In the Supreme Court of the United States.

EX PARTE WILLIAM H. McCARDLE.

The appellant presented his petition to the Circuit Court of the United States for the Southern District of Mississippi at its regular term, for a writ of habeas corpus, to be released from the military prison at Vicksburg, in which he was confined by military order. The appellant states in his petition "that he is a citizen of Mississippi, in no way connected with the army or navy of the United States, and that he was not confined for any military offence."

The writ was granted and duly served on the military officer having the appellant in custody. The return shows that the appellant was imprisoned by order of Major General E. O. C. Ord, commanding the Fourth Military District, on the charges submitted as part of the return, and that he had been arraigned, and was being tried by a competent court organized under the act of Congress of March 2d, 1867, and the acts supplementary thereto.

The documents filed with the return, and as part of it, consist of the proceedings of a military commission convened for the purpose of trying McCardle, on the charges and specifications against him. It seems that he was put upon trial after the writ was served, and refusing to plead, a plea of not guilty was entered for him. The charges against him are four in number: "1st, Disturbance of the public peace, in violation of the law of Congress, passed March 2d, 1867, entitled an act to provide for the more

efficient government of the rebel States, and the acts supplementary thereto." Under this charge there are two specifications, which consist of offensive articles published in the Vicksburg Times, of which McCardle was editor, the articles being set out at length. "Charge 2d, Inciting insurrection, disorder, and violence, in violation of the law of Congress, passed March 2d, 1867;" the same act above named. Under this charge there are also two specifications setting out offensive articles published in the paper. "Charge 3d, Libel." Under this charge there are four specifications of like character of those above named. "Charge 4th, Impeding the reconstruction of the Southern States, under the law of Congress, passed March 2d, 1867, and the laws supplementary thereto;" under which charge there is one specification, which is an article published in the paper advising voters to stay away from the polls. From this brief statement it will be seen that the publication by McCardle, in his paper, of certain articles offensive or insulting to the Commanding General, constitute the offences charged against him.

The acts under which these charges were made, and the appellant arrested, are so broad, so comprehensive, and so complete for the establishment of absolute, unrestrained military supremacy, that it may be conceded the Military Commander had a right to arrest for anything and everything deemed by him an offence, and to punish as he might think proper, regardless of any code of laws, for none such was prescribed to him. But the question is, are these laws or acts constitutional and valid? Or, are they unconstitutional and void? On the hearing, the Circuit Court held that they were constitutional, and therefore remanded the prisoner to the custody of the military authorities, from which decision this appeal was regularly taken to this Court, and the constitutionality of the reconstruction acts is the question to be determined by this Court.

As preliminary to the application of the constitutional

test to the several provisions of these acts, it may be proper to enquire whether Mississippi is really a State in the Union? That she was admitted into the Union in 1817 is certainly true, and she must be in the Union still, unless she left it by virtue of her secession ordinance; for certainly it cannot be pretended that she can be turned out of it, or expelled from it by Congress, or any other department of the Government, or by all of them together. The act by which she undertook to dissolve her connection with the other States has been declared void by every department of the Government. On that ground alone the war was commenced and prosecuted, and the result of the war settled the question. The State herself abandoned all claim to such a right in the solemn declaration, by a convention of her people, that the ordinance of secession was absolutely void, and did not require to be repealed. The Government of the United States treated the ordinances of secession as nullities; the State of Mississippi did the same; she was a State in the Union from 1817; how could she get out of the Union by an act admitted on all hands to be a nullity? This cannot be without imparting validity to the act of secession. That the State government became disorganized, as a consequence of her attempted withdrawal from the Union, is true; still the power of self-government, the capacity to re-establish her connection with the Federal Government, as it had previously existed, remained to her, and only required the action of the sovereign authority—the people—to restore her to her former condition in all respects.

