throw of all republican forms of government and the adoption of a Constitution against the will of its people and under the dictation of military power.

§ 312. The next clause reads, "The United States . . . shall protect each of them against invasion." This is a carrying out of the offensive and defensive alliance between the States, and requires the United States, through the action of Congress and by force of their armies and navy, to protect each State against invasion. This is the common defense. It makes it improper for the United States, by treaty or otherwise, without the consent of the State, to cede any part of its domain; for how can it be protected when the invasion or permanent possession of any part of the State is permitted by the guarantor?

§ 313. The clause then provides[1] that the United States, "on application of the legislature or of the executive (when the legislature cannot be convened), shall protect each of them against domestic violence." In the case of domestic violence, it is obvious that the United States cannot interfere unless called upon to do so by the legislature, or by the State executive when the legislature cannot be convened. The United States, then, are not to determine what is domestic violence calling for their protection, but that is to be determined by the legislature or executive of the State. It is interesting to note the observations of Mr. Madison on this point. He says:[2] "At first view, it might seem not to square with the republican theory to suppose either that a majority have not the right or that a minority will have the force to subvert a government; and, consequently, that the Federal interposition can never be required but when it would be improper. But theoretic reasoning, in this as in most other cases, must be qualified by the lessons of practice. Why may not illicit combinations for the purpose of violence be formed as well by a majority of a State, especially a small State, as by a majority of a county or a district of the same State; and if the authority of the State ought in the latter case to

[1] Const. U. S., Art. IV, sec. 4.
[2] Federalist, No. XLIII.

protect the local magistracy, ought not the Federal authority in the former to support the State authority? . . . Is it true that force and right are necessarily on the same side in republican governments? May not the minor party possess such a superiority of pecuniary resources, of military talents and experience, or of secret succors from foreign powers as will render it superior also in an appeal to the sword? May not a more compact and advantageous position turn the scale on the same side against a superior number so situated as to be less capable of a prompt and collected exertion of its strength? . . . May it not happen, in fine, that the minority of *citizens* may become a majority of *persons* by the accession of alien residents, of a casual concourse of adventurers, or of those whom the Constitution of the State has not admitted to the rights of suffrage? I take no notice of an unhappy species of population abounding in some of the States, who, during the calm of regular government, are sunk below the level of men, but who, in the tempestuous scenes of civil violence, may emerge into the human character and give a superiority of strength to any party with which they may associate themselves."

These views show that the United States are bound, on the application of the legislature or executive of a State, to aid in suppressing an insurrection in a State, even though it may have a majority, including alien residents not suffragans, on the side of the opposition to the government. The United States cannot join with the parties to domestic violence, because they are in the majority, to overthrow the government which is guaranteed as a republican government, and to be protected against domestic violence. This would make the United States a factor in domestic quarrels, and not a protector of the government against those who are too strong to be overborne by it. Where there are rival governments and the demand is made by either or both, it has been decided in the case of *Luther v. Borden*,[1] followed

[1] 7 How. 42.

in *Texas v. White*,[1] that when the application is made the President may have the authority to decide which is the legitimate government.

This latter part of this clause was insisted on by the Southern States, because assuring them of the protection of the United States government in case of servile insurrection.[2]

Express Limitations on Federal Power.

§ 314. In the form in which power was delegated to the Congress in the Constitution, there was an implied limitation upon the powers in the fact that all were delegated; and that all not delegated, or prohibited to the States, were reserved to the States respectively, or to the people. But the framers of the Constitution were not content with this. They were wise enough to foresee that power, when left in any degree to implication, would seek to increase itself by inference so as to endanger public liberty.

They proposed, therefore, upon certain essential matters, to provide against this stretch of power through implication, by forbidding the exercise of certain dangerous powers in express terms. A number of these are to be found in article I, section 9; and others were afterwards added in the first ten amendments to the Constitution. There had been a great popular demand for a bill of rights, and after the Constitution was submitted to the judgment of the people of the several States, the cry of patriots throughout the Union was, that a radical defect in the system was in the absence of a declaration of rights, which should be beyond the reach of Federal power. How far this demand was met in the original Constitution we will now proceed to consider.

§ 315. The first clause of the ninth section we need consider no further, as we have already fully considered it under the power as to commerce.

[1] 7 Wall. 700. See also Appendix to Tucker's Blackstone, 367.

[2] 1 Tucker's Blackstone, Appen., 367; Rawle on the Constitution, ch. 32. See also Attorney-General Cushing's Opinion, March 3, 1857, in Yazoo City (postoffice) case.

