the law do that which an enforcement of its purpose would do, if done by Congress? Would not such enforcement by Congress be supererogatory, and subordinate, or simply displaced as void, under the greater force of the Constitution, merging it?

Authority derived from opposite sources,—Powers dependent upon delegation, in diminution of authority of States, restricted, or limited in their extent and exercise,—are not so analogous to the Constitution of an *absolute* Partiament, as to justify the attribution of a power to Congress, because Parliament possesses it, or to deny a limited power, ordered by a law, to the Executive, dependent upon requirements of public safety, because Parliament, or some Great Charter, or the common customs of England denies to the King the power of suspending the right of personal liberty at his pleasure.

In interpreting the Constitution, it must be remembered, that the matters it presents are ordained *in order to form* and effect the purposes proposed in the preface. To reconcile and subordinate its matters to the accomplishment of its purpose, is the proper office of interpretation.

The Habeas Corpus Clause, when in conflict with that providing for the defense of the Constitution, is modified in subservience to the object for hich the clauses are but instruments regulating the measure of per- al liberty by the standard of the public safety, upon which the enjoyment of private liberty must depend.

Omit the second sentence of the Clause, and we have "*The privilege of the Writ of Habeas Corpus shall* NOT *be suspended,*" expressed. But it is subject to the implication, "unless the public safety require it," or "it be herein otherwise ordained."

Though Congress be prohibited action by the first sentence, the requirements of the purposes to which it is tributary, are neither arrested or suspended; nor are the President's duties as they are expressed, modified or restrained by that sentence.—Sickness, pestilence, insurrection, conflagration, or other inevitable cause, may necessitate the postponement of the prisoner's remission to the Court by his custodian, or the hearing of the case by the Judge, in suspension of the privilege of the writ.

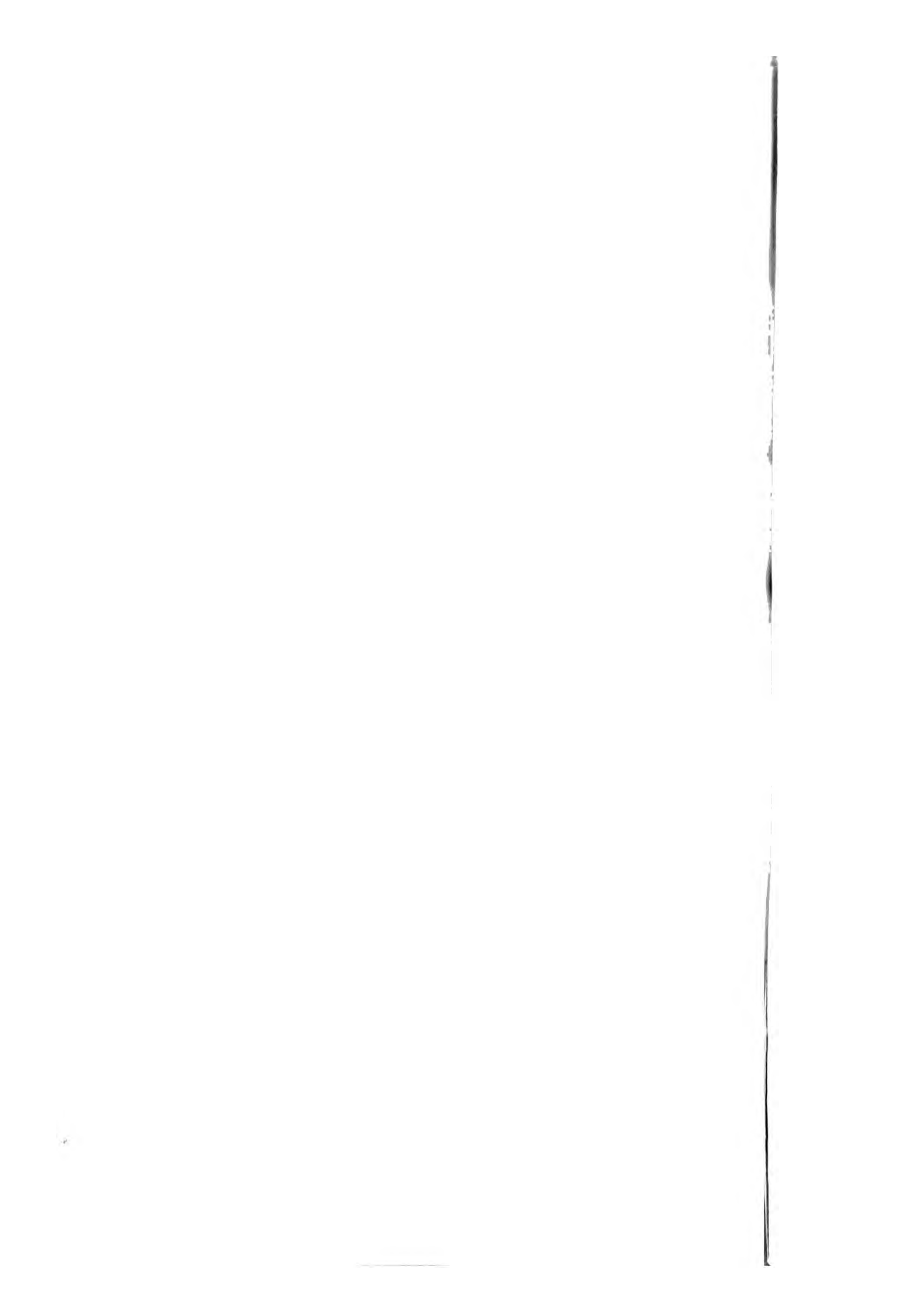
The second Clause therefore but expresses what is otherwise implied in cases of rebellion or invasion, as it is authorized in the President's duty of preserving, protecting, and defending the Constitution, or the assertion of the common defense of the public safety. The Clause does not authorize Congress to regulate, it is itself a regulation provided by the People.

