Will the U. S. Judiciary Permit, and the People Ratify, the Congressional Overthrow of Our Constitutional System of Government?

by Thomas Watson

Mr. Watson's Argument Against the Conscription Acts

Before Judge Emory Speer, at Mt. Airy, August 18, 1917

Press of
THE JEFFERSONIAN PUB. CO.
Thomson, Ga.

Will the U. S. Judiciary Permit, and the People Ratify, the Congressional Overthrow of Our Constitutional System of Government?

Mr. Watson's Argument Against the Conscription Acts

Before Judge Emory Speer, at Mt. Airy, August 18, 1917

(ON the 18th of August, 1917, Judge Emory Speer, of the United States District Court, heard argument in the cases of two negro men, jailed in Augusta, Georgia, for failure to register, as per the Acts of Congress, May 18, 1917.

The Judge held court under the trees in front of the hotel, with a large crowd of people—many of whom were ladies—encircling the improvised open-air court.

Probably no Federal Judge ever presided under circumstances so unique and informal; and the inborn respect of our people for legal authority was never more beautifully illustrated than by the perfect decorum of the assemblage during the several hours of the sultry day, when Judge Speer, without Marshal or Deputies, or other official attendants,

held court as our Germanic ancestors did a thousand years ago—under the spreading branches of a noble tree.

The District Attorney, Mr. Earl Donaldson, replied to Mr. Watson by reading the decision made by the Supreme Court of Georgia during the Civil War, and the obiter of the U. S. Supreme Court in the Tarble case, where a STATE undertook to question an Act of Congress.

Mr. Donaldson did not attempt any defense of Section 6 of the Conscript law; nor did he try to answer Mr. Watson's argument on the 13th Amendment; and he appeared to evade studiously the claim that the citizen cannot lawfully be sent out of the country against his will.

Indeed, the District Attorney did not seem to realize that the President's proclamation of July 10, 1917, had already FUSED THE STATE MILITIA WITH THE REGULAR ARMY, IN VIOLATION OF THE CONSTITUTION.

Judge Speer asked that the briefs of the attorneys be submitted to him, and he stated his purpose to carefully consider them before rendering his decision.)

May it please your Honor:

We are here for no other purpose than to discuss a question of law. We have nothing whatever to do with the politics, or the sentimental aspects of the Great War. Those matters have no place in this forum and this case.

We are here with one issue only, and that issue is, whether Congress in exercising the Constitutional grant of power to raise armies has enlarged its own powers and those of the Executive in a manner destructive to other provisions of the Constitution.

Has Congress, wilfully or inadvertently, adopted a method of raising armies which overthrows the Constitutional scheme of government? Does the method of 1917 nullify the system created in 1787? Does the present plan of Army increase practically abolish the militia system of the States, which system was in existence when the present Federal Government was formed, and whose continued existence, as a necessary part of State machinery, is provided for in the Constitution? Is it within the power of Congress to authorize the Executive, by his Proclamation, to fuse the militia with the Regular Army and order it beyond seas for service in foreign lands?

Has Congress the power to disintegrate the States, by abolishing the essential principles of the States' Bills of Right, thus depriving the States of the sovereign power to protect their citizens in the exercise of immemorial rights?

If the Constitution itself forbids a State to deprive the citizen of liberty, save as a punishment for crime, and if the State is forbidden by its own Bill of Rights to do this, from what source does Congress draw the power to do it?

If Congress can assume any one power

which was never delegated, but which was, on the contrary, *expressly withheld*, what would become of Constitutional government?

If Congress can legally make such a law as Section 6 of the Act of May 18, 1917, which places every State officer—from Governor down to Constable—under the orders of the President, with no definite limits to the President's control of those State officers, and with a penal threat suspended like the sword of Damocles over the heads of those State officers, what becomes of State rights, sovereignty, and independent authority?

Under Section 6, of the Act, the entire civil administration of the State is subjected to military control and placed under the commands of the President: how can it be contended that such an innovation does not effect a revolution, reversing the relative position of the civil and military power, and overthrowing the State's control of its own internal civil administration?

These questions are respectfully suggested in the case at bar; and there is no other tribunal which can authoritatively answer them.

In the very nature of things, Power is grasping. Its innate tendency is, to grow.

The Constitutional monarch humanly inclines to personal absolutism. Every town council is tempted to become a local Czar. Our sage forefathers, knowing the weakness and the vices of human nature, fixed the bounds of the habitation of the Federal Gov-

ernment and of the States; and to each system the Constitution says, in a spirit of paternal admonition, "*Be content with the orbit assigned you!*"

But because no person can be trusted to act as judge in his own case, and no established authority can be allowed to define its own limits, our forefathers created the Judiciary.

