

THE RELATIONS OF THE CONSTITUTION AND OF PUBLIC LAW TO
REBELLION.

S P E E C H

OF

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OF OHIO,

Delivered in the House of Representatives, February 24, 1862.

The House being in Committee of Whole on the state of the Union.

Mr. SHELLABARGER said: Mr. CHAIRMAN: Upon the 7th day of March, 1850, in a speech now passed into the imperishable literature of the American Senate, Mr. Webster, drawing his figures from the classics of another age, thus described the state of the Republic at that time. He said:

"The imprisoned winds are let loose. The East, the West, and the stormy South combined to throw the whole sea into commotion, to toss its billows to the skies, and to disclose its profoundest depths. I am not fit to hold the helm in this contest with the political elements. It is well for the country that there is a Senate; a body not lost to a sense of its high responsibilities; a body to which the whole country looks with confidence for wise, patriotic, and healing counsels."

But, Mr. Chairman, at that time no weak and facile Executive had dropped the reins of Government into the hands of a deep and concerted treason. Then the Cabinet had not become the heads and ministers of a gigantic rebellion. Then peculation had not impoverished the Treasury, nor theft fingered the diamonds of the State. Then the guns of the Republic, turned against her by her own sons, in whose souls were new and reeking the sear of recent perjuries, had not shot from all our Southern forts the ensigns of the Republic. Then the Senate and the House had not become the seats where conspirators held the carnivals of treason, and where they concerted and whence they telegraphed to all the extremities of their hideous plot plans for the overthrow of the Constitution. Then no State had turned against the Republic the dagger of the parricide. Tens of thousands of her children then were not exiles from their homes because they would not write the mark of Catiline or Iscariot upon their brows. Then other thousands had not, in the Constitution's defence, mingled their blood with the blood of the Revolution, which almost yet crimsoned the shores of the rivers. Treason had not yet desolated cities and fields of fairest portions of the land. It had not then betrayed navies and light-houses and fortresses, and ordnance and treasuries, and mints and arsenals and armies into the hands of its allies. Two hundred thousand of the bayonets of a huge rebellion were not then gleaming in the sunlight which is reflected from the dome of the Capitol. Six hundred thousand of the loyal sons of the Republic, in lines stretching from the mouths of the Potomac and Delaware to the sources of the Missouri, were not started to the deadly shock of battle. Then had not come the realization of that strange vision, thrown by the wizard pencil of a prophetic limner upon his imperishable canvas, in which we see "the broken and dishonored fragments of a once glorious Union, severed, discordant, and belligerent, a land rent with civil feuds and drenched in fraternal blood." Then, none of these. Now they have all come—come, it is true, most foully, causelessly, wickedly, but still no less really come.

Sir, I have alluded to the relations to each other of *that* time and *this*, to indicate the profound distrust with which I approach the discussion of the issues upon which I now enter. I scarce indulge the extravagances of rhetoric, nor deal in figures of speech, when I say that in hours we here fix the destinies of centuries, and our minutes chronicle the events of ages; and the high moment of the trusts consigned now to the American Congress finds some fit designation in an aphorism which has been recovered from the ruins of another republic, which declares that "no human virtue approaches so near the divine as that which establishes and preserves the State." Our very instincts, in times of danger, impel us to circumspection and care. The trained beast on the verge of Alpine precipices, where one bad step would dash it upon invisible depths below, selects and tries, with unerring instinct, each stone, before it trusts its fate upon the treacherous pathways.

Although the end we aim at—the preservation of the Republic—neither demands nor admits of circumspection, moderation, or choice, yet the means for the attainment of that end demand them all; and he who now has no doubts nor misgivings as to the selection of the fittest means, may find that not always the wisest men "rush in where angels doubtful tread." That this end shall be attained is resolved—not resolved only in those moments of national humiliation and shame which followed the fall of Sumter; but that resolve, by the sense of inexpressible wrongs, is burnt, with inextinguishable fire, deep into the undying purposes of this vast people.

Permit me now to make some suggestions as to the wisdom of some measures now before the Congress as means for the re-establishment of the Government. And, sir, at the threshold of the consideration of every possible measure affecting the policies of this conflict, we are met by the grave and radical inquiry whether, in its prosecution and in the selection of the means for the suppression of the rebellion, Congress and the President, and his subordinates at the head of the army, are still under the guidance and the high sanction of the Constitution and of public law, and should select such means as are in harmony with these; or whether, on the other hand, in dealing with causeless and formidable rebellion, all the departments of the Government are absolved from the recognition of law? Sir, this may seem a strange and useless inquiry—an abstraction—having no application to the investigations now before Congress, and in the answer to which all are agreed. I thought so, too, Mr. Chairman, when this Congress convened. I thought that all men united in one harmonious assent that now and yet the Constitution and law presided over all the conduct of all departments of the Government, in all the majesty of its forces and authority, guiding, swaying, controlling, giving bounds and system and order to them all. I thought that the effort which the Government, in the hour of its peril, by its Constitution, is required to put forth for its deliverance from the rebellion, was not a plunger into anarchy.

Sir, the sentiments uttered upon this floor, and urged for adoption upon this House, and also upon the Senate, have rendered the inquiry which I now make, as to what relations the Constitution and law sustain to this war, one of a practical importance absolutely startling.

I maintain, sir, that it is not within the right, nor the necessities, nor the just policy, of any department of this Government to disregard the obligations of law in the prosecution of this war—neither in the selection of means for the restoration of the Government nor in their application to any citizen.

The two distinct classes of powers which inhere in the very essence of every constitutional and supreme Government are well enough stated by Mr. Adams, when he says:

"There are, then, Mr. Chairman, in the authority of Congress and of the Executive, two classes of powers, altogether different in their nature, and often incompatible with each

other—the war power and the peace power. The peace power is limited by regulations and restricted by provisions prescribed within the Constitution itself. The war power is limited only by the laws and usages of nations. This power is tremendous; it is strictly constitutional, but it breaks down every barrier so anxiously erected for the protection of liberty, of property, and of life.”