COMMON SENSE.

April 4, 1862.

APPENDIX.

Since the foregoing was in type, J. C. Bullet's Review of Binney on the Habeas Corpus, has appeared, adding another confirmation of the impotence of error in a struggle with truth. A theory resting alone on the opinions of *political fathers*, originating in unseen analogy, and abiding only in the force of a mistaken prejudice, may announce. Allah is great, and Mahomet is his prophet! or that the power of Congress is analogous to that of Parliament, and can suspend the Habeas Corpus act, writ, privilege, or law, or only can do so, as the phrase used may as-



sume the form of a bias, from which substance is to be imparted to our Constitution. The errors of the fathers are handed down in their traditions, and opinion begets opinion, where error breeds error.

A theory resulting from an inspection of facts, and an agreement as to their form and effect, would be entitled to the weight attached to the facts and logic employed. But that which announces a limited power in a limited Congress of a specific character, because of the analogy of its Republican character, to the absolute power of a King's Parliament, may be found void alike of weight or force.

To refute Mr. Binney, his commentators multiply theories, through which Congress alone *may be supposed* to possess the power to suspend the privilege of the Writ of Habeas Corpus. Say they: "We can as readily discard our language, or ignore our English blood." The fact is adverted to that our Constitution upon this subject, is but "the enactment of their Constitution and practice combined." They saw the value of the English "as a protection against Executive power, and adopted it, with one addition in favor of liberty, namely, a restriction of the power of suspension upon the Legislative department, in which alone it was vested." What may not twaddle thus prove?

The conflicting propositions of those critics assume the following forms:

1. The power of Congress to suspend the Writ is founded on English analogy.

2. It is a delegated power, vested alone in the Legislature.

3. It belongs to Congress, because the Habeas Corpus Clause "is wedged in between two clauses which hold it fast." "It is inseparably connected with the first, and it is the link which binds the third to the first." That is, which connects the absolute prohibition of bills of attainder and expost facto laws with the postponement of the exercise of the power of Congress to prohibit a certain character of importations prior to a definite period.'

4. "It is derived under the express grant of the power of Congress to regulate the Courts."

5. "It is conferred under the power to provide for the suppression of insurrection and the repelling of invasion."

6. It flows from the power given to Congress to declare the punishment of treason, and inseparably connects under the head of Judiciary, the definition of treason, and the effect of corruption of blood, as it links them together, and is to be conferred as a judicial power.

As either of these propositions is true, the truth of the others is dissipated. Won't they determine which is the true one, or look again at the Habeas Corpus Clause, and see whether, as a law, it does not preclude the power of legislation, by enacting its effect in unalterable regulation.

Truth stands self-supported as the construction of its own elements, and repels error in conflict with it. Hence a true exposition of its form, dispels the illusions that have usurped its character, and perverted its force. One argument, until it is falsified, dispels the quandary in which the commentators have involved themselves and the subject. It is this:

Upon the achievement of National Independence, The People of the United States, as one people, possessed all the attributes of an absolute unlimited sovereignty—as such, it was certainly competent for them to mould and form their Constitution, the powers of Congress, the authority of the Judiciary, the duties of the Executive, and the office of the President, as they pleased, or thought proper, out of respect for English analogies, or independently, irrespective, and in total disregard, thereof.

They certainly had the power and exercised the right of prescribing laws, as the supreme law of the land. It was competent for them to have said, The writ of Habeas Corpus shall not in any case, or under any circumstances, be denied or suspended; and that the privilege of the writ should not in any case be suspended, or suspended by Congress, or unless to serve the common safety. What they should thus have declared upon the subject would have become their order, or the law of the land. It was competent for them to have said, The power of executing their laws should be vested in the office of, and exercised by, the President. That the President shall be sworn faithfully to execute his office, and to the best of his ability preserve, protect, and defend the Constitution, the symbol of the public safety; and that he shall be the sole and exclusive judge of the facts of his duty in the execution of his authority—(see Bullet, p. 41)—or for the purpose of securing the largest possible personal liberty consistent with a due regard for the public safety. It was competent for them to have declared as a Supreme Law, the Order that "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it;" and also that it shall be the duty of the President to protect, preserve, and defend that safety in that of the Constitution, upon which the security of our rights depend. If they *have* done so! they have *not delegated* the power to do it to Congress.

Let us suppose that the Habeas Corpus Clause was an Act of Congress, executing itself in announcing its effect, that the privilege of the writ should only be suspended when in cases of rebellion or invasion the public safety required it,—would it not regulate the whole subject? Would not the order of the act then operate as suspension under the Constitution? Does not the order of the Constitution equally operate as suspension, by the Constitution with imperative force?


BIBLIOTHECA BODLEIANA