Holding office for life, removed from the accidents of politics, elevated above the clamor of the hour, the Federal Judge is put on guard to protect the Constitutional rights of all—the Federal Government, the States, and the humblest citizen who comes in the hour of his extremity and lays his hand upon the sacred altar of the Law.

In this case, your Honor, two poor negroes are the applicants for protection; and in their behalf we say, that Congress has adopted a method of raising armies which not only violates express provisions of the organic law, but which destroys the immemorial rights of the citizen, and revolutionizes the Constitutional scheme of mixed Federal and National government.

We will not now discuss—for it is unnecessary—the various methods by which Congress might legally raise armies, whether by bounties, by employment of mercenaries, by offering inducements to volunteers, by recourse upon the States for the full number of their militia, or other mode: the sole issue here is, *Did Congress, in May, 1917, adopt a method which the Constitution will not tolerate.*

The complainants in this case would have no standing in court, were it not for fact that our system of government is different from any other, and that such questions as are raised in this application for relief, *hinge upon those very peculiarities and complexities which distinguish our Republic from any hitherto known.*

Our illustrious statesmen have exhausted the resources of language in describing this novel, this marvellous, this intricately complex system—the One composed of Many, the wheels within wheels, the indissoluble union of indestructible States.

At the very outset of the discussion, we must endeavor to realize fully the controlling power of the fact, that no reasoning based upon analogy, parallel, or precedent will be worth the breath which gives it utterance, if that reasoning does not conform to the Constitution of the United States.

Nothing that any other nation has done, in ancient times or modern, authorizes our Government to adopt the policy of imitation, if this adopted policy conflicts with our Supreme Law, and with the perfect integrity of the *peculiar system of mixed Federal and National sovereignty*, created by the Constitution.

The bare fact of this case being here, illustrates the distinctive nature of our Government.

The vital fact that your Honor has taken jurisdiction, to weigh and determine the validity of an Act of Congress approved by

the Chief Executive, advertises the tremendous fact, that our Federal Union not only depends upon the separate existence of the three sovereign attributes of government, but that the life-tenure Judiciary is the final arbiter, in cases where the citizen alleges that Congress and the President have encroached upon his Constitutional rights.

In no other country, does one department of the government thus check and balance the others.

In this country, there is no such doctrine as Parliamentary omnipotence. In our Republic, the desires, the ambitions, the prejudices, the passions of the majority—no matter how numerous, rich, and powerful—can never overbear and override the minority, depriving it of time-honored privileges, immunities and rights, unless the Judiciary prove recreant to its high and sacred trust.

Your Honor! The place you fill today towers in noble importance above that occupied by any monarch on this troubled sphere. You are humbly asked to uphold and preserve the Ark of the Covenant of our Fathers. We come reverently to the Tables of the Law, and seek to have you tell us what is there written.

No greater issue of life or death, of Constitutional liberty or legalized servitude, has ever been presented to your Honor, or to any other Judge, since Moses came down from Sinai.

The lives and fortunes of millions of men

are at stake. The inherited liberties of our English forefathers are at stake.

In countless thousands of homes, your Honor, strong men are suffering more than words can tell, and good women go down on their knees in prayer, while we are here today presenting the case of two poor negroes, whose fate involves that of millions of blacks and whites.

In a general way, we all understand that Anglo-Saxon liberties and institutions originated before there were such things as written Charters and Constitutions. We all understand that our Colonial forefathers claimed these immemorial rights, as a portion of their heritage. We are all more or less familiar with the historic tragedy which caused the British-Saxon laws to be overlaid and smothered by the feudal tyrannies of the Norman Conquest; and we yet drink inspiration from the glorious revolt of 1215, which re-asserted the ancient liberties of the realm.

It is, *or has been*, our boast and pride, that these immemorial rights of free men came down to ourselves, unimpaired, inalienable, imperishable.

Addressing a District Judge of the United States Court in Atlanta in 1873, the late magnificent lawyer and orator, Benj. H. Hill, referred reverently to "the sacred civil jewels, . . . from an English ancestry, hallowed by the blood of a thousand struggles."

Said Mr. Hill—

"It is infidelity to forget them. It is sacrilege to disregard them. It is despotism to trample upon them."

I congratulate myself and the country that my appeal for the Constitution is addressed to one who learned law in part from the great Georgia Senator, and who, like the Federal Judge whom he addressed in 1873, amid the turbulence and passions of Reconstruction, "possesses the ability to discern, and the courage *to declare the law*, AS IT IS."

What are those "sacred civil jewels" to which Mr. Hill referred, and which are treated with such profound respect by English historians, advocates, judges, and standard authorities on Constitutional Law?

They form the very Primer of Democracy. They are the Holy Scripture of Patriotism. No intelligent person denies that these elementary principles embrace Life, liberty, and property — carrying protection as well as security to one's person, to one's free choice of vocation, to one's freedom from restraint, to one's acquirement and enjoyment of property and the fruits of one's toil, unless deprived thereof in some manner prescribed by the established law of the land.