The purposes of the present inquiry lead me, therefore, directly to ascertain what is the “war power” of this Government, and what the relation of that power to the Constitution.

This requires that we should ascertain the relation which the “law of nations” sustains to the American Constitution. That the law of nations is part of our constitutional law, I think is incontestable.

The Constitution, in terms, gives to Congress the power “to punish offences against the law of nations,” and thereby recognises that law as part of itself. It also confers on Congress the power to punish crimes only known to the law of nations, of which “piracy” is an example. It employs terms, designations of offices, and titles only employed by the law of nations; as “captures,” “letters of marque,” “ambassadors,” “consuls,” and “public ministers.”

The same important doctrine, that the law of nations is part of the constitutional law of the United States, is also established by the invariable practice of the Government itself, by the authority of our own jurists, by the opinions of the most eminent statesmen, by the invariable adjudications of the courts of the States of the Union, and by the repeated decisions of the Supreme Court of the United States.

The most eminent work upon the law ever given to the profession in the United States, in its opening sentence, states this doctrine most explicitly. “When,” says Chancellor Kent, “the United States ceased to be part of the British empire, and assumed the character of an independent nation, they thereby became *subject* to that system of rules which reason, morality, and custom had established among civilized nations as the public law.”

Justice Story, in discussing the powers of the President in war, says :

“He cannot lawfully transcend the rules of war as established among civilized nations.”
* * * * * “The modern usages of nations are resorted to merely as a limitation to this discretion of the President.”

The Supreme Court of the United States has again and again so declared the law. In *Jecker et al., vs. Montgomery*, (13 Howard,) that court declares that the international law forms part of the municipal law of every country. It has, for centuries, been held to be part of the common law of England, and “it is well settled that the common law of England, so far as it is consistent with the constitutions of this country, and remains unaltered by statutes, is an essential part of American jurisprudence.”

In his letter of April 24, 1841, to Mr. Fox, your Secretary of State, Mr. Webster, commits this Government to the absolutely binding force of public law upon all the departments of the Government.

In alluding to the claim of McLeod, a subject of Great Britain, then on trial in New York for a homicide committed in that State, to be discharged upon the ground that his offence was committed by the authority of the British Government, Mr. Webster says :

“Mr. McLeod demands indemnity from personal responsibility by virtue of the law of nations. That law, in civilized States, is to be respected in all courts. None is either so high or so low as to escape from its authority in cases where its rules and principles apply.”

That same eminent jurist, certainly the most able of the present century, speaking upon the same point, says :

“You cannot escape from the law of nations where its principles apply. The air of every judicature is full of it. It pervades the courts of law of the highest character, and the court of *pie poudre*. It is a part of the universal law. It may share the glorious eulogy of Hooker upon law itself, that ‘there is nothing so high as to be beyond its power—nothing so low as to be beneath its care.’”

Mr. Chairman, I will introduce but one other single witness in support of this argument I make in favor of the reign of law—of constitutional law—now, even in the midst of the clash of arms and the chaos of war. I take that witness from our most illustrious dead. Mr. Adams, alluding to the force of the law of nations in war, says :

“The war power is limited by the law of nations.” * * * * * “It is strictly constitutional.” * * * * * “Congress must carry on war, whether of invasion or of insurrection, according to the laws of war.”

I conclude, therefore, that the law of nations is so incorporated into and so become part of the constitutional law as to have become rules, limitations, and guides, controlling every department of the Government of the United States in the exercise of the rights of war ; and whenever it controls or interprets constitutional powers, it cannot be escaped from any more than can be the plainest provisions of the Constitution. But, sir, do the rules of the international code apply to a *civil* war like that which now involves the Government in its fearful perils ? That they do, is as plain as that they apply to any war. Neither precedents, authorities, nor decisions confine these rights of war to any particular kind of war, but extend them to all that is “war”—that is, to all contests of force in which the belligerents are sufficiently compact, organized, and powerful to maintain organized armies, and are not mere “mobs” or “hordes of wandering savages,” or “pirates,” or “associations of robbers.” Our Government has, during its entire existence, acted upon the same doctrine ; and it is declared, in the special message of President Jackson, of the 21st December, 1836, to be in accordance with the just principles of public policy. The Supreme Court of the United States has uniformly so declared the public law ; as in 3 Wheaton, 310, and 4 Wheaton, 52 ; and Mr. Adams, in the celebrated speech from which I have quoted, declares the same rule of public law when he says, “a war against insurrection *must* be carried on according to the laws of war.”

Sir, the Constitution, therefore, brings to its defence and shields itself, in times of civil war, in the panoply of public law, not by authorizing any violation of its provisions, but by invoking and bringing into operation part of its own powers—powers silent in peace but omnipotent in war.

I should not have ventured to argue propositions so evident before the meeting of this Congress ; but, sir, I have been led to do so by the views which I have heard so earnestly pressed upon the consideration of Congress.

We are, in substance, told that the President of the United States, in according to rebels some of the rights of war, is doing so in violation of the Constitution, and has made them foreign States ! One gentleman, in an ingenious and able argument, assures us that—

“The work of the Government, at its present stage, is not, therefore, suppression of insurrection in any just sense ; but the overthrow of a rebellious belligerent Power. Its success does not signify the execution of the terms of an existing government in the seceded States, remitting them to their *original status* in the Union ; but implies their subjugation to the sovereignty of the United States, to be held as territories, or military dependencies, or States, or anything else we please.”

The same gentleman also informs us, after enumerating rights of war which have been by the Executive, through his subordinates in command, practiced in the treatment of rebels—such as our blockade, the use of flags of truce, holding them as prisoners of war, exchange of prisoners, and recognising their ambassadors as the representatives of a belligerent, that—

“The action of our Government in all these matters is necessarily based on the theory that the confederate States (so called) are beyond the jurisdiction of the Union, holding a middle ground, subject to the issue of the pending conflict.”