If the intervention of the Government of the United States was ever necessary to bring about the establishment of a republican form of government in the State, it was when the Southern army surrendered. Between that time and the establishment of a government by the proper authority, the State remained disorganized, and whilst in that condition it was proper for the United States to interpose, under the

clause in the Constitution which declares that the United States shall guarantee to each State a republican form of government. But such interposition could extend no further than to aid the people in forming such a government. The guarantee was completely and effectually performed by the President, whose province and duty it was, as will be shown hereafter, to fulfil the guarantee. Under his proclamation the people elected delegates to a convention by competent electors, such as possessed the requisites of loyalty to the United States. The sovereign power of the people was thus called into action; the convention assembled and proceeded to make the requisite changes in the constitution of the State; it provided for a general election to fill all the offices of the State, and directed that after the election the Legislature should be convened. The government thus established by the amended constitution was republican in form, and was put into complete aud successful operation by the election of all officers, and so continued until superseded by the military governments established by these acts. The aid of the United States was no longer necessary; the guarantee had been completed; and it made no difference whether the President had acted in virtue of his civil power or of his military power, the thing was done, and done effectually. The emergency which had called for the fulfilment of the guarantee had passed away, and with it the power of the United States for further interposition, in regard to the affairs of the State, had ceased. The Government of the United States was actually estopped by its own acts from further interference, as every department, in various ways, had recognized the State government so established, and had thus recognized the validity of the plan which the President had adopted. All the Federal offices in the State had been filled by the President with the advice and consent of the Senate. A proposed amendment to the Constitution had been submitted to the Southern States for their ratification

as States, and their ratifications were counted. They had elected Senators and Representatives; the Chief Justice of this Court held his Circuit Courts in them, which he could not have done had they not been considered as States, and he decided that they had not been out of the Union. To all intents and purposes they were States in the Union when these acts were passed by Congress; and if these acts be valid and binding as to those States, similar acts, with equal propriety, may be extended to any or all of the other States of this Union.

Having shown, then, as we think, that Mississippi was a State in the Union at the time of the passage of the reconstruction acts, I proceed to try the validity of the various provisions of the acts by the test of the Constitution. The original act starts out with a preamble which furnishes a pretence or excuse for this most extraordinary legislation, and this preamble demands some notice. It is as follows: "Whereas, no legal State governments, or adequate protection for life or property, now exists in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas; and whereas it is necessary that peace and good order should be enforced in said States, until loyal and republican State governments can be legally established: therefore," &c. This preamble is noticed for two purposes: In the first place, to show that it is not true, but a mere assumption; and, in the next place, to show, if the facts were as stated in the preamble, no such legislative power as that exercised by the acts would result to Congress.

It was not true—when the war ended, the States called upon the President to aid them in reorganizing their governments in harmony with the Government of the United States; he did render the necessary aid by appointing provisional governors, who were directed to call conventions; these conventions assembled in obedi-

ence to proclamation; when assembled, they represented the sovereign power of the State by universal approbation; they amended the constitution, and prescribed the preliminaries to the organization of State governments, in strict conformity, in all respects, to the Constitution of the United States. The State government was accordingly organized and put in complete operation, and it was recognized by the President, which recognition, according to the celebrated Rhode Island case, must be deemed conclusive as to its character. Indeed, it had been recognized by all the departments of Government. It was a government which had originated from the proper source of all governments—the people. It had a code of laws, civil and criminal, adequate to the protection of life, liberty, and property, and it had tribunals to enforce them. Why, then, was it not a legal government? If there be any ground for such an assumption, it must be because the President's action was improper or illegal. Such a position is absurd, because it presupposes that the State government derived its validity from the President, when that is not true: it derives its power from the people; the President but aided them to exert their power. Suppose they had assembled in convention without that aid, could it be said their government was illegal for that reason? This would be to assert that there is some power above the people from which they must derive authority to govern themselves. If I remember rightly, there are several instances in our history of governments so formed, and their legality has never been questioned. But Congress itself recognized the State as in the Union in various ways, and thus approved and ratified the action of the President and the action of the people. May it now withdraw that ratification and approval after it stood ratified and undisturbed for more than twenty months by the acquiescence of Congress, by the universal approbation of the people, and of both parties in their platforms in Connecticut,

New Hampshire, and other States, after the States had acted under it in good faith, and had a right to consider the question forever foreclosed? If so, then all the States are in the same condition, and hold their existence as States at the mere will of Congress. Certainly, from the time Congress recognized the State by submitting to it an amendment of the Constitution, and asking its approval, it became a State to all intents and purposes, even if the President had taken no part in its organization. Neither Congress nor the President can do more that aid the people to establish a republican form of government—neither can prescribe or give a government to a State. Suppose the people of the Southern States should form constitutions under these reconstruction acts, would such constitutions derive there validity from the acts? Not at all. The question, therefore, seems to resolve itself into this: Congress claims the right to aid the people to do a thing which has already been well done without its aid.