Necessarily incident to personal security, is the sanctity of one's home, which is inviolate, unless a warrant be sworn out against it:

Fair trial by jury, in the vicinity of one's residence, when accused of crime, is also an immemorial right:

Freedom to speak one's opinions, and to publish them to the world, with a view to

winning to their support the opinions of one's fellow-citizens:

Freedom of religious belief and worship:

Freedom to keep and bear arms, for the protection of one's life or property:

The right to representation in the laying of taxes, and the making of laws.

Underneath the whole elaborate, and powerful structure of our system of government lies the principle which is the exact opposite and irreconcilable enemy of the ancient royal dogma of Absolutism, or the Divine Right of Kings.

That fundamental democratic-republican principle is, that the People are sovereign; the People are the source of honor, privilege, and power; and all just government rests upon the consent of the People.

Under our system, no Bourbon can say, "I am the State," and act upon that monstrous theory.

The State is the people, and the people are the State; and it necessarily follows that in such a system there must be freedom of assemblage, freedom of discussion, and freedom of petition.

In his elaborate work, "The State," published in revised form by Woodrow Wilson, then Doctor of Laws, and Professor of Jurisprudence and Politics at Princeton—1901—the learned author forcibly and most truly says—

"Discussion is the greatest of all reformers.

It rationalizes everything it touches.

It robs principles of all false sanctity and throws them back upon their reasonableness. If they have no reasonableness, it ruthlessly crushes them out of existence and sets up its own conclusions in their stead."

("The State," page 139.)

These ancient rights were not first set forth in the Charters of Henry and John: those rights had been in existence "from time whereof the memory of man runneth not to the contrary."

This fact, immensely important to the consideration of the new laws of 1917, is well stated by Dr. Woodrow Wilson, his then title, in his valuable book, "The State."

"Our own charters and constitutions have . . . been little more than formal statements of rights and immunities which had come to belong to Englishmen quite independently of royal gifts or favor. . . . And so our own Colonial charters . . . simply granted the usual rights of English freemen.

Our constitutions have formulated our political progress, but the progress came first." (*The State*, p. 564.)

Chancellor Kent, Judge Cooley, Sir William Blackstone, and all other authorities with whom I am acquainted, state the same great truth—towit: that the Great Charter of 1215 and its succeeding legislation were nothing but the re-assertion of ancient liberties. Indeed, Blackstone says in his Commentaries, if my memory is not at fault, that nearly all of the remedial laws of modern times consist

of the abolition of abuses which were introduced by tyrannical Kings!

As everybody knows, our forefathers contended that these ancient English liberties came with the colonists to this country. A seven years' war established that proposition.

The Mother Country acknowledged the Independence of Thirteen American States, *separately*, by name: the old Confederation never issued a Declaration of Independence, and was never recognized by Great Britain.

The old Confederation of the Thirteen States had an Army and a Navy of its own; and this Army and Navy were independent of the States.

Let us bear that in mind, for the fact has its bearing on the issue now in Court.

The independent, sovereign States composing the Old Confederation select delegates to a Constitutional Convention, commissioned to amend the existing Articles of Union. Instead, the delegates create a new Constitution, and submit their work to the States, for acceptance or rejection.

The requisite number of the States separately ratify the new instrument of Union, although North Carolina and Rhode Island did not.

Before her accession to the new Union, what was North Carolina? What was Rhode Island?

There can be but one answer: each of those States was a separate, independent sovereignty, just as Sweden is today.

The new Union had its Army, and the two separate States had theirs, consisting of their militia: and the two States were just as fully organized into political entities, as Holland and Denmark are at this time.

What surrender did those two States make of their control over their militia, when they at length came into the Union?

They surrendered nothing of that supreme, sovereign control, except that the Union might use this militia for the general welfare, in case it were menaced by invasion, rebellion, and resistance to the laws of the United States.

That is all.

What Rhode Island and North Carolina surrendered, the other eleven States yielded--that much and no more.

The first question—

What is the real character of our Government?

Reasoning applicable to other nations fails here. What Parliament may do in England, is one thing: what Congress may do, in the United States, another.

We lose our road before we get good started, if we ignore the dual system of the United States.

Gen. Logan, 1879, said of the United States Constitution: "It cannot have the aspect of both a sovereign nation and a collection of sovereign States.

A paradox of insurmountable character is involved in the very idea of such a thing."