What do gentlemen mean when they argue that this Government in suppressing this insurrection cannot bring into operation the laws of war without recognising a *status* which places them “*beyond the jurisdiction of the*

Union," to be held after subjugation as "territories or military dependencies, or States, or anything else we please?" Does it mean that after *this* rebellion shall have been quelled—after *any* rebellion shall have been quelled—the rebel district or State is, *ipso facto*, out of the United States, and the Union dissolved? Does it mean that whenever you have to resort to war, and in war use its laws in suppressing insurrection, then the rebellion, or its suppression, or the use of a flag of truce in the suppression, has severed the Union, and dissolved the whole structure of the Government? If so, was it the "rebellion," or was it the "flag of truce," or was it the "suppression" which placed the State "beyond the jurisdiction of the Union?" Which did it; or was it all three? Sir, it can scarcely be that I understand gentlemen. If I do, then, in the suppression of every rebellion, where you must call out the militia and resort to war, one or two things must occur: either in the employment of this militia of the States, which the Constitution says you must call out for that purpose, you must employ *none* of the symbols nor rules nor practices of civilized warfare; or, if you do, then you have given to the rebels a "status" which "authorizes them to make war upon the Constitution," and which places them "beyond the jurisdiction of the Union;" and just when the majesty of the Government has triumphed in reasserting its sway and in establishing the Union, you have, in your triumph, destroyed the Union.

Look at this dilemma. It is the law of nations alone which forbids the slaughter of prisoners of war. Forbid your legions that slaughter, and you have recognised the laws of war. It is the law of nations alone which throws its shield over helpless infancy. Prohibit infanticide, and punish it in your army, and you recognise and adopt the laws of war. Woman relies upon the laws of war for her protection. Punish your soldier for outrages upon defenceless woman, and you give your enemy what he is entitled to only by the laws of war. Sir, it is the law of nations which puts out the torch which is firing the retreats of children, the asylums of the insane, the collections of literature, the productions of science, the monuments of art, the seats of learning, the sanctuaries of religion, the hospitals of the aged, the infirm, and the wounded; which keeps poison out of food and fountains. Compel, within your lines, the protection of any of these, and you have accorded to your adversary rights he can only claim as a belligerent under the international law.

Sir, light up the pathway of your army with cities in bonfire. Strew your road, not with the branches of the palm in honor of God-given victories, but scatter beneath the progress of your eagles the child whom you have dashed against the wall, the dishonored body of women whom you have slain, the charred bones of the insane, the sick, and the wounded whom you have consumed in those sanctuaries of misfortune and helplessness which even war consecrates to these. Let the measured steps of your cohorts be taken to the music to which the Roman eagles were carried when "in Rama was there a voice heard, lamentation and weeping and great mourning." Ay, sir, let Liberty herself, as she is carried at the head of your triumphant battalions, not wear the vesture and crown and sceptre, emblems of her majesty and purity; but drape her in garments dipped in the blood of "the innocents;" bind on her brow of alabaster a crown of nightshade, and put into her lily fingers some cup of hemlock, and let all these be symbols of the war waged by the army of the Republic for LAW, but waged without LAW!

Sir, the Capitol of this Republic was once on fire. It was set on fire by the hand of war, but in violation of the laws of war. But the hand which lighted it kindled a flame in whose glare will be read forever the infamy of England. In the House of Commons, upon the 11th day of April, 1815, Sir James Mackintosh declared, in speaking of the burning of this city, that, "after twenty-five years of fiercest warfare, every great capital of the European continent had been spared—he had almost said respected—by

enemies, it was reserved for England to violate all the decent courtesy towards the seats of national dignity. That success was a thousand times more disgraceful than defeat—a success which had made the naval power of England hateful and alarming to all Europe.” These sentiments have rendered their author illustrious.

Yes, sir; all I have alluded to as a war without law, you must have in this war, or if you do not you have made your enemy a belligerent, and out of the Union!

Look, for a moment, at another result of this strange doctrine, that a rebellion, or a flag of truce, or an exchange of prisoners, or any other act of civilized war, places the revolted States out of the Union. Admit it, and you instantly place it within the power of any traitorous district—a Burr conspiracy, a Mingo Creek revolt, a Hartford Convention, or a Charleston rebellion—to dissolve the whole framework of the Constitution, and to overthrow the Government. Let it be settled, that what is required to put a State or a district out of the Union is only to resist the law by a force too powerful for the marshals, so that the Union must call into operation the powers of war to suppress insurrection, and in that war practice the rights of all civilized war, and that then, by your act of war in the overthrow of the rebellion, all the sublime guarantees of the Constitution, all the majesty of its presence, its protection, and its forces, have been dissipated at the touch of treason, and have disappeared from the land of the rebellion, as the fogs float off from the surface of the rivers, then where may your fitting and fugitive Constitution abide? It becomes a cheat, a vapor, a will-o'-the-wisp, which dances and flits over the quagmires and fens of its deserted dominions, chased by a pursuing treason which it can neither resist nor approach.

Sir, those words of the Constitution—“THE UNION”—take into their high import not the idea of unimpaired territorial dominion alone, but involve as well the indestructibility of the States themselves. Their perpetual life is guaranteed against invasion, secured in republican forms of government, in interchangeable rights of citizenship, in equal representation in the Senate, and in at least one Representative in the House. The Constitution apportions among them electors and direct taxes; gives faith and credit to their public acts, records, and judicial proceedings; returns to them fugitives from their justice; secures them against the infraction of their territorial limits; and then subordinates them all, as to Federal powers, to the Constitution, laws, and treaties of the United States. Destroy one of these political identities called “States,” which the Constitution so fully recognises, protects, and unites, and you destroy “the Union” itself. Admit that a State can do, by rebellion or secession, an act which can destroy a “State,” and you admit that the rebellion or secession can destroy what the Constitution has guaranteed to protect. If an armed minority, or even a temporary majority, may, in spite of the Constitution, and by means of the very “domestic violence” against the State which the Constitution covenants to suppress, commit the murder of a State, then each State may be so murdered, and you have a Union of States without a State in the Union; two Houses of Congress without a member in either House; a President chosen by electors appointed from each State, but no State to appoint any electors!

