REMARKS

OF

HON. HENRY C. MURPHY,

OF KINGS COUNTY,

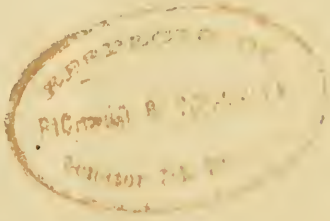
UPON THAT PORTION OF THE MESSAGE OF HIS EXCELLENCY GOVERNOR SEYMOUR,

RELATING TO

ARBITRARY ARRESTS,

DELIVERED IN THE SENATE,

March 5, 1863.



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question of what is called arbitrary arrests, within the State of New York; for it is to that action within our own State limits that the question is presented to our consideration.

There are two branches of the enquiry somewhat involved together but yet essentially distinct—arrests by State warrant and the denial of the privilege of the writ of *habeas corpus*. It is undoubtedly true that if the writ of *habeas corpus* cannot be complied with so that the cause of detention may be inquired into, the means of arrest become immaterial to the subject of it, and whether legal or illegal, its effect is all the same to him. Still there are two distinct questions, involved in the consideration of the subject and so the Govenor evidently regards them. I purpose to treat them, therefore, separately. There are however, some considerations belonging in common to both of them upon which I will first say a few words.

In both cases there is an exercise of power by the President, and the enquiry becomes proper, what is the nature of his authority? This may briefly be answered by stating what he is and what he is not. He is the mere creature and instrument of the Constitution. The government of the United States itself is a limited organization made by a free people for their own purposes. It is confined in all its

powers. Its different departments are limited and restricted to particular duties; and the executive is as distinctly confined in its authority as the legislative or judicial departments in theirs. Each and all can exert such powers only as the people have thought proper to entrust them with. On the other hand, the President is no crowned head. He takes no prerogative by hereditary right or by prescription, or as the advocates of monarchical power claim *ex jure divino.* He is not the fountain of power. He is only the recipient of it, and of just so much and not a particle more as is expressly conferred upon him. He has no reserved authority. All the powers not expressly given to him or prohibited to the States are reserved to the people and the States.

These are cardinal principles in our government, differing in that respect essentially and fundamentally from most others. The President has no more power outside of the Constitution than the humblest citizen who treads American soil. When he transcends the authority expressly conferred upon him by that instrument, his authority in that regard is null. It may be disregarded and defied, and should be rebuked. He becomes an usurper,—worse than a dictator. Your dictator had at least the semblance of authority. It was expressly conferred upon him by the Senate and it was, with some regard

to popular rights, limited to six months. But the President who by his mere motion assumes for the period of his term the power to do acts in derogation of life, liberty, and property, has not even the justification of a dictator.

It was indeed against the exercise of power such as claimed by the President in the cases which are the subject of our present consideration that the colonies rose against the King of England. Among the causes set forth in the Declaration of Independence, for taking up arms it is enumerated that the King of Great Britain had "affected to render the military independent of and superior to the civil power," and had combined with others "to abolish the free system of English laws in a neighboring province, establishing therein an arbitrary government so as to render it at once an example and fit instrument for introducing the same absolute rule in these colonies." How fearfully parallel are the causes of complaint now urged against the Federal Administration by the people of the loyal States.

What is true as to the limitation of the power of the President is also true of the limitation of the powers of Congress. Its enactments, beyond the authority conferred upon it by the Constitution, are utterly null. The Parliament of Great Britain, whence we derive our notions of liberty, declare in

connection with the King, what the Constitution of that nation is. Practically they can alter, enlarge, or abridge its unwritten provisions adapting them to the change of circumstances in the country. But our Constitution is written. It is fixed, and can only be changed by the people themselves, in whom all power not delegated is reserved, whatever may be the state or condition of the country. Thus Congress can confer no power upon the President which it is not authorized expressly by the Constitution to do.

In determining, therefore, the authority of the President we must resort to the fundamental law, to ascertain his powers, whether they are claimed by him from the Constitution directly or to be conferred upon him by act of Congress. No circumstances in the condition of the country, no necessity can confer upon him an iota of authority beyond what is found there. It matters not whether it be a time of peace or war, of prosperity or adversity, of concord or insurrection. That instrument was intended to embrace every condition of the country, and in my opinion, amply provides for all, and against all; and one of its principal merits is that it is thus intended to step in and protect the people in times of disorder.