The second clause is in these words: "The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion and invasion, the public safety may require it." Let us analyze this clause. There is no other mention of the writ of *habeas corpus* in the Constitution. The underlying principle of this writ, which subjected all arrest or seizure of the person of a free man to judicial arbitrament, was found in the thirty-ninth chapter of Magna Carta; but that which we refer to ordinarily as the Habeas Corpus Act was the 31st of Charles II., chapter 2.[1] The principles of this great act of Charles II. were brought to America by the several colonies, and acts of *habeas corpus* based upon that primeval act, which was itself but a re-enactment of acts more ancient than it, were passed by the several States, for giving to every person imprisoned by whatever authority the right to have the legality of his arrest and imprisonment passed upon by judicial authority. When, therefore, the Constitution declares in this clause that "the privilege of the writ of *habeas corpus* shall not," etc., it necessarily speaks of the writ of *habeas corpus* which obtained in each of the States comprising the Union. It is natural, therefore, as has been settled by decisions, that the writ of *habeas corpus* cannot under this clause be suspended. The privilege may be; the writ never.[2] The form of the clause is a negation of the power to suspend except under certain circumstances, which are mentioned; which is a negative pregnant with affirmation that power to suspend it is only given when those circumstances arise.

§ 316. What Federal authority can suspend this privilege? The answer is distinct: No power but Congress can suspend it; the President cannot.

1st. England, from which we obtain Magna Carta, Habeas Corpus, and the fundamental principles of our bill of rights, has settled this question there. In the thirty-ninth chapter of Magna Carta, it is declared that no free man shall be ar-

[1] Stubbs' Select Charters, Appen., 517.

[2] Ex parte McCardle, 7 Wall. 506.

rested or lose his life or liberty, except by the law of the land or the judgment of his peers. His liberty is protected by law, and cannot be stricken down by royal power. Therefore this principle of English liberty, the law which established *habeas corpus* and protected *liber homo* from any deprivation of liberty, could not be repealed by any other than the power which enacted it; nor could the king repeal temporarily, by suspension, the law enacted by Parliament. This pivotal principle in the English Constitution was the turning point of the English revolution of 1688–89. And the trial of the seven bishops and the verdict in that case was the vindication by the English people of the irrepealability of an English law by the suspending power of an English king. The last of the Stuarts lost the throne by insisting on his power to dispense with a law of the kingdom. In England, therefore, since the revolution of 1688, the king has not sought to exercise the power of dispensing with *habeas corpus*. If he could, English liberty would be dead, because subject to suspension at the will of an English king.

2d. The history of the debates in the convention leads to the same conclusion. In Pinckney's plan, the privilege of the writ was not to be suspended except in cases of rebellion or invasion.[1] Subsequently Mr. Pinckney proposed a clause "that it shall not be suspended by the Legislature, except," etc.[2] Rutledge and Wilson thought suspension should never be allowed. But by a vote of seven to three the clause was adopted in substantially its present form. It was never referred to as subject to suspension except by Congress.

3d. The power of suspension was in the legislative article, and between two clauses, and in a section which related exclusively to legislative power. So, *noscitur a sociis*, was the power to suspend a legislative act of the States only in the legislature.

4th. The power to suspend the privilege of a writ must be in one of the departments. It cannot be that the judiciary

[1] Madison Papers, 741. [2] Id. 1265.

could suspend a writ grantable by a court *ex debito justicii* to a citizen; nor was there any mention in the enumerated powers of the President. Suspension in fact was to repeal *pro tempore*. How could the President repeal permanently or for a time a law of Congress? *A fortiori*, how repeal a right imbedded in the foundation law of the State, and recognized as a constitutional right in this very clause?

5th. In the convention it was distinctly proposed that the President should have the power to suspend a law for a certain term. Ten States vote no without an affirmative vote. The only time that the authority to suspend the privilege of the writ of *habeas corpus* is mentioned is in connection with Congress, and with none other.