Mr. Chairman, this fatal error, which gives to void State action validity for the purpose of destroying itself, misconceives, as its kindred error, the right of secession, misconceives, the very foundation principle upon which the entire structure of the Government rests, and which taken away, the whole Government falls. Marshall, the great pioneer jurist of the Constitution, states that principle in words wise, memorable, and just, when he declares—

“The Government of the Union is emphatically and truly a Government of the people. In form and substance it emanates from them. Its powers are granted by them, and are to be

That Union, which it required the will of this whole people to make, can only be dissolved by the will which created it; and, being made and administered "for the benefit" of all the vast body of the people, it cannot be overthrown, nor any part of its dominions or of its States be withdrawn from its "jurisdiction," either by an act of secession or by an act of rebellion, or by a flag of truce used in the suppression of a rebellion, or by any act less than the will of the people who made it. No, no. It is not the rights of treason which forbid the dissolution of the Union by means of an unsuccessful rebellion.

Sir, it is a delusion which assumes that none but the rebellious are interested in the momentous principles, written in imperishable light as the very head-lines of the Constitution, and which consecrate it to "a more perfect union," "to the common defence," "the general welfare," "the liberty of ourselves and our posterity," and which secures to the citizens of each State all the privileges of the citizens of the several States, protects them against domestic violence and in republican forms of government. It is a delusion which assumes that rebels only are concerned in the question whether the mouths of the Mississippi, the sources of the Gulf stream, the fountains of the trade winds, and the harbors of a continent, are within the Union or out. Those whose fortunes are given to the rescue of their States from rebellion have some concern to know whether; when the rebellion is crushed in their States, they will have ceased to be equal members of a once glorious Union, or whether they will have become "military districts, or what else we may please." It is too plain for cavil that, instead of the Constitution and laws becoming silent and its Union dissolving in the midst of arms, and in the times of great public danger, it is pre-eminently for just these times that the Constitution and the guides and restraints of law are made. When the forms of government and political and social systems are on the verge of dissolution in the storms and convulsions of society, then it is that the only safety of society is in clinging with new devotion to our cherished institutions, and in gathering more closely around and guarding with a higher, purer, holier patriotism all the principles and all the parts of the Constitution and the laws.

Sir, it is not so. The Constitution has not so ordered it that whenever those powers are brought into operation which it holds in reserve for its deliverance from its most deadly perils, and when, by a resort to arms, it puts itself upon the justice of God, and when its majesty has just been vindicated by the overthrow of treason, that then the triumph of the Constitution is but the consummation of a self-slaughter, and its deliverance from the rebellion is the last act in a tragedy ending in a hideous *felo de se*.

The wisdom which devised all the sublime framework of the Government seems, in times like these, more than ever the inspiration of the Divinity. After having arranged all its vast, intricate, and harmonious machinery for the security of the rights of the people and of the States, in all the peaceful and ordinary experiences and designs of human government, then to perpetuate, to protect, and to shield them all in the day of battle, it has covered itself with the impenetrable panoply of LAW—a law which draws all its materials from the sources of our holy religion and of our Christian civilization. It has laid at its own deep foundations, and covered its exalted summits, and fortified all its approaches with the forces and sanctions of the international law—a law not alien to itself, not in conflict with any of its provisions, but one with which the Constitution has penetrated its very essence and being, and which at once illustrates, sanctifies, and guards the whole.

If that aphorism, now so often and so flippantly quoted on this floor—which is derived from an age anterior to the growth of the international law, and which had its terrible significance in that conspiracy which drew it from the

lips of a Roman consul—"inter arma silent legis," is intended to indicate that the Constitution and public law of the world utter no commands in civil war, then its employment here, and now, is a most pernicious and fatal error, striking at the heart of all government, all security, and all law; annihilating at a blow all that distinguishes our cause, which is one *for* law, *for* Government, and *for* Constitution, from the cause of the rebellion, which is for the destruction of them all; and it at once precipitates us all together into that abyss, at the bottom of which you can only see the "remorseless revolutionary struggles" of force and passion, from which all human eyes turn away appalled.

Sir, had the President taken his formulas for this war from that war brought by England upon the Carnatic, and which Edmund Burke describes as drawing from every quarter whatever savage ferocity could add to the new rudiments in the arts of destruction, and compounding all the materials of fury, havoc, and destruction into one black cloud, hanging for awhile upon the declivity of the mountains, and then bursting in a storm of universal fire upon the land, blasting every field, consuming every house, destroying every temple—the miserable inhabitants, as they fly from their burning homes, enveloped in whirlwinds of pursuing cavalry, slaughtered without regard to age, sex, or condition, until all the horrors of war ever known before should become mercy compared to that new havoc! Had he done this, it would have been *the* war required by the doctrines which I resist, which would *not* give to the revolt the *status* of a belligerent, nor put the States "out of the jurisdiction of the Union." But, sir, such a war *would* have impeached the President—as Hastings was impeached before the Lords of England—in the name of the Constitution which he had trampled upon, in the name of the people whose character he had dishonored, in the name of the eternal law of justice which he had violated, and in the name of human nature itself which he had outraged.

From what I have said it results that in a war against rebellion this Government is endowed with all the powers over persons and property which are the incidents of civilized war, and with the additional power of all Governments over treason. This comes from the traitor having two distinct legal characters which are both alike known to the law, to wit: enemy and traitor. I understood the gentleman from Indiana [Mr. VOORHEES] to deny that this Government, in this war against rebellion, holds war powers over the persons and property of rebels, by which their property can be forfeited as an act of war. Why, Mr. Chairman, this denial, this doctrine, of that gentleman is so self-evidently fallacious that it is the precise principle seized upon, in the case of *Luther vs. Borden*, by the Supreme Court of the United States, as the superlative degree of all the absurdities to be found in the universal charnel-house of legal abominations. Justice Taney—ay, sir, Taney—assumes that it is self-evidently monstrous to hold that any court could interfere with the military possession of *persons*, whom the President had arrested in a war against insurrection; and he not only holds that property is subjected to the powers of war over it, but he declares that any other doctrine would turn the Constitution into "a guarantee of anarchy." But will the gentleman inform this country that the laws of war suspend, and for the time, when the public safety demands it, override the civil powers of this Government, so that persons can be deprived of *liberty*, and can be held from the interference of courts, in military arrest, and yet that war cannot, for the public safety, deprive them of *property*? You can try a rebel spy at the drum-head, and, on conviction, shoot him; but to save the Republic you cannot forfeit his negro! Buckner's hands are to-day red and reeking with the hot heart's blood of our gallant dead—hands from which all great Neptune's ocean will not wash clean the blood. Could a rebel judge in Kentucky