There is another general consideration to be borne in mind. Our revolution was undertaken, our independence achieved, and our Government formed

for the purpose of securing certain inalienable rights which our fathers claimed, and among them were those of property, life, liberty, and the pursuit of happiness, who claimed them as the heritage of Englishmen. They declared them not only sacred but inalienable, and so jealous were they of them that while they expressly reserved to themselves all powers not conferred upon the Government by the Constitution, they required amendments to that instrument as originally drawn, expressly guaranteeing the provisions of Magna Charta, and the bill of rights established in the revolution of 1688. These guarantees every one can read for himself, but briefly stated, they are the right of conscience in religion, freedom of speech and of the press, trial by jury, and arrest and imprisonment only according to the course of the common law. And lest the enumeration of these rights might be interpreted to the prejudice of the great principle that all rights and powers not granted by the Constitution were reserved to the people, it is expressly declared that the naming of these rights in particular shall not be construed to deny or disparage others retained by them. Arbitrary power is as carefully provided against as human ingenuity could devise, and we discover that one of the principal objects in view is, to cut up by the roots the vile system of arrest and imprisonment by executive

authority and to vindicate and perpetuate beyond all peradventure the rights of man against the pretensions of prerogative on the part of Government.

With these allusions to the nature and powers of the Government and the natural, inherent and inalienable rights of the citizen I pass to the consideration of the first question proposed. Citizens of this State, where no insurrection or invasion has taken place, who are not in the military service, have been arrested and imprisoned and taken from the State without warrant of any court or magistrate, by the arbitrary order of the President acting through the State or War Departments or other subordinates. It is the exercise of such authority that the Governor condemns, and the people of this State, at the late election, among other acts of the Federal Government, rebuked. Now, sir, while the arrest itself is properly an executive act, the order of arrest is a judicial one. These two powers are distinct. They do not, cannot and should not be in the same department. Combined in one tyranny is the result. The founders of our Government particularly guarded against their being exercised by the President. Thus the Constitution declares that "no warrants shall issue but upon probable cause, supported by oath or affirmation," that " no one shall be held to answer for a capital or otherwise infamous crime unless on a pre-

sentment or indictment of a grand jury," and that "no person shall be deprived of life, liberty or property without due process of law." All these provisions look to judicial investigation or judicial action before an arrest can be made. Has the President any right to determine the judicial point of probable cause? Does the common law permit any warrant to issue except by the magistracy? If not, and it seems to be too plain for argument, then where is to be found any judicial authority in the executive? The Constitution expressly declares that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. This power is thus placed in an independent branch of the Government and Congress is prevented from conferring it upon any other than tribunals proceeding according to the course of the common law.

The Senator from the Nineteenth admits the limit to executive power as regards its civil authority, but finds a warrant for the proceedings of the President in his military authority, and in the demands of the people. In order that I may do him no injustice, I will quote his language as it is printed:

"Nobody claims that the President can do these things in his capacity of Chief Magistrate and in time of peace. His powers as civil executive are then limited by the restraints imposed

upon him, as such, by the express language of the Constitution. But the President is not merely the Chief Magistrate and civil executive of the nation, he is also the Commander-in-Chief of the army and navy—and the same Constitution which makes him the one, makes him the other also. The same instrument which defines and restrains his powers in time of peace as civil executive, *confers upon him every military power necessary to save the Government in time of war, as Commander-in-Chief.*"

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"With almost entire unanimity the people called upon the Government to arrest these traitors and prevent their doing further mischief. In response to this demand, and to stop the spread of treason at a moment of imminent peril, the Government did order the arrest of a few of the noisiest and worst of these men. And yet as it is, I must concede that it has its effect, for it appeals to the blindest and lowest passions of humanity."