Furthermore, as the power is not given to the President in express terms, it would have to be implied as necessary and proper to carry out Presidential powers. But these means which are necessary and proper for this purpose are vested in Congress itself, as we have seen, by the words "to make all laws which shall be necessary and proper for carrying into execution, etc., powers vested by this Constitution . . . in any department or officer thereof."[1]

§ **317.** Again, Congress has sole power to declare war and to provide for the suppression of rebellion. The President has neither. This clause prohibits the suspension of the writ, unless when in case of rebellion or invasion the public safety may require it. As Congress is charged with the public safety in cases of rebellion and invasion, it would seem to follow that Congress may have the power to suspend the writ of *habeas corpus* when its exercise would endanger the public safety. Congress alone can determine when the war shall begin, and therefore when the occasion has arisen for its suspension. If the President has power to declare war, as seemed to be held in the *Prize Cases*,[2] and to continue it indefinitely, as was decided by the Supreme Court in reference to the end of the Civil War by the Presidential procla-

[1] Const. U. S., Art. I, sec. 8, clause 18. [2] 2 Black, 635.

mation, then the power of the President to suspend the privilege of the writ of *habeas corpus* would be dependent on his own authority to declare and perpetuate a rebellion at his own pleasure. In this view, how can it be supposed that the framers of the Constitution intended to give this extraordinary authority to destroy human liberty to the President, during a period of war which can never cease by a treaty of peace, except with the consent of the President; or of a civil war, which the courts have decided continues until its cessation is declared by the Presidential proclamation?

6th. Judge Story,[1] speaking of who shall decide whether the exigency has arisen for a suspension, uses this language: "It would seem, as the power was given to Congress to suspend the writ of *habeas corpus* in cases of rebellion or invasion, that the right to judge whether such exigency has arisen must exclusively belong to that body." Judge Tucker[2] says: "In England the benefit of this important writ can only be suspended by authority of the Parliament. . . . In the United States it can be suspended only by the authority of Congress." Mr. Hamilton[3] refers to this clause as being equivalent to an important article in a bill of rights to secure liberty. How feeble would have been his citation of this, if those who demanded a bill of rights had been able to charge that the privilege of the writ of *habeas corpus* was suspensible by the one-man power. The truth is, it may be safely said that no respectable lawyer before the Civil War, nay more, no lawyer, had ever asserted that the privilege of the writ could be suspended by any power except Congress. Mr. Blackstone[4] says: "But the happiness of our Constitution is, that it is not left to the executive power to determine when the danger of the State is so great as to render this measure expedient; for it is the Parliament only or legislative power that, whenever it seems proper, can authorize

[1] Story on the Constitution, 1342.
[2] 1 Tucker's Blackstone, Appen., 292.
[3] Federalist, No. LXXXIV.
[4] Stephen's Blackstone, 151.

the Crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons, without any reason for so doing."

Besides the American authorities already cited, Chief Justice Marshall, in delivering the opinion of the Supreme Court in the case of *Ex parte Bollman*,[1] prefaces what will be quoted by stating that, in the great judiciary act of 1789, Congress secured the liberty of the man by authorizing the issue of this great writ by all the courts, and then adds: "If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide. Until the legislative will be expressed, this court can only see its duty, and must obey the laws."

§ **318.** It is thus seen that, at the time of the adoption of the Constitution, no power in Great Britain could suspend the writ of *habeas corpus* except Parliament. Parliament may suspend the privilege of the writ, or rather authorize the Crown to suspend it, in order that in case of public danger a suspected person may be arrested without the giving of reasons for the arrest or detention. To give to the Crown the power to suspend in order to arrest would be to unite the legislative power with the executive, which, under the maxim of Montesquieu, would be unbridled tyranny.

During Jefferson's administration he recommended to Congress the suspension of the writ of *habeas corpus* during the Burr conspiracy. Congress refused to do so, and the President never assumed the power or pretended to claim it. It is obvious if the President can create the status of civil war, as was decided in the *Prize Cases*,[2] and when this status of war is brought about the President can close it by proclamation, as was decided in a case already cited, then it follows that the President would have power to create the status of war, in order to declare that the public safety required the suspension of *habeas corpus*, and to suspend it by executive act until

[1] 4 Cr. 101.
[2] 2 Black, 635.

he should declare the war at an end. Contrasting this assumption of power for the executive with the power of the Crown in Great Britain, it may well have been said that on such a construction the Constitution would have conferred upon the President "more regal and absolute power over the liberty of the citizen than the people of England have thought it safe to entrust to the Crown; a power which the Queen of England cannot exercise at this day, and which could not have been lawfully exercised by the sovereign even in the reign of Charles the First."

In *Ex parte John Merryman*,[1] the question arose in 1861 of where the power resides to suspend the privilege of *habeas corpus*. On the 26th of May, 1861, before Congress had met after the outbreak of the Civil War, the President had assumed the power as an executive prerogative to declare that civil war existed, and on the basis of that declaration assumed in May, 1861, not only to suspend the writ of *habeas corpus*, but to confer that authority upon the military commander in the district of Maryland. Merryman was imprisoned in Fort McHenry in the State of Maryland, and filed a petition for *habeas corpus* before Chief Justice Taney to be released from an arrest made on the 20th day of May, and detention by General Cadwalader of his person without warrant from any judicial officer, but upon the general charge of treasonable acts against the government. The Chief Justice issued the writ of *habeas corpus*, directing General Cadwalader to appear and produce the body of John Merryman, and to certify and make known the day and cause of the capture and detention of the said John Merryman, and to submit to and receive whatsoever the said Chief Justice should determine upon concerning him in this behalf, according to law, and to have then and there the said writ.