discharge him and his fourteen thousand fellow-traitors on *habeas corpus*? No, answers Chief Justice Taney, the supreme oracle of the law; no, you can not only hold him, but, if his case be such that the laws of war admit, you may shoot him. But you may not free his slave, though the Republic perish. The slave has knowledge of which you can possess yourself by granting him liberty, which knowledge will save our army and the Republic; but both must perish, for you cannot emancipate a slave to save them both! So says the gentleman from Indiana. He must say so, because he denies the power of war to free a slave. If he admits that we may free one for the public safety, then he yields the legal principle, and admits that as war may liberate one it may liberate all whom the public safety requires to be freed.

Why, sir, of what kind of celestial stuff is this band made up which ties the slave to his lord and master, that the spear of Ithuriel nor the sword of war can neither pierce nor sever it? Does not the gentleman know that democratic administrations and commanders, in about every war in which this Government has ever been involved since its origin, have exercised the right to emancipate slaves by act of war, and that not against traitors either? Sir, the science of Government, like the science of mathematics, hath its axioms—truths which are, like the attributes of God, eternal, immutable, and self-evident. One of these truths, which stands inscribed in characters of inextinguishable light over the portals of the temples of law, and which enwreaths the very brow of the statutes of justice in every land where liberty hath a home—which is the frontal gem in the constellation of legal lights collected by Bacon and Broom—is the precise truth which the gentleman from Indiana has denounced as the damning heresy of treason to the Constitution; and which he tells us the member from Kentucky has overthrown forever. That truth "*Salus populi suprema lex*" it is which, when required for the public good, commands this Government to consume the field, the house, the city, and the lives of the most loyal and valued citizen. But, sir, the lights of Lord Bacon and Broom "pale their ineffectual fires" before the new torch which my able friend brings to us from Indiana, with lights borrowed from a Kentucky's sun. By the light of that new flambeau we see that the sages, saints, and martyrs of constitutional liberty and law have for ages misread the foundation maxim of human government; and that, instead of its reading "*Salus populi suprema lex*," it reads "*Salus Pompey suprema lex*." Which being interpreted, signifieth: "The safety of negro slavery is the supreme law of the land!"

Sir, somebody said that the Declaration of Independence is a self-evident lie! The Supreme Court of the United States—and, worst of all, by the lips of Justice Taney—has said that the gentleman's law is a self-evident fallacy!

If I misapprehend the position of the gentleman from Indiana, and if he admits the war power of "capture" and "confiscation," when required to save the Government, and only denies the power in Congress to abolish slavery by permanent and general municipal acts of emancipation, then I agree with him, as the sequel of my remarks will show.

Two propositions I now state which limit and qualify every remark I shall make as to the right and duty of this Government to confiscate or forfeit property in and by war.

1. The right and power of the Government to resort to such forfeitures is derived solely from the same source from which its power to make "captures" in war is derived, which is the inherent right of national defence and self-preservation; and all laws of confiscation, capture, and forfeiture should be framed and executed with reference and subservient to this end—the national defence and self-preservation.

2. That it results from the preceding proposition that it is neither the

right nor the true policy of this Government to inflict upon and to reduce to beggary an entire people by indiscriminate and sweeping acts of confiscation or forfeiture ; but such acts should be framed and executed with sole reference to the punishment, prevention, and overthrow of rebellion.

I content myself by laying down, in the language of all the authorities known to the law of nations, a single rule, which includes and settles every possible question of forfeiture which can arise in this war. That rule is, that although private property of an enemy on land is ordinarily exempt from confiscation, except such as may become booty in special cases, as when taken from the enemy in the field or in besieged towns ; and except, also, military contributions levied on the inhabitants of hostile territories, yet, you are " authorized to use against an enemy such degree of violence, and such only as may be NECESSARY to secure the objects of hostilities ; and if it be necessary, in order to accomplish the *just* ends of war, you may ravage and lay waste the enemy's property," and of course confiscate it ; and even where it might not be necessary to seize private property to accomplish the just ends of war, but the established usages of war are violated by your enemy, and there are no means of restraining his excesses, retaliation may be resorted to by the suffering nation, in order to compel the enemy to return to the observance of the law which he has violated. (Wheaton's International Law, pp. 420, 421.)

What is included in the employment of the term " when necessary," as employed in these authorities, it is not important to examine ; because, if you assume that the " necessity " which authorizes confiscation must be the extreme one applicable to acts made lawful by the " necessity " of national self-preservation—which your own Government, in the McLeod case, says must be " overwhelming "—still it would be admitted that *such* degree of " necessity " exists in favor of the Government in this war.

Applying, then, these plain and elementary laws of war to this contest, and all questions of right of confiscation are settled. The war is just. You not only began not this drama of blood, but you " lay supinely upon your backs, hugging the delusive phantom of hope, until your enemy bound you hand and foot." It is just, because you struggle for ends no less momentous than the preservation of republican Government, and for human liberty itself ; just, because the rebellion is causeless, the rebels themselves being judges ; just, because the Government you seek to preserve, in its results upon all the people of a hemisphere, in their material, social, and moral interests, for three-quarters of a century, has shown it to be the best human Government ever established among men.

The ends of this war are just. And then add to this the consideration growing out of the disregard of the just rules of war by your enemy, as you experience it, not in the universal repudiation of pecuniary obligations, but in the sweeping and universal sequestration of the property of the loyal men of the Republic ; as you experience it in the devastation of loyal homes and possessions ; as you encounter it in the indiscriminate slaughter or exile of all unarmed and helpless men, women, and children suspected of loyalty to the Constitution, and in the destruction or confiscation of their property, and as you experience it in the piracies on the sea ; and will not the voice of public law, the safety and success of the Government in this contest, and the enlightened conscience of all Christendom alike not sanction merely, but demand, that *such* a rebellion, so prosecuted, shall be met and dealt with by such laws of warfare as will not only compel " a return to the observance of the law which it has violated," but by such as will render its overthrow absolutely certain ?