But even if the pretence stated in the beginning of the preamble were true, it is denied that any such power resulted to Congress as that claimed. It need only be said on this point that this is confessedly a military bill—it establishes a military government of all governments on earth, the least calculated for the "protection for life and property." It deprives the people of every constitutional right which they enjoyed either under the State or Federal Constitution. If Mississippi was a territory, or even a conquered province, if the Constitution is supreme there, no government could be established which violated any of the rights secured by it to any of the inhabitants or citizens; for, though it be admitted that Congress may establish governments in territories, a question formerly much mooted, and only reconcilable with the American theory on the hypothesis of the implied assent of the people, yet such territorial governments must be in perfect harmony with the

great guarantees of the Constitution. No such thing as a military government ever has been, or ever can be, established where the Constitution prevails.

The bill then proceeds to divide the ten Southern States into five military districts, and declares them to be subject to the military authority of the United States, thus impressing the character of military government on them. The second section requires the President to appoint a General of the army to the command of each district; and the third section is explicit and full as to the powers and duties of these military commanders, who have a competent soldiery under them to enforce their orders. It is in this language: "That it shall be the duty of each officer assigned as aforesaid to protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, all disturbers of the peace and criminals; and to this end he may allow local civil tribunals to take jurisdiction of and try offenders, or, when in his judgment it may be necessary for the trial of offenders, he shall have power to organize military commissions or tribunals for that purpose; and all interference under color of State authority with the exercise of military authority under this act shall be null and void." What authority does this section confer on the Commanding General? He is to "protect all persons in their rights of person and property." This embraces every duty for which civil government is established anywhere—not a single obligation or duty of government towards the citizen that is not embraced by it. Law writers inform us that the whole object of government and of laws is the protection of the rights of persons and rights of things or to things, which is generally done by appropriate laws defining rights and prescribing penalties and remedies. This ceremony, however, was entirely dispensed with. No laws or code of laws were given or prescribed to the General defining rights or

remedies or prescribing punishments—no rule of action given to guide him, save his own will; for, if the State governments are not legal, of course State laws are invalid, as the laws emanate from the government. But the State code was not even given him as his rule of action, for the act left it discretionary with him whether he would or would not allow State tribunals to take jurisdiction of and try offenders. This, however, was left discretionary with him, as he was authorized to establish military commissions, or a petty star chamber, for the trial of offenders, leaving it with him to determine what should or should not be an offence and its appropriate punishment. These military commissions were only to have cognizance of offences. The whole catalogue of mere civil rights, including controversies in regard to real and personal property, matters of contract, trespasses, and controversies growing out of the domestic relations, including divorces, are left with him to adjudicate and determine by his own will, without any law, as the power to protect rights necessarily includes the power to decide the question of right. And, as if to remove all possible obstructions which might be interposed in the way of his authority, it is also declared that "all interference under color of State authority with the exercise of military authority under this act shall be void," thus giving supremacy to the military over the civil authority. In this connection the supplemental bill of July deserves a brief notice. As if to remove all doubt as to the intention and meaning of the original act, and to remove all ground for misconstruction, it is in that declared that it was intended by the original bill to give the military commander the absolute power of government in the States. Certainly no such declaration was necessary; the original act had already transferred all the authority of the State to his hands, with the single exception of power to regulate the right of suffrage, which Congress regulated itself by the original and first supple-

mental act. This right the States, in the formation of the Constitution, most persistently refused to surrender to the General Government, but each State reserved this power to itself.