General Cadwalader made a return declaring that he was duly authorized by the President of the United States to suspend the writ of *habeas corpus* for the public safety, and declined to produce the prisoner. Thereupon the Chief Justice issued an attachment against General Cadwalader for contempt, and delivered the same to the marshal. The marshal made return that he was unable to serve the attachment upon General Cadwalader by reason of military force. The Chief Justice, in an impressive opinion, decided that the civil process had been subordinated to military power by the action of General Cadwalader under the assumed orders of the President. He decided that the assumed power of the President was contrary to the Constitution of the United States; that the suspension of the writ of *habeas corpus* was a legislative power; that the President, under his duty to take care that the laws be faithfully executed, was bound to uphold and aid the judicial power, and not to oppose and defy it; and, referring to the nature of the British Constitution on this question, and the opinion of Chief Justice Marshall in *Ex parte Bollman*, and to Judge Story's Commentaries, he closes his opinion in this language: "In such a case my duty was too plain to be mistaken. I have exercised all the power which the Constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him; I shall therefore order all the proceedings in this case, with my opinion, to be filed and recorded in the circuit court of the United States for the district of Maryland, and direct the clerk to transmit a copy, under seal, to the President of the United States. It will then remain for that high officer, in fulfillment of his constitutional obligation to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced."

The President never acted in the matter so as to release Merryman; and the suspension of the privilege of the writ of *habeas corpus* by military force was allowed to have effect at the will of the executive against the judicial mandate of

[1] Taney's C. C. Rep. 246-65.

the venerable Chief Justice of the United States. Thus the only proceeding in our annals up to that time which could be regarded as a precedent for the use of the executive power to suspend this great privilege was in the exertion of the military power of the President to enforce the authority of the military over the civil jurisdiction of the courts; and so the only judicial precedent is the emphatic decision in this case that the only power that could suspend this privilege is in Congress, and not in the President. The tenor of the opinion of the court in *Milligan's Case*[1] sustains the principles of the decision of the Chief Justice in *Merryman's Case.*

§ **319.** Another case well calculated to shock the public sentiment of the country in respect to the danger of the military power has occurred. In violation of the fifth amendment to the Constitution, to be hereafter referred to, Mrs. Surratt, a woman, not a soldier in the army of the United States or subject to militia duty, was arrested and tried by a court-martial for the deplorable assassination of President Lincoln, which tribunal, by the fifth amendment, had no jurisdiction in such cases. She was condemned to death. She sued out a petition for the writ of *habeas corpus* to bring under the jurisdiction of the civil courts in the capital of the country the power of the court-martial to condemn her to death. The writ was issued by Mr. Justice Wiley, one of the judges of the District of Columbia. With the precedent of General Cadwalader's defiance of the order of Chief Justice Taney before them, the military disobeyed the order of Mr. Justice Wiley, and this woman, in the shadow of the capitol, under a jurisdiction utterly unconstitutional, and by a military power in defiance of the jurisdiction of the civil courts, was hung. It will be perceived, therefore, that the suspension of the writ of *habeas corpus* screened the unconstitutional jurisdiction of the court-martial from the scrutiny of the civil courts, and under cover of this the military power was left without restraint to work the death of its victim in defiance of the Constitution of the country. This con-

[1] 4 Wall. 2.

struction, therefore, is not only fatal to the liberty but to the life of the citizen, and puts his liberty and life in the hand of the executive.

Several years after hostilities ceased, the trial of McCardle by military power under the provisions of the Reconstruction Acts was attempted to be averted by invoking the benefit of the writ of *habeas corpus.* We have seen how it was attempted to remedy the denial of that writ in obedience to those acts by an appeal to the Supreme Court of the United States, and how the Supreme Court was divested of its jurisdiction upon appeal to grant to McCardle the benefit of its great power to rescue him from the prospect of military trial by the law repealing the clause of the previous act granting it the power to consider the case upon appeal. The history of these unhappy precedents is given only to exhibit the dreadful evils of a departure under any exigency from the sacred provisions of the Constitution of the country, and to note them, we hope, as the only cases in all our future as in all our past history which will endanger the life and liberty of the citizen so fully protected by the noble provisions of the Constitution of the United States.