The right of confiscation I have considered is applicable to property seized in the rebel districts. Under the decision in *Brown vs. United States*, 8

Cranch, a different rule and more unlimited right of confiscation probably exists. This I shall not stop to consider.

The conclusion to which I am thus conducted, Mr. Chairman, I am brought to by all the authority of the great body of the public law, itself the sublime emanation and result of the joint forces of the reason, the civilization, and the Christianity of eighteen centuries. I am brought to it by the plain and express requirements of the Constitution of the United States. I am brought to it by the history and practices of your own Government during three-quarters of a century; by the opinions of the great exponents of your Constitution; by the judgments of the supreme judicial tribunals of the land; and, above all, by the irresistible logic of a just, imperious, and overwhelming necessity—the necessity given by the RIGHT OF SELF-PRESERVATION. That conclusion is, that in this war it is not the right merely, but the stern and terrible duty of the Government to bring to its rescue from this peril *every force* which the law of self-preservation places in its hands; forces controlled, guided, and aimed by law, it is true, but still such forces as shall be requisite to attain the just ends of the war. Among these forces is that one which is described in the Constitution as “captures by land and water.”

Sir, it is as to the *extent* of and the wisest modes of asserting these war powers of the Government over property that the greatest variety of opinion exists in the country, and in Congress. The right and duty of the Government to exert this extraordinary power over property, to some extent, and in some way, is doubted by but few. One bill is pending in the House emancipating all slaves in the United States; another emancipates the slaves of all the rebels in the United States; and a third, reported from the Military Committee, emancipates all such owned by rebels as shall in any way be “captured” by our arms, and this, as I understand it, as merely a regulation of acts of war, and to promote the just ends of the war. And it provides modes of disposing of them as freed men. It is with unaffected distrust of myself that I have come to the opinion that the last of the measures I have named, so far as it relates to emancipation, is the only one not subject to grave constitutional objections, and that it is the wisest and best for the Government, for the cause of constitutional liberty, and for the slaves themselves.

I propose to allude to only some of the considerations which have led me to this opinion—an opinion I shall, of course, abandon, if I shall find it erroneous.

Sir, any law whose present utility comes from its being speedily *executed*, but which purports now to emancipate slaves beyond our military lines, is mere bravado. Mr. Chairman, pronunciamientos are ordinarily unbecomingly real sovereignty. A Government conscious of its power never employs the *brutum fulmen* as forerunner of its mediated redress. Law is quiet, majestic, and serene as she sits self-poised and secure upon her throne; and she utters no voices from the mouths of blatant trumpets far beyond the reach of her sword. Since the siege of Jericho, rams’ horns have not grown in favor as siege ordnance, and the proclamations by which weak and tottering dynasties herald against their enemies their impotent spite have become the Chinese gongs of modern warfare. The fallen Stuart sent from St. Germain a catalogue of his revenges mediated against all England; and his navies, burning at La Hogue, attest to all history how poor a thing a proclamation is with which to make war. I would utter from this capital no bulls. Rather take the models of your dialect from the midnight god, Silence, than borrow them from Gascony. The people are sick of, and the world is laughing at, the amazing courage of Congress—these Peter Pindar heroes, who wear their daggers in their mouths, and who

“Dash and vapor
Less on the field of battle than on paper;”

and who are going to bring this war to a speedy and glorious end by the clangor of belligerent edicts and the clash of sanguinary statutes; and, best of all, with perfect safety to themselves. Sir, your

“Decrees, dead to infliction, to themselves are dead;
And liberty plucks justice by the nose.”

Another of the reasons for the position I have indicated relates to the question of the constitutionality of any measure of emancipation *by Congress*, except such as are an exercise of the power of Congress to “make rules concerning captures.” I think the bill from the Military Committee is a constitutional exercise of that power, and I have already said that, so far as it relates to captures, I favor it. What I deny is the power of Congress to enact a permanent and municipal regulation forfeiting, confiscating, or emancipating property which is never “captured” in war, and that without trial for treason. What I mean to assert I desire to state carefully, and I may also enforce what I mean by an illustration. Suppose the rebellion at an end, and, of course, the war for its suppression at an end. But it did not become necessary to, nor did you, free all the slaves, and the slaves of deceased rebels are held by their heirs. Or suppose you did capture and free all the slaves in some State which, however, is now loyal and in the Union, but the people have, under their State constitutions, reintroduced slavery. Now, how are we to execute our statute in either of these cases? It will not do to say that you will continue or renew the war against slavery. For most manifestly you cannot make or continue the war to abolish slavery now, when there is no rebellion, any more than you could have made a war for that purpose before there was any rebellion. The war for that end could not be continued as an enforcement of a municipal act of Congress, nor could you appeal to the courts for its enforcement as a municipal enactment, because it is impossible to hold that the mere fact that the act was passed in time of war enables it to impose forfeitures which are expressly prohibited to be enforced in time of peace. To hold that you may, during a rebellion, pass a law which shall continue in force and be executed, either by war or by the courts, through all time, which imposes forfeitures which you could not enact into law in time of peace, would be, in principle, precisely the same as to hold that because you may, during a rebellion, deprive men of the privilege of the writ of *habeas corpus*, therefore you may enact a law, during the rebellion, depriving the rebellious districts and the rebel inhabitants of the privilege of the writ forever. It is asserting that in times of rebellion you may pass a law which shall be operative through all time, and be executed, if need be, by war, which shall abolish, as to the rebel inhabitants and districts, after they shall have become loyal, their local institutions, and, as to them, the Constitution of the United States also! What I here argue is explicitly declared by Mr. Adams, 15th of April, 1842. He says, speaking of a time of war:

“I say that the military authority takes, for the time, the place of all municipal institutions, and of slavery among them.”

Mr. Adams makes the whole power of the Government over slavery to continue “for the time” of the war, and that only by the “laws of war taking the precedence” of municipal laws and institutions.