We have endeavored to show that Mississippi was a State in the Union, but what vestige of power, what attribute of a State is left to her? None whatever. She is even told what sort of a constitution she must form, what provisions it must contain, or remain in her present condition. To complete the work of annihilation, the last section of the original act declares that "any civil government which may exist in the rebel States shall be deemed provisional only, and in all respects subject to the paramount authority of the United States"—at any time to abolish, modify, control, or supersede the same—that is to say, the sovereign power of the people is usurped by Congress, which, regardless of the Constitution, has denied the State the constitutional rights of representation in both houses of Congress, and her people have been taxed without representation. And the government under which she has been placed may be continued indefinitely. She cannot escape from it except on submitting to terms degrading to her people, and even after doing this, she is not on equality with the other States, but degraded below them, inasmuch as she places herself in a state of subordination to her former slaves.

Without further notice of the provisions of these acts, it is thus seen that Congress has not only abolished and annihilated the regularly organized government of a State in the Union, but it has formed a government for the State and forced it upon her; and not only has it done this, but the government so formed is a military despotism. Can the acts by which these things have been done be reconciled with the Constitution of the United States?

We might dwell at some length on the power claimed to destroy a government and build up a new one on its ruins,

but by exposing the fallacy of the argument in favor of the power to create a government for a State, the fallacy of the pretended right to destroy will necessarily be exposed.

Every one knows that this is but a limited Government; it derives all its powers, in every department, from the Constitution, either by express grant, or by necessary implication, to enable it to exercise some power expressly granted, and it possesses no power not granted in one way or the other. The Constitution created it, and is its enabling law; whatever it has been enabled to do it may do, but it cannot do that which it has not been enabled to do. The natural person cannot do that which the law of his nature or of his being has not enabled him to do; it is physically impossible. So the artificial person or thing—the Government—cannot do that which the law of its being has not enabled it to do; it is morally impossible. To be sure the Government must be administered by individuals who may transcend their authority; this is simply usurpation.

Has the Constitution, then, either expressly, or by necessary implication, enabled Congress to establish a government for a State, and especially a military government, and force it upon the people, for no matter how long or how short the time; if it may do so for two years, as it has done, it may do it for fifty years just as well; and, if upon ten States, then upon all, just as well? This branch of the subject will be discussed at some length, and rather in the form of an answer to or refutation of the position or argument recently put forth by the advocates of the constitutionality of these acts, which is destitute of any solid foundation, and, if it were true, would at once sweep away all the guards thrown round the liberties of the people and the several rights of the States. This argument is built up on two provisions in the Constitution—the 4th section of the 4th article, and the closing paragraph of the 8th section of the 1st article. The first-mentioned provision is, that "the

United States shall guarrantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and, on application of the Legislature or of the Executive, (when the Legislature cannot be convened,) against domestic violence." And the second is, that "Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and also other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

The argument drawn from these provisions is, in substance, this: it devolves upon Congress to perform the guarrantee contained in the 4th section of the 4th article; and, as it is incumbent on Congress to guarrantee to each State a republican form of government, the closing sentence of the 8th section of the 1st article authorizes Congress to adopt such means as in its discretion may be deemed necessary and proper to accomplish the end; and, having adopted these reconstruction measures as necessary and proper, they are therefore within the constitutional power of Congress.

The first error in this argument consists in the assumption that it is peculiarly the duty of Congress to fulfil this guarantee. That this is an assumption is very clear for several reasons. In every instance in which power is specially conferred upon Congress, or any other department of the Govermment, or in which a duty is required, it is done by specifically naming the department, save only in this one; in this, and in this alone, the duty is required to be performed by "the United States." In the two sections immediately preceding the one under consideration, certain powers are conferred upon Congress by name. Is it not strange, therefore, if the framers of the Constitution had intended that this guarantee should be fulfilled by Congress alone, or by act of Congress, that the same expressions used in all other cases should have been omitted? We must