In his reply, Mr. Hill said—

"It is a remarkable fact that, just what the honorable Senator from Illinois calls an insurmountable paradox, *is exactly the Constitution of the United States.*"

Mr. Hill then proceeds to quote from Mr. Madison's papers in *The Federalist*, and from Mr. Webster's replies to Hayne and Calhoun, demonstrating the mixed character of our system, the Federal Government being national in some respects and federal in others—for instance, the House of Representatives is national and the Senate, federal; while the Electoral College *is partly both.*

Mr. Hill rose in one of his flights of oratorical splendor as he described our complex system, evolved from the wisdom and experience of struggling centuries, a system whose model had never existed. He said, "When you hear about a man going to Rome or to Greece or to Switzerland, or anywhere, to find models by which to understand the Constitution of the United States, he is going in dark places to gather light."

Tracing briefly the contest between the two conflicting theories concerning the Constitution, Mr. Hill denounced the extremists of both theories, and he is asked this memorable question—"If he is a traitor who would divide the States, how can he be less a traitor who would destroy the States?"

Within its orbit, the national government is supreme: within their spheres, the States. For example, the State is sovereign over

the jury-box, and the qualifications of voters: the national Government has no authority except to prevent racial discrimination.

Thus the sovereign States have to supply the Federal Government with jurors for its own courts, and with electors for its own elections.

In fact, the national Government has no electorate at all: the State not only furnishes the voters, but holds the elections.

If the national Government were deprived of State voters and jurors, it would be emasculated; but if the States were deprived of everything coming to them from the Federal Government, they would still be separate, independent, completely organized, and self-sufficient sovereignties.

Unless this undeniable fact is kept in mind, we miss the true understanding of our complex system of government, the like of which was never before seen in this world.

Students of government have said that our system was not a demonstrated success: they say it is still an *experiment.*

Perhaps they are right. And it may be that the supreme crisis of the experiment is upon us.

God help us to recognize the old landmarks, and to go by them.

I lay down this proposition as the basis of the argument against the new Acts:

The Fathers who framed the organic law of our Union were men who were loyal supporters of sovereign States, and who were

careful to safeguard the States in the preservation of those sovereign powers not delegated to the Federal Government.

Not only does the organic law of the Union say this, in express terms, but that Supreme Law also recognizes the existence, in the people themselves, of powers which even the States could not lawfully impair.

If I may use the simile—*the people are the great reservoir of sovereignty*, from which the States draw for their needs. Afterwards, the States expressly gave to the Federal Government a specified portion of this power, so drawn from the reservoir; *but neither the Federal Government nor the States have exhausted the source from which their powers were drawn.*

Always, the people remain the rightful heirs of the English liberties which the writers call "immemorial"; and, if some of these inherited rights are not stated in the organic laws, they nevertheless exist, and can be asserted whenever the people see fit.

State or Federal Constitutions, subject to amendment at the popular will, have recently undergone great changes; and it is not improbable that the people will draw from the reservoir the power to enfranchise the women, and to prohibit the manufacture of intoxicating liquors.

In dividing sovereign powers between the States and the Federal Government which they were creating, our Fathers took particu-

lar pains to protect the States from military encroachment.

A student of the Convention Debates, of *The Federalist*, and of the Constitution itself, is struck by that.

In the Philadelphia Convention, the dread of military aggression found frequent utterance: and in *The Federalist*, the best efforts of Hamilton and Madison were put forth to allay those fears.

Again and again, Hamilton and Madison reminded their countrymen, that the Federal Government could never deprive the States of their power to withstand Federal encroachments, *because* the States would always have control of their militia, except when the Federal Government needed it, to repel invasion, &c., and that, *even then*, the State's own officers would remain in command.

The scheme of the organic law of the Union, as shown in the very language used, was that the Federal Government should have an Army of its own, and that each State should have a militia system capable of maintaining order, enforcing law, and safeguarding the people from any sudden invasion.

The Federal Government has no authority whatever over the State's troops, save in the three emergencies mentioned in the Constitution.

It follows, therefore, that if the new laws of 1917 obliterate this clearly-drawn distinction, and lump the State troops with the National Army, they violate one of the most

vital parts of the organic law, and destroy an integral part of the Constitutional scheme.

To merge the militia with the regular National Army, is to revolutionize our system of government, and to set up another, totally dissimilar.

Under the Constitution, as plainly written, (and as put into operation by President Washington during the Pennsylvania Whiskey Rebellion,) no Act of Congress is valid if it deprives the State Governors of their prerogative of *naming all the officers and issuing the call for the troops*, when the President declares, officially, his need of them to repel invasion, suppress insurrection, and execute the laws.

These provisions were placed in the organic law, out of wisely jealous regard for the reserved sovereignty of the States: Congress has no authority to change them, and the President cannot legally overbear them.

Consequently, the issue before this Court is narrowed to a conflict between the plain letter of the Supreme Law, upon the one hand, and, on the other, the Acts of Congress, followed by the President's proclamation, which virtually destroy the existence of the State militia.

Another provision of the Constitution was adopted for the declared purpose of safeguarding the States and the inherited liberties of the people: and that provision checks the Congressional power to raise a Federal

Army, *by the two-year limit put on appropriations.*

As all the Representatives and one-third of the Senators were to be chosen biennially, it was thought that the Federal Government could never maintain a military establishment dangerous to the States and to popular rights.