But take another illustration of this power of Congress to adopt permanent municipal enactments, and of making them operative in peace and war, as modes of forfeiture which are forbidden by the Constitution as *peace* powers.

On the 27th of June, 1851, Mr. Webster wrote to Hamilton, of New York, setting forth a resolution in which it was—

“Resolved, That as God is our helper, we will not suffer any person charged with being a fugitive from labor to be taken from among us.”

Now, Mr. Webster asserts, what no one will deny who knows the law, that this resolution carried out by the force of arms or of numbers would be treason. Now, I inquire, may we enact a law providing that any one who shall, "by force of numbers and arms" assist in resisting the fugitive-slave law, and also his children and heirs, shall forfeit, *without trial for that offence*, all his property forever? May we this winter add such a section to the fugitive-slave law? If not, why not? You must remember the punishment of treason does not depend on the latitude in which it was committed; nor upon *which* law of the Government the war is levied against; nor what the *size* of the war is, so that it be a levying of *war*. I admit that I am wholly incapable of seeing why we may not amend the fugitive-slave law as I have above indicated, if we may pass a law, operative beyond our military lines, and not in regulation of military camps or captures, but operative through all time and over the whole land after we shall be at peace, which shall punish Southern treason as we could not punish Northern treason.

In what I have here said touching the right of confiscation and forfeiture by the Government being limited as I have argued, I have by no means overlooked those exceptions of summary right of forfeiture which the Government has always exercised for the enforcement of revenue laws, and of official duties, and imposing forfeitures *in rem* for illegal employment of property. All such forfeitures rest upon special and peculiar grounds, which are elaborately discussed and stated in the case of Murry, lessee, 18 Howard. These exceptions, there brought to notice, affect in no degree what is here argued.

It is claimed, however, for the policy of general acts of emancipation, that the fear of forfeiture will deter men from acts of forfeiture. The self-evident answer to this is, that your legislation alone will not free a single slave whom you do not "capture," and therefore the emancipation of "captured" slaves of rebels will be as great a restraint upon acts of treason as general acts of emancipation will be.

Another argument in favor of this legislation is its tendency to give hope to the slaves, and to array them on the side of the Government. But, sir, how perfectly obvious it is that a policy which protects these slaves of rebels whom we capture, furnishes to them equal and far safer inducements to be on the side of the Government. To induce those whom your arms cannot protect to insurrection, is to invite them to indiscriminate self-slaughter. The other policy excites hope in them just as fast as it is wise and useful to excite it, and that with supreme regard to the public safety.

Another plea, based upon notions of policy, in favor of this legislation is, that it gives a moral quality to the war which will unite England in sympathy with us. England! You will throw out a tub to the whale, England. Sir, it is utterly preposterous. He must be blind beyond medication, even by "clay made of spittle," who does not see that the only governing class in England—the tory—now against us in sympathy, is so just because they prefer the aristocracy of slave power to the dignity of free labor, which they hate. No, sir; if you would angle for England, and would bait your hook to catch the ruling tory class of the "guardian of civilization," put upon it all that debases free labor and exalts upon its ruin classes of privilege.

It is asserted that the objections to this legislation have their origin in the mastery still held by the slave power over the minds of legislators, Presidents, and commanders. I think, Mr. Chairman, that mastery is already gone in this Republic, and I trust forever. No, sir; my objection to it is that while it is practically useless, its tendency is not only to overthrow this Government, but in that overthrow to establish a slave confederacy having its foundation and top-stone laid in human bondage, and to set back the sun of human liberty perhaps for ages.

Sir, change, by your legislation, this war from one to overthrow rebellion

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against the Constitution into one for the enforcement, by the sword, of our views of moral duty, and be assured that if your legislation is not rendered impotent of evil by the success of our arms before it is adopted, you will have incurred imminent danger of the demoralization of our own army—danger of adding fearful accessions to the forces of rebellion in States now struggling with you for the Government—danger of adding their resources and territories to some slave power—danger of transferring the war into the free States, and of giving frightful force to the elements of treason and of revolution which have slumbered in your own midst, and of at once ending this war in the establishment of slavery's supremacy over more than half of our territories; or if you do not thus end it, you will plunge the Republic into a gulf at whose bottom rage, in infernal discord, all that revolutions, steeped in passion, crime, and anarchy can make up of public woe. Do not say I paint, or dream. I would it were all dream. Would that this hideous train of goblins damned, which this rebellion has already brought, having

“Treason and murder ever kept together,
As two yoke-devils, sworn to either's purpose,”

for file leaders, and with rapine, arson, perjury, and all the other crimes which make up the troops of hell for followers, were all a horrid dream. Sir, have the events which have passed us in this ghastly panorama not yet taught us that there is no catastrophe, no crime, no fell purpose too dark, dreadful, or complete, to come to us unless consummate wisdom avoid them?

Sir, in urging wise I do not urge timid or tender policies. Nay, sir, we have had too much of these. I detest them as weak and unmanly efforts to conciliate treason, which these efforts dare to wanton with, but dare not to strike. I am impelled by my love of peace, by my horror of human slaughter, by my admiration of free institutions, and by my detestation of this treason against them, to favor every blow, consistent with civilized war, which either will or which may rationally be expected to contribute to treason's overthrow.

But then, sir, on the other hand, we dare not forget that

“True fortitude is seen in great exploits
That justice warrants and that wisdom guides;
All else is towering frenzy and distraction.”

I remember that it is the poorest cheat and counterfeit of courage and of enlightened progress which abounds in swelling words, makes allies of imbecile rashness, harshnesses in her car of war of the tyrant's pack-horse, cruelty, and then dashes, with blind and impotent fury, into perils which it could neither comprehend nor overcome.

That such consequences as I have alluded to may come from this revolutionary legislation, in the disorganization of our army, in the alienation of other States, and in the alienation of the loyal people of the South, you have the testimony of the most enlightened men of the South, and also of a very large proportion of the armies of the Republic. And who are these men, in these Halls and out, who bear this testimony? They are the men who have made the loyal part of the public sentiment of the South. They are the men who have been the breakwaters in helping to turn back from you the tides of treason which have swept, like floods of lava, towards your shores. They are the men who in the storms which have swept their States have held them to the moorings of the Constitution—men whose votives now upon their country's altars are homes, estates, children, and their own blood.