understand the framers of the Constitution to have used proper language to express what they intended, and to have meant what they said. They did not say that Congress should guarantee a republican form of government to each State, but that the United States should—that is, that the power of the United States, adequate or necessary for the purpose, should be employed to accomplish the end. The inference is irresistable, that it was not intended to impose this duty on Congress alone to the exclusion of the other departments. But a still more conclusive reason that this was not designed to be exclusively a legislative duty is found in the rsasons which gave rise to this provision, the dangers it was intended to prevent, and the defect or mischief it was intended to remedy. These are very clearly stated in the 21st number of the Federalist, by Mr. Hamilton, and the 43d number of the same work, by Mr. Madison; and we have thus an unmistakable key to the true construction of the article from which we shall quote at some length. Mr. Hamilton says: "Without a guarantee, the assistance to be derived from the Union, in repelling those domestic dangers which may sometimes threaten the existence of State constitutions, must be renounced. Usurpation may rear its crest in each State, and trample upon the liberties of the people, while the National Government could legally do nothing more than behold its incroachments with indignation and regret. A successful faction may erect a tyranny on the ruins of order and law, while no succor could constitutionally be afforded by the Union to the friends of the Government. The tempestuous situation from which Massachusetts has scarcely emerged, evinces that dangers of this kind are not merely speculative. Who can determine what might have been the issue of her late convulsions if the malcontents had been headed by a Cæsar or a Cromwell? Who can predict what effect a despotism established in Massachusetts would have upon the liberties of New Hampshire or Rhode Island—of Connecticut or New York?

"The inordinate pride of State importance has suggested to some minds an objection to the principle of a guarrantee in the Federal Government, involving an officious interference in the domestic concerns of the members. (Alas, but too truly verified in the case before us.) A scruple of this kind would deprive us of one of the principal advantages to be expected from Union, and can only flow from a misapprehension of the nature of the provision itself. It could be no impediment to the reforms of State constitutions by a majority of the people in a peaceable and legal mode. This right would be undiminished. The guarrantee could only operate against changes to be effected by violence. Towards the prevention of calamities of this kind, too many checks cannot be provided."

Mr. Madison said: "It may possibly be asked what need there could be for such a precaution, and whether it may not become a pretext for alterations in the State governments (as, unfortunately, it is now used) without the concurrence of the States themselves? These questions admit of ready answers. If the interposition of the General Government should not be needed, the provision for such an event will be a harmless superfluity only in the Constitution. But who can say what experiments may be produced by the caprice of particular States, by the ambition of enterprizing leaders, or by the intrigues and influence of foreign powers? To the second question it may be answered, that, if the General Government should interpose by virtue of this constitutional authority, it would be, of course, bound to pursue the authority. But the authority extends no further than to a *guarranty* of a republican form of government, which supposes a pre-existing government of the form that is to be guarranteed. As long, therefore, as the existing republican forms are continued by the States, they are guarranteed by the Federal Constitution. Whenever the States may choose to substitute other republican forms,

they have a right to do so, and to claim the federal guarrantee for the latter. The only restriction imposed upon them is, that they shall not exchange republican for anti-republican constitutions; a restriction which, it is presumed, will hardly be considered as a grievance."

Pertinent extracts from the same authors might be multiplied if it were necessary; these are believed to be sufficient. They very clearly point out the mischiefs or evils intended to be guarded against, and thus furnish a safe and certain rule for the construction of this provision in the Constitution. The evils apprehended were certainly such as were likely to subvert the State constitutions by internal rebellion—by the influence of factious and powerful leaders in a State actuated by ambition, or by the influence of foreign powers. That such was the chief object of the provision in confirmation of the declarations of Mr. Hamilton and Mr. Madison, the Court is referred to the debates in the Federal convention. See Madison's report of the debates, 332, (5 Elliott's Debates.) These being the evils, no construction of this clause can be admitted which would extend its operation beyond the corrective. Mr. Madison is explicit in saying that the authority only extends to the guarrantee of an existing republican form of government; and he says, moreover, that the people have a right to substitute other forms of republican government, and the guarrantee extends to them also. And Mr. Hamilton denies that, under this authority, there could be any interference in the domestic concerns of the State; that the guarrantee can only operate against changes in the form of government to be effected by violence. Judge Story says "that every pretext for intermeddling with the domestic concerns of a State, under color of protecting it against domestic violence, is taken away by that part of the provision which renders an application from the Legislature or Executive of a State necessary to be made to the General Government, before its interference can be at all proper."