The recent Acts of Congress spread these military appropriations over a period of 30 years; and therefore we say that the whole scheme, composed of these various recent acts, is absolutely violative of the Constitutional mandate which forbids that sort of appropriation for a term of more than two years.

It is claimed that "the power to raise armies" vests Congress with plenary powers, and that our Government can raise armies by any method it thinks best.

This argument might have weight in England, where Parliament is untrammelled by a written Constitution, and where the Government does not have to lean on sovereign States: but it cannot have any force in this country, before a capable and fearless Judge, who knows that Congress, alone, cannot breathe a soul into statutes: it is the Constitution *which breathes the breath of life into statutes.*

There is here no question of what the Court thinks Congress *should be* competent to do: it is simply and solely a question of what the Constitution authorizes.

Every house-top in America might be

turned into a rostrum and resound with clamorous demands for *this* law, *that* law, and the other; but an upright Judge, thoroughly versed in the Supreme Law, will heed nothing save the lines in that Golden Book—that casket of the Constitution, which as Senator Ben Hill said, keeps for us the sacred jewels of our own English ancestry.

Your Honor is requested to take judicial cognizance of the published Acts of Congress and the Proclamation of the President, July 10, 1917: we respectfully contend that these must all be construed together, as forming one inseparable military plan, system, and policy.

These published Acts and the President's proclamation not only abolish the independent State militia, and contravene the clause of the Constitution which prohibits Congress from making appropriations of this character for a longer term than two years, but they destroy the ancient Common Law principle of *ne exeat*, and they violate the 13th Amendment.

No English principle was more firmly fixed, than that the subject could not be sent out of the realm without his consent. So long as he was innocent of crime, it was his right to abide in his native land. Sir William Blackstone is most emphatic on that point. The King could forbid his subjects to go abroad, but he could not banish them: they had as much right as he, to stay at home.

Your Honor will remember that, when Richard II. arbitrarily expelled Henry of

Bolingbroke from England, there was great dissatisfaction; and when Bolingbroke returned, the people rallied to him and dethroned the King.

Hon. Hannis Taylor calls attention to the historic fact that, for a thousand years prior to 1776, the law of England had exempted the militia from service abroad, and he cites the statutes I Edw. III., 26 Geo. III.

Mr. Taylor not only quotes the official opinion which Attorney-General Wickersham gave to President Taft, Feb. 17, 1912, but quotes the recent statements of President Wilson, who for so many years was Doctor of Laws, and Professor of Law at Princeton:

In an address delivered at New York, January 27, 1916, he said: "I believe that it is the duty of Congress to do very much more for the National Guard than it has ever done heretofore. I believe that that great arm *of our national defense* should be built up and encouraged to the utmost; *but, you know*, gentlemen, *that under the Constitution of the United States* the National Guard is under the direction of more than twoscore States; that it is not permitted to the National Government directly to have a voice in its development and organization; *and that only upon occasion of* ACTUAL INVASION *has the President of the United States the right to ask those men to leave their respective States.*"

In an address delivered at Cleveland, Ohio, January 29, 1916, he said: "The President of the United States has not the right to call

on these men [the National Guard] except in the case *of actual invasion*, and, therefore, no matter how skillful they are, no matter how ready they are, they are not the instruments for immediate National use."

In an address delivered at Milwaukee, January 31, 1916, he said: "The National Guard, fine as it is, *is not subject to the orders of the President of the United States.* It is subject to the orders of the governors of the several States, *and the Constitution itself* says that the President has no right to withdraw them from their States even, *except in the case of actual invasion of the soil of the United States.*"

In an address delivered at Topeka, Kansas, February 2, 1916, he said: "*The Constitution of the United States* puts them [the National Guard] under the direct command and control of the governors of the States, not of the President of the United States, and the *national authority has no right to call upon them for any service outside their States unless the territory of the Nation* IS ACTUALLY INVADED."

Our militia laws recognize this fundamental personal right, by virtually providing that the Federal Government shall never send the State troops out of the country. To defend our own soil *from the invader*, the Federal Government may employ the State militia: to suppress a domestic rebellion; and to enforce the United States laws within the

Republic — these are the only purposes for which the State troops may be lawfully used.

Every one of those emergencies, contemplates SERVICES AT HOME.

The ancient Common Law is a part of our system, so recognized in all the standard authorities and leading decisions. The Constitution did not supersede it, but left it in full force by express provision. (Articles IX. and X. of the Amendments.)

Common law marriage still exists, and so do many other common law customs and principles, never specifically repealed. In fact, it is to the Common Law we must look, if we would learn what are those "rights . . . retained by the people," in addition to those which they had delegated to the United States and those "reserved to the States."