Sir, can we trust these witnesses? Have they shown their love of country yet enough to induce us to believe that they would not bear false witness against her as to these apprehended results, so vital to us all? But if you will not believe these, nor the men now in arms who speak for themselves and their commands, and who tell you that it may be fatal to change the ends and purposes of this war from one for the Constitution into one for something else,

call it what you please, then I invoke you to heed the inexorable logic of the fearful events of this rebellion which have swept into its terrific maelstrom already the forms of government and the institutions of one third these States, and which but recently was carrying around in the giddy whirl of its outer circles so many more; and do not for the poor sake of an abstraction, for the sake of uttering statutes which can have no useful results beyond your power to enforce them, risk all we have. In inviting insurrection, or uprising by the slaves, do not place them where they, unarmed and defenceless as they are, will, if your legislation has the tendency designed, be slain by hecatombs to prevent the consummation your legislation invites.

The policy indicated by the Military Committee's bill is, in substance, that inaugurated at Port Royal and at other points where slaves have fallen into our hands; is the exercise of a just and constitutional *war power* for the safety of the Republic, and is acquiesced in by the country. Make that uniform by law, and then let it alone. Trust the retributions of war and the logic of battles for the rest. Sir, the results of that retribution, and the inductions of that logic, are neither doubtful nor obscure; and they are penciled in no ambiguous lights in these words, found in a very recent issue of a leading Southern journal:

"If the war should be long continued, the forcible and universal abolition of slavery will be inevitable. If it should speedily be brought to a close, gradual emancipation in State after State by the introduction of free labor with political rights will be natural consequences of the rebellion. These are solemn truths which time will verify."

And this, sir, is sternly, terribly just. To save the Republic let slavery perish. It has sown to the wind; let it reap the whirlwind. It has taken the sword; let it perish by the sword. It has poisoned a chalice for others' lips; now, with even-handed justice, commend it to its own. Now, when slavery is about this, the consummation of all its villainies, "trip it and let its heels kick at heaven." Not by my love of country, of home, of liberty, alone, but by my admiration of God's first attribute, justice, I say, to save the Government, let slavery perish. But then, sir, if I am expected to attain this end through treasons against the Constitution, through broken oaths of fealty to it, and through means which may wreck all constitutional government; and when in that wreck I may lose my own liberty as well as the slaves whom I sought to free, I turn away from a policy not merely replete with danger, but stamped, also, with a Punic faith and with the morality of a Borgia.

I hear from altars consecrated to the adorations of the Deity, from journals wearing the "livery of heaven," and from lips consecrated to the offices of religion, and even from some congressional whispers, the ghastly taunt and sneer, "Constitution-worshipper," "idolatry of constitutions." And these say, "to overthrow slavery let the Constitution which recognises and protects it be overthrown;" "the end sanctifies the means." The end sanctifies the means! Ah! sir, this morality and these politics are not new. "For the higher glory of God"—"*in majorem Dei gloriam*"—lighted the first *auto da fé* at the castle of Triana, and the last one at Seville; it glared in the blood of Alice Lisle and of Hewling, from the temple doors where Jeffries held the "bloody assizes;" it flashed from the arms of Glenlochan at the massacre of Glenco; it rang out from the great bell of the palace on the midnight air of St. Bartholomew, and was read in the bloom of that hawthorn in the garden of "the Innocents;" it made a martyr's crown for Digby, and put Garnet into the calendar of saints. Sir, upon the car which carried Robespierre through streets which he deluged in the blood of innocent citizens were written the words, "LIBERATOR OF THE PEOPLE—DEFENDER OF LIBERTY."

Sir, bad means never have good ends. Adopt a measure which changes

the war to a revolution; make all the South what Ney said to Napoleon at Peninsula was to the French, where we will not have armies only to fight, but women and children; enlarge the nation of your enemies by taking from your own the resources and the people of a whole zone of the continent; disorganize your own army by the demoralization, or something worse, of those who regard (whether rightly or not is not very material in its results on the practicalities of war) these measures as a revolution; then add millions to the party which now coys and dallies with treason at the North; and do this for the sake of fulminating at your enemy a statutory abstraction which, beyond your lines, is baseless as a vision's fabric, and then what will come? I have shut my eyes to the book in which some future Tacitus shall record, and some future Dante shall celebrate in infernal song what will come—come in the mingled tears and blood of a once great people—the last events of their history.

Instead of these, let every loyal heart in the Republic now renew its allegiance to the Constitution in oaths and promises and blood. Let every loyal arm now cover itself, in the day of battle, with the triple shield of "him who hath his quarrel just." Let our brothers and sons, as in the tempest of war they sweep to their revenge, feel that they violate no oaths to that Constitution which they put themselves upon the dread arbitrament of God's justice to protect. Let all the people gather, in circles widening and strengthening to the infinite, around this ark of our "covenant." Let the rulers of the land, whom the Constitution intrusts to guide the awful retributions of war, now, in the midst of storm, stand sentinels to the Constitution, as constant and unchanging as the vigils kept by the pointers to the north star. Let those see to it that these dread retributions are all aimed to blast, as with live thunder, whatever must be stricken in order to the Government's rescue, whether that be human slavery or any other source or spring of this hideous treason. Let these things be, and then as certainly as came the overthrow of the revolt of God's angels; as certainly as came to the Chaldean king the execution of that decree which was written by the fingers of a man's hand over against the candlestick upon the plaster of the wall of the king's palace, so certainly will come the overthrow of this rebellion, the crowning wickedness of human history; and with that overthrow will come the overthrow of the power of slavery in our Government, and the dawn of that morning whose light was seen through the ages from the summits of Mount Moriah, and which is told of in the seraphic utterances of prophetic vision, when the people "shall loose the bands of wickedness, undo the heavy burdens, let the oppressed go free, and break every yoke."

WASHINGTON, D. C.