Now, do we not see that the evils against which this provision was intended to be a safe-guard are not such as necessarily to require the aid of Congress; on the contrary, do we not see that they are just such as require the exercise of Executive authority under the powers vested in the President by the Constitution. Manifestly, a military force could be more appropriately used to suppress internal disturbances of the kind contemplated than any other power; indeed, it would be indispensably necessary; and the President is commander in chief of the army, and, when called on for that purpose, may employ the army for the purpose of suppressing rebellion or insurrection in a State—a duty very clearly imposed on him by the latter part of the section of the Constitution under consideration. Besides, it is the duty of the President to see that laws are faithfully executed, and, above all, to see that the Constitution is preserved inviolate. Then, of course, he is bound to prevent any State from separating itself from the Union; and, in case a State should attempt to do so by rebellion, it is his duty to prevent it, and to restore the State to its proper position in the Union. These are very clearly executive duties, and though the particular mode or manner of discharging them is not prescribed, still the power is given. To accomplish the end he certainly may employ the army and navy. By law, as well as by the Constitution, he is authorized to decide when a state of war or rebellion exists, and, as a necessary consequence, must determine when it ceases. Being his duty to suppress rebellion and restore peace, he may exercise his discretion as to the manner of bringing this about. Peace was not restored by the surrender of the southern army; the Secretary of War did not approve of the terms agreed on by General Sherman and Johnson, therefore other terms must be proposed by some one. Whose duty was it to do this? It was the duty of the President, of course, either as commander in chief or as the Executive

Department. War between nations is usually terminated by treaty, but no treaty was necessary; no such thing could be made. As it was the duty of the President to make peace and to decide when hostilities had ceased, it was competent for him to prescribe conditions, and to demand evidence of a compliance with the conditions by yielding obedience to the Constitution. This is just what the President did, and when he received evidence that the southern States had complied with the conditions by yielding obedience to the Constitution, he declared by proclamation that peace had been restored. The advocates for the power of Congress to "guarrantee" are publican form of government, under the general direction that the "United States" shall do so, seem to overlook the latter part of the section which directs that the United States shall protect each State against invasion; and if the one command is addressed to Congress, the other must be also. The immergency might occur in the recess of Congress, and it might be of such a character as to require more prompt action than could be afforded by act of Congress. It is worthy of note, that the immergency in this instance did actually occur in the recess of Congress, and, to secure the guarrantee provided in the Constitution, the State of Mississippi, through its Legislature and governor, did actually send two commissioners to require the necessary aid from the President, and through his instrumentality reconstruction was actually completed before Congress met.

Hence it was not intended that these duties should devolve exclusively upon Congress; the direction or command is that the duties shall devolve upon "the United States"—that is, just such power may be employed as may be necessary by the department having control of that power. It is, therefore, insisted that the argument which maintains that Congress alone is bound to perform the duty of guaranteeing to each State a republican form of government is a fallacy; and, if possible, it is a still greater fallacy that

Congress can prescribe a form of government for a State--indeed, it is an absurdity, since government in this country must emanate from the people.

But suppose it even true that this guarantee is to be performed by Congress, does it follow that Congress may exercise just such means as it may think necessary and proper in the performance of the duty? Is there no limitation on its powers? If not in this instance, then there is no limitation in any case, and the discretion of Congress becomes at once the paramount rule of government. It is true the Constitution declares that Congress has power "to make all laws which shall 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." And it is also true that this provision allows of great latitude in the choice of the means; but it is equally true that there are limits to this discretion, and those limits are well marked by the decision of this Court in the case of McCulloch vs. The State of Maryland, 4 Wheaton, 420, in which the rule is thus laid down: "Let the end be legitimate; let it be *within the scope of the Constitution*, and all means which are appropriate, which are *plainly adapted to the end*, and *which are not prohibited*, but are consistent with the letter and spirit of the instrument, are constitutional." Apply this teste to these reconstruction measures, it will be at once seen that they are not within the scope of the Constitution; they are not consistent with its letter and spirit, and, in many particulars, they do what Congress is actually and positively prohibited from doing. Indeed, it would be difficult to conceive a plan more completely without the pale of the Constitution than this whole scheme of reconstruction, as it is called, which is indeed a misnomer, since the Southern States all had State governments in successful operation, which had been established by the proper authority—the people. This is but a scheme to take from the States their established gov-

ernments and to give them new ones—to convert, in effect, the Government into a consolidated one. Instead of guaranteeing the existing governments, which was the extent of the power conferred by the Constitution, according to Mr. Madison, Congress has abolished these governments, and in their stead has placed the Southern States under absolute military rule or despotism.