The States are not forbidden to suspend the writ of *habeas corpus* by any provision of the Constitution of the United States, and the power of the States to do so is not restricted by the conditions upon its exercise by the Federal power which occur in this clause.[1]

The true view of this important restriction upon Federal power is that the framers of the Constitution felt that occasions might arise of public danger in time of war or civil commotion when the arrest of a person might be proper, though there might be no sufficient proof to establish a treasonable purpose before a civil court. It was obviously a power by arrest and detention to prevent the evil results which would flow from leaving the accused to carry out his designs unrestrained, and to hold him in order to the safety of the country. It was never intended that this detention

[1] Luther v. Borden, 7 How. 42.

should be followed, under cover of the suspension of the privilege of the writ of *habeas corpus*, by prosecution, conviction and punishment, and in the deprivation of his liberty or life. Prevention, not punishment, was the object of this clause. The case cited was an abuse of the suspension of the privilege of the writ of *habeas corpus* by the violation of the fifth amendment of the Constitution in the unconstitutional trial, conviction and punishment of the offender.

Prohibition Against Bills of Attainder.

§ 320. "No bill of attainder or *ex post facto* law shall be passed."[1] The same restriction was imposed upon the States.[2]

We may consider this subject in its application to Congress and to the States. Bills of attainder were not within the judicial power of Parliament. The judicial procedure was by impeachment by the House of Commons and trial by the House of Lords. A bill of attainder was the legislative act of Parliament.[3] These acts of Parliament to attaint particular persons of treason or felony, or to inflict pains and penalties beyond or contrary to the common law, to serve a special purpose, are, to all intents and purposes, new laws made *pro re nata*, and by no means in execution of such as are already in being.[4] These acts charged persons named in the bill with criminal misconduct, convicted them, and adjudged the penalty of death with forfeiture of property. They were passed to reach cases where the evidence of guilt was not sufficient for judicial conviction, and sometimes for obnoxious conduct not made criminal by existing law, and therefore making criminal by after-law what was not criminal when done. The accused was generally denied a hearing. It was the union of legislative and judicial power in the same hands, which, under Montesquieu's maxim, was the "essence of tyranny." The legislature made a deed not crim-

[1] Const U. S., Art. I, sec. 9, clause 3.
[2] Id., Art. I, sec. 10, clause 1.
[3] 4 Stephen's Blackstone, 386, and note; May's Practice of Parliament, 484.
[4] 4 Stephen's Blackstone, 379.

inal at the time done a mortal offense, and sat in judgment upon the accused to carry out by judicial forms what had been enacted by the so-called judges.

Besides these bills of attainder there were bills of pains and penalties, which only differed from the former in that the penalty was less than death. During the Revolutionary period such bills were passed in some of the colonies, one case of which came before the Supreme Court, the case of *Cooper v. Telfair*.[1] That case grew out of a bill of pains and penalties. In New York bills of attainder were passed confiscating the property of offenders, and condemning them to death without hearing and without the form of trial.[2] But these acts of the State were passed before the Constitution went into effect. In the convention of 1787 the clause as to bills of attainder was passed *nem. con.* As to the clause relating to *ex post facto* laws, passed by a vote of seven to three, many members thought that it was unnecessary to insert such a provision, Mr. Ellsworth holding that *ex post facto* laws were void of themselves.[3] The tyrannical character of a bill of attainder has been exposed by a number of writers.[4]

In *Fletcher v. Peck*[5] the Supreme Court said: "A bill of attainder may affect the life of the individual or may confiscate his property, or both." In this clause the power of the legislature over the lives and fortunes of individuals is expressly restricted. This definition includes the technical bill of attainder, as well as the bill of mere pains and penalties, and was so interpreted by Justice Story, *ubi supra*. The question has been very fully considered in two cases, *Ex parte Garland*[6] and *Cummings v. Missouri*.[7]

In *Ex parte Garland* the court defined a bill of attainder as "a legislative act which inflicts punishment without ju-

[1] 4 Dall. 14.
[2] Cooley's Constitutional Law, 284, 285.
[3] Madison Papers, 1399–1401.
[4] Story's Commentaries, 1338, citing Dr. Paley; 1 Tucker's Blackstone, Appen., 292; Rawle on the Constitution, ch. 10; Woodson's Law Lectures, 621–24.
[5] 6 Cr. 138.
[6] 4 Wall. 277.
[7] 4 Wall. 326; Hawkes v. New York, 170 U. S. 189.