That there are powers and rights inherent in the people, and not surrendered to the States, or to the United States, the Supreme Law emphatically asserts in the Ninth and Tenth Amendments.

What are those powers and rights?

Whatever they are, the people are still the possessors, since they never delegated them, expressly, or by necessary implication.

Among those retained rights, is that of marriage without license, minister, or ceremonial formality: the highest New York Court has recently re-affirmed that doctrine.

To the same heritage of Common Law rights, belongs the principle that the citizen cannot be forcibly sent out of his native land.

To sum up the whole matter, we respectfully submit to your Honor, that *our Constitutional system*, prior to the adoption of the post-bellum Amendments, was intended and designed—

(1) To form a more perfect union of sovereign States than the Old Confederation had brought into effect;

(2) To establish justice, in accordance with English ideals and institutions;

(3) To insure domestic tranquility by placing under central control the militia of all the States, when internal tumults broke out;

(4) To promote the general welfare by a uniform system of laws and administration, on matters affecting all the States in common;

(5) To provide for the common defence of all the States, by using for each the power of all;

(6) To secure the blessings of liberty to ourselves and our posterity—those liberties which were so well understood at the time, that the Fathers thought it unnecessary to enumerate them in a Bill of Rights;

(7) To leave the States in full possession of all sovereign powers not ceded, including the right to prescribe the qualifications of voters, and of jurors: also the right to maintain a State militia, and govern the same, except when it was constitutionally called forth in the service of the United States for one of the three purposes named;

(8) To leave the citizen of the State in complete possession of his immemorial rights,

as understood by the Fathers, and as set forth in such State papers as the Great Charter, the Act of Habeas Corpus, the Petition of Rights, the Bill of Rights, and the Amendments to the United States Constitution adopted prior to the Civil War.

Whether an Act of Congress imposing compulsory military service upon citizens of a selected age would have been held Constitutional prior to 1865, need not now be considered. We know that the States, alone, exercised that power, to some extent, during the Revolutionary War; and that the efforts of the Government in 1814 and 1833, to secure such an Act, were defeated.

At the time the Fathers invested Congress with the power "to raise armies," the small Kingdom of Prussia was the only European state that had been accustomed to raise them by compulsion. The English system, since Feudalism and its Knight-service of 40 days a year, had consistently been *voluntary*. Crimping and kidnapping were the abuses of the system, but there was never a legalized conscription until the third year of the present war; and even now, there is no compulsory service imposed upon Ireland, Canada and—I believe—Australia.

We earnestly submit to your Honor, that no decision made prior to 1865 would adjudicate the issues we raise in favor of these two complainants.

The 13th, 14th, and 15th Amendments

worked material changes in the pre-existing Constitutional system.

The negro and his civil status were the subjects matter; but the words of the law could not measure the citizen's rights by the color of his skin. What was law for the black, became law for the white; and what was law for the natural person, became law for the artificial.

I call your Honor's special attention to the fact that the United States Courts have held the 14th Amendment to annul the 11th.

The Eleventh Amendment denies to the United States Courts jurisdiction over suits commenced or prosecuted against one of the United States by citizens of another State; and that Amendment was adopted to protect the sovereign States from being made defendants in United States Courts by private citizens of a State, or of a foreign country.

It is well known that Chisholm's case against the State of Georgia was the provocative of that Amendment.

After the adoption of the 11th Amendment, it was universally respected by the United States Courts, during all the years preceding the Civil War, and during the entire period covered by that lamentable struggle.

But when the 14th Amendment was adopted, after the War, a different course was pursued.

That change in the Supreme Law created, *for the first time*, a citizenship of the Federal Government, as distinguished from State citizenship; and the States were forbidden by

the Federal Government, *for the first time*, to make any law abridging the rights of these newly-made United States citizens.

No State was thereafter to be allowed to deprive any person of life, liberty, or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws."

How was it possible for the United States Courts to give effect to the 14th Amendment without ignoring the 11th?

If the citizen-corporation of New York could not bring suit against the State of Georgia, claiming that the State had made a law violating the 14th Amendment, where would redress be sought?

The long line of decisions in which the United States Courts have set aside, or enjoined the enforcement of, State laws, upon the ground that they were confiscatory, and therefore in violation of the 14th Amendment, necessarily rest upon the idea that the later Amendment prevails over its predecessor.

Now, with all the earnestness of my nature, I appeal to your Honor to say whether the 14th Amendment, so effective to safeguard property, does not equally protect life; and whether the 13th Amendment, being a part of the radical change made in the Constitutional system, after the Civil War, does not override any preceding clause in the Supreme Law and all decisions made thereunder!

The vast combinations of wealth, incorporated for all manner of business enterprise,

have taken refuge in the broad provisions of law, made particularly for the negro.