And we now proceed to show in what particulars Congress departed from the rule laid down in McCulloch *vs.* The State of Maryland, by employing means which are not only prohibited by the Constitution, but utterly inconsistent with its letter and spirit. In order to do this we may, with propriety. look to the practical workings of the government so established, all of which are justified as within the scope of its powers by the body that created it. The Constitution declares that Congress shall make no law "abridging the freedom of speech or of the press." No eulogy on the liberty of the press is needed; its value is too well understood. It has been called "The sun of our political system, without which all were darkness"—"the palladium of all our rights, civil and religious." Do these acts violate this sacred right? What is the case before the Court? A citizen, not connected with the army or navy, was arrested and imprisoned by a military officer, not for any crime known to any law, but because he had published certain articles which criticised severely the acts of that military officer as commander of the Military District. These articles are set out in the record, and it is not necessary to repeat them. Insulting to the officer they may have been—nothing more, although in the exercise of an unlimited discretion, he has tortured them into offences by drawing inferences from them unwarranted by the articles themselves, and which are merely the creation of his own brain. He thus established a censorship of the press—nay, more; he asserted and exercised a right which is totally destructive of the liberty of the press, by which every press in the State may be stop-

ped at his pleasure. If he may imprison the head of the paper, he may also imprison the subalterns, not only of this particular press, but of all others. And is not this abridging the liberties of the press? It is a total suspension or destruction of the press. These acts authorize all this, and yet it is insisted that the officer acted within the scope of his power. We may remember that we once had a sedition law far more limited than the present sedition law, and we remember, too, that it met the universal indignation of the American people, because it was regarded as abridging the liberty of the press. That law made the offender liable to be punished by the tribunals of the country only; this punishes him by the power of the bayonet. That law defined what should constitute the offence; this leaves it to the discretion of the officer to determine what shall be the offence, and he may arrest and punish for it, although no law, no order, had declared it to be an offence before the act was committed. No conductor of a newspaper can know when or how he may offend. Martial law, the will of the military commander, is the arbiter of his conduct, and that will is locked up in the secret recesses of the commander's bosom. It is surely unnecessary to enlarge on this subject.

The Constitution provides that "The rights of the people to to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation," &c. Was not this provision violated when the appellant was arrested without warrant, without oath, but merely on the order of a military officer, which order did not even inform him of the cause of his arrest? And could Congress authorize any such arrest of a citizen in time of peace? Yet this has been done, and the law under which it was done is said to be constitutional and valid. If it is so, the framers of the Constitution made a most signal failure when they undertook to place the liberty of the citizen beyond the reach of Congress, or to impose any restraint upon the legislative department.

The Constitution also declares that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces;" and in the same article, that no one shall be deprived of life, liberty or property without due process of law. This act, however, dispenses entirely with the useless ceremony of a grand jury, and tries without due process of law; for it is supposed that no one would be so rash as to contend that trial by military commission, which may deprive the citizen not only of his liberty, but of his life also, is proceeding by due process of law.

One other prohibition remains to be noticed, the importance of which cannot be over estimated. "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." These provisions are so plain as to require no comment, and just as plain is it that the acts of Congres violate them all. They were all proposed as amendments to the Constitution, and, the more effectually to protect these invaluable rights of the people, they were put in the form of positive prohibitions, so that no pretext might be left for their violation. The framers of the Constitution well knew the tendency of legislative power to extend its sphere of action. Mr. Jefferson admonished his countrymen "that all powers—legislative, executive and judiciary—are constantly tending to the Legislative Department, and when there concentrated, it is precisely the definition of a despotism." Mr. Madison said: "The Legislative Department is constantly extending the sphere of its activity, by drawing all power into its impetuous vortex. Against the enterprising spirit of this department the people should exert all their jealousy and exhaust all their watchfulness." Dangers like these, so seriously and justly apprehended, superinduced the abundant caution observed by the founders of the Government. They well