In plain terms he justifies the President by the martial law, and the old and much perverted maxim that the voice of the people is the voice of God. Now the authority of the President whether in his military or civil capacity has one and the same origin—the Constitution; and the only power conferred upon him by that instrument as respects military matters is that which makes him the Commander-in-Chief of the army and navy. Congress in the exercise of its granted powers, has given him rightfully the power to make rules and regulations for the government of the military and naval forces of the United States. But these powers are in terms confined to persons in the military and naval service. In this respect he has the same powers in substance

as the King of Great Britain, and certainly no more. When he assumes military authority over citizens who are not in the military or naval service and, for the sake of the argument, I will include persons within any district in actual military occupation where the civil law is suspended of necessity, he transcends the authority conferred upon him and is guilty, in the language of the Governor, of a crime.

It is from no desire to shield crime or to punish treason that exception is taken to his course. The laws have provided for such offences and the civil courts of the State are open to punish offenders. To attempt to supersede them by the will of the executive, under any pretence whatever, is to deprive the innocent as well as the guilty of the protection which the laws afford them. False accusations, secretly made and fomented by private malice, reach the ear of the executive and there is no remedy. This will of the executive is called martial law. But martial law cannot exist where the laws are enforcible, especially under our form of Government. It is at best, in the sense in which it is now used—that is, as an emanation of the supreme military authority of the President—a law of necessity, only applicable when there is no civil rule. The authorities upon this point are incontrovertible. The Governor cites that of Lord Coke:

"More than two centuries since," he says, "that bold defender of English liberty, that honest and independent judge, Lord Coke, declared: "Where courts of law are open, martial law cannot be executed," and also that "the power that is above the law, is unfit for the King to ask or us to grant." Are English laws more sacred, or is English liberty more secure than ours?"

This is old authority it is true, but it has the uniform sanction of the best writers on the subject since the days of Coke. Without quoting from them in detail, I cannot forbear citing that of Sir James Mackintosh as he is quoted by Sir F. Thesiger in the debate which took place in the House of Commons in 1851, upon the administration of the affairs of Ceylon. That eminent lawyer then said, "he would quote a passage from the writings of one of the most accomplished philosophers, jurists and statesmen this country (England) had ever produced—he alluded to Sir J. Mackintosh. He said:

"When law is silenced by the noise of arms the rulers of the armed force must punish as equitably as they can those crimes which threaten their own safety and that of society and no longer. Every moment beyond is usurpation. As soon as the law can act, every other mode of punishing supposed crime is of itself *an enormous crime*."

This language is almost the same as the Governor adopts in stigmatizing the character of the arrests made in this State.

Perhaps it may be objected that this is British authority only, and has no application to our own Constitution. Well, sir, although all our notions of

law and liberty are derived from England, and we are therefore justified by the sound rules of argument in using authorities derived from thence, here is one not liable to exception of any kind and to the very point and in my judgment conclusive. It is the solemn judgment of the State of New York herself. It is the declaration of our State convention which ratified the Federal Constitution. It is an explicit document. Among other points of the Constitution considered by it was the military power, and how the Constitution limited that power. It declares among other things "that standing armies in *times of peace* are dangerous to liberty, and ought not to be kept up except in cases of necessity, and that *at all times* the military should be under strict subordination to the civil power." At all times in contradistinction to times of peace. And then in signifying the ratification by the people of this State they declare such to be their understanding of the Constitution in these words:

"Under these impressions and declaring that the rights aforesaid *are consistent with the said Constitution* and in confidence that the amendments which shall have been proposed to the said Constitution will receive an early consideration, we, the said delegates, in the name and behalf of the people of the State of New York do by these presents assent to and ratify the said Constitution."

This is the language not only of the delegates who had been chosen by the people to express their views,

but of such men, who were members of the convention, as John Jay, whom Washington selected from among the purest and wisest of that day to be Chief Justice of the United States, as Alexander Hamilton, who was an aid of Washington in the war, and who, in intellectual vigor, has had few equals and no superior in our State, and as Melancthen Smith, Chancellors Livingston, Lansing, and Jones, Judges Duane and Hobart, Richard Morris, Lewis Morris, and not last or least, George Clinton, then Governor of the State, *clarum et venerabile nomen*, who