I was present, some 37 years ago, when the Justices of the Supreme Court of Georgia heckled and jeered at the late Frank H. Miller, when that able attorney invoked the 14th Amendment in behalf of the Augusta Street Railway.

Justice Blandford told Mr. Miller, laughingly, that the 14th Amendment had nothing to do with railroads: "*it was made for niggers.*"

With equal force, it *could* be said, that the 13th Amendment was made for niggers; and, in *this* case, we would not care, because our clients are niggers.

But the Congressional leaders who prepared the general plan to safeguard the black man in all of his newly-won freedom, made their language as broad in the 13th Amendment, as they did in the 14th.

Not only the white man, but the corporations owned by the whites, can come into Court and successfully plead against any form of servitude to which they are opposed.

Can a corporation be made to serve the Government against its will?

That very issue may be sprung within the next few weeks, and your Honor may have to pass on it.

I am not speaking of martial law, duly proclaimed; nor of military law embracing camps, trenches, and troops in actual service: I am speaking solely of the civilian, and the civil status; and my contention is, that the

citizen can no more be lawfully forced into military service, than he can be drafted to mine coal, smelt metals, build post-roads, and dredge rivers and harbors.

And my contention further is, that while the enlisted man, legally a soldier, is a soldier for all purposes, and from the very nature of the employment, may be sent anywhere and controlled absolutely by his officers, THE CIVILIAN, standing flat-footed on his rights under the Constitution, *cannot be arbitrarily deprived of his liberty, cannot be sent out of the United States, cannot be compelled to undergo any form of servitude, and cannot be legally controlled in his personal movements*, WHEN HE IS OUTSIDE OF THE TERRITORIAL JURISDICTION OF THIS REPUBLIC.

To say that Congress can forfeit the Constitutional rights of millions of citizens, and can authorize their despotic control in Europe, is abhorrent to every idea of civil liberty, and repugnant to every principle of sound law.

The Act of May 18, 1917, together with other legislation constituting the general Army plan, has been officially construed by the President to mean, not only the incorporation of the State militia into the Regular Army—which we say is unconstitutional—but to mean, that citizens may be "assigned" to manual labor, in fields, mines, and factories.

The language of the President in his Address to his Fellow Countrymen is, that "thousands, nay, hundreds of thousands of

men, otherwise liable to military service will *of right* and necessity be excused from that service, and ASSIGNED to the fundamental, sustaining work of the fields and factories and mines."

Has Congress the power to authorize a system of industrial servitude?

The law under discussion is held to be broad enough for that purpose, and the President apparently so understands it.

What else could be meant when he speaks of citizens being "assigned" to manual labor?

Who will do the assigning? Who will send a thousand black men to the fields, and a thousand white men to the mines?

If they are unwilling to be assigned, and must be coerced, what becomes of the 13th Amendment?

The liberty of one is the liberty of all: in defending these two negroes, we defend everybody. If Congress can annihilate their civil status, and "automatically" transform them into soldiers, it can with equal legality transform them into peons, and slaves. No Alexandrian sword can cut a cleavage between the prohibition against slavery and the prohibition against involuntary servitude. The bolt which smites one, smites the other: the curse of the Supreme Law is pronounced against both.

How then, is Congress to raise armies?

The conscript has never yet played any part in English history; and very little in ours.

There are 4,000.000 volunteers fighting England's battles at this time; and nearly 1,000,000 Americans voluntarily enlisted in our Army. Who knows how many would volunteer, under conditions which convinced our people that such service is needed for the defense of the country?

There is no limit to the number of able-bodied men that the States may enroll in the militia, and the United States has ample constitutional power to appropriate every one of these men, provided the service is needed to repel invasion, suppress insurrection, or execute the laws of the Union.

Twelve million men will spring to arms, at the call of the Government, to defend their country.

It is the idea of being sent into foreign lands, to fight for something not understood, that agitates our people, deters enlistments, and spreads consternation.

Not a line of the Supreme Law indicates the purpose of the Fathers to authorize the use of the military for any other purposes than those stated in the Preamble, and in the body of the Constitution; and those provisions strictly limit the use of our troops to tranquilizing our own country, upholding our system of laws, and repelling any invader who ventures to attack our frontiers.

That question, however, is not before the Court. The only question here is, *the Constitutionality of this Act of Congress.*

If Congress has undertaken to raise armies

by a method which violates the Supreme Law, then Congress must try some other method. If the method hastily adopted by Congress destroys the guaranteed liberties of the citizen, then Congress must choose some other plan. To raise armies is a legitimate power, most necessary to preserve the Union; but that power must not be abused, to the destruction of our republican institutions.

If the destruction of the Temple of our liberties is a condition precedent to raising armies, then it is a colossal instance of paying too much for the whistle.

Liberties without armies, are preferable to armies without liberties.

History presents but too many illustrations of the truism, that a great noise, concerning imaginary foreign dangers, has often covered the designs of those who conspired against domestic freedom.

May it please your Honor, I beg leave to submit to your most thoughtful consideration these additional propositions—

(1) The new Acts of Congress emasculate the States, deprive them of powers necessary to preserve a republican form of government, and make it impossible for the States to protect their citizens in the enjoyment of those rights guaranteed to them by the Constitutions of the States:

(2) That the new laws usurp Federal control over the State militia, and render the sovereign State powerless, in case of any unforeseen and sudden riot, invasion, or other emer-

gency which puts the State upon the defensive, to uphold its authority and defend its soil:

(3) That the new Acts disintegrate the States, disorganizing and revolutionizing their internal affairs, penalizing freedom of speech and of press; and rendering ineffective the State's Constitutional guarantee of life, liberty, property, and pursuit of happiness.

In other words, the Acts complained of amount to a repeal of the most important of the civil liberties set forth in every State Bill of Rights.

(4) They violate both the letter and the spirit of the organic act of the Union, totally subvert the scheme of divided and balanced sovereignty, reduce the States to the helplessness of subject provinces, and are therefore null and void.

(5) Section 6 of the Act (May 18, 1917) places under Presidential conscription every officer of the State. The new duties of the officials thus conscripted, are left undefined. Those State officers must obey such orders as the President chooses to issue. In case the Governor of a State fails or refuses to do what the President tells him to do, the Governor becomes guilty of a misdemeanor. If he should be unable to give bond when arrested, he must go to jail. He may then continue to act as Governor, the best he can, from the prison to which the President commits him. If found guilty at his trial, he may be punished by a year's imprisonment; or if held

to be a part of the military establishment,—and therefore subject to military law—he may be summarily court-martialed and incontinently shot.

No other construction can be put upon Section 6, if it is admitted that the Governor is one of the officers of a State.

To every State-officer the same section applies; and no matter how pressing might be the needs of the State for the diligent service of her officials, she is compelled to sacrifice the interests of the State to the demands of the President.

In other words, the State government is paralyzed, and the various organs of State administration must cease to perform their functions, if the President exercises the enormous powers conferred by this Act.

Such powers are not democratic, or republican; they are imperial, belonging to systems where Divine Right and One-man Power are supreme, and where the personal will of the sovereign is not limited by charter or kept in check by independent, incorruptible courts.

You may ransack your law-libraries, read every paper of Hamilton and Madison, scan every speech of Webster and John Quincy Adams, study every decision of John Marshall, Joseph Story, and Roger Taney—but you will search in vain for the germ of the revolutionary doctrine, that Congress may, through the Executive, transform State Governors into Presidential satellites, lesser State officers into Federal officials, and suspend the

sovereignty of the State, by sending the entire State establishment to jail, for non-performance of Federal duties, suddenly thrust upon it by Congress.

If this kind of thing can be done, anything can be done.

It comes dangerously near to abolishing the State's form of republican government, if it does not, *in fact*, DO THAT VERY THING.

What's left of the State's form of republican government, when her entire establishment is placed under conscription by the Federal Government?

What could be a more ruinous blow at the separate, sovereign existence of the State, within its Constitutional orbit, than an Act of Congress which fuses all State establishments into one federal mass, and makes the whole mass criminal, if it fails to obey such commands as the President may see fit to issue?

It is almost a mockery to talk of the Constitution and the laws, and of our unprecedented mixed system of government, when such a revolutionary Act of Congress is being enforced.

Has any statesman in this Union ever contended that the President can be legally vested with authority to prescribe duties to any and all State officers? Has any Court done so?

Does the power to raise armies carry power to subjugate peaceful, loyal States?

Cannot we raise armies without burying the Constitution? Must we build our military system in the cemetery where we have first entombed the States?

It has been many years since I appeared in any court—except where compelled to go in my own behalf—and had not expected to ever argue another case. But the vital and lasting results that depend upon the recent Acts of Congress, caused me to volunteer my services, and I am here, without fee or other reward, and with no other interest than that of a lover of liberty and of country.

As well as possible, under the shadow and handicap of a terrible domestic affliction, I have done my duty by those who trusted me.

The issue is with your Honor.

Let me conclude, in the words with which Mr. Hill ended the great argument already quoted:

"Sir, in disunion *through the disintegration of the States*, I have never been able to see anything but *anarchy with its endless horrors.* In disunion through *the destruction of the States*, I have never been able to see anything but *rigid*, *hopeless despotism*, with all its endless oppression. In disunion by any means, in any form, for any cause, I have never been able to see anything but *blood*, *and waste*, *and ruin to all races and colors and conditions of men.*

"But in the preservation of our Union of States, this confederate nation, I have never

been able to see anything but a grandeur and a glory such as no people ever enjoyed. I pray God that every arm that shall be raised to destroy that Union may be withered before it can strike the blow."