knew the history of the spirit of encroachment on the liberties of the people in that country from which we mainly derive our ideas of free institutions. They had observed its progress from the reigns of the Saxon Monarchs down to the reign of John, when it was checked by *Magna Charta*, and afterwards through a succession of reigns, down to the reign of the *Stuarts*, when it was again checked by the indomitable spirit of the English people by the second Magna Charta or Petition of Right. And so jealous are the English people of encroachment on their liberties secured by these great Charters, that, by repeated acts of Parliament, about thirty in number, these Charters have been affirmed. The American people have equal cause for jealousy and watchfulness. - The progress of the spirit of encroachment through centuries, aided and encouraged by the authority and power of the crown, did not accomplish as much in England as has been accomplished by the acts of one Congress, if that body may be called a Congress, which is composed of representatives of only part of the States, the rest being excluded from the right of representation, which I utterly deny.

The right of trial by jury in criminal cases was first secured to the people in the third article of the original Constitution, by which the Judicial Department of the Government was *created.* By that article Congress has power to establish tribunals inferior to the Supreme Court; by the preservation of the right of trial by jury in the same article, it is in effect a command to Congress never to establish a tribunal with criminal jurisdiction, without providing for a trial by jury. Yet Congress has established a tribunal known as a Military Commission, by which all offences, real or imaginary, of all persons may be tried without jury. These tribunals are United States tribunals, as they exist under act of Congress.

Now, it is contended that Congress acted beyond the scope of its power, under the clause of the Constitution which

declares "that the United States shall guarrantee to each State in the Union a republican form of government." It exceeded its power because the guarrantee presupposes a government of that form, which Mississippi had, and did not then require the aid of Congress, or of any other department of the Government. But even if Congress possessed the power under different circumstances, or if its action had been even then called for, it adopted means which are not only inconsistent with the letter and spirit of the Constitution, but which are actually prohibited by that instrument. It abolished the government which had been established by the people, and placed them under a military despotism, with no law to govern them except the will of a military commander. This is that monster, martial law, as defined by the chief law officer of the military department, which cannot rightfully exist in this country; it is contrary to the genius and spirit of our republican institutions; contrary to the spirit and the letter of the Constitution, which declares itself to be the supreme law, that is above all other laws or rules of action. This Government knows no rule of necessity, which is but another name for despotism. It was the instrument or theory employed by Cæsar, by Cromwell, and by Napoleon to invest themselves with absolute power.

If the Constitution be defective, amend it in the proper way; do not subvert it by the unhallowed doctrine of necessity. And if the fair fame of the Government has already been stained by the foul foot-prints of martial law, blot them out forever, and let it not be said that our Government is so feeble, so imperfect as to require the exercise of martial law to support it. The striking resemblance which the original reconstruction act bears to the commission of Charles I to his Lord Marshal, Wembleton, is so remarkable as almost to induce the belief that the provisions of the latter were before the framers of the former. The power conferred by the act of Congress is quite as great, and there is even a remarkable resemblance in the language

employed. Charles' commission ran—"And to the end that all disorders and outrages to the disturbance of our peace and the prejudice of our loveing subjects may be tymely prevented," &c.; and the language of the act is, that it shall be the duty of the commanding officers to "suppress insurrection, disorder, and violence, and to punish or cause to be punished all disturbers of the peace and criminals." The administration of these laws by the Commanding General does not differ in any essential particular from the practice of martial law under the commission of Charles: despotic power is conferred by both, and we well know the result where such power is given. If "history is philosophy teaching by example," we should know that abuse is an incident of unlimited power.

To redress these grievances, we make our petition of right to this Court, the conservative department of the Government, as the great safeguard to our constitutional rights. This Court speaks the voice of the Constitution. Here, in the language of Montesqueiu, we can "meet power with power." It is needless to refer this Court to authorities to prove the purposes of its creation, or its authority to declare acts of Congress unconstitutional. These questions are familiar to the Court. Nor is it deemed necessary to multiply authorities in support of the positions taken. The opinion of the whole Court in the Milligan case, so recently decided, is believed to be decisive of most, or perhaps all, of the questions involved in this case. Other authorities will be presented by associate counsel. We have *a case* arising exclusively under the Constitution and the laws of the United States--a case in which the rights of an individual are involved, being such an one as this Court has recently decided would be a proper one to bring up the constitutionality of these laws, and it is respectfully submitted to the consideration of the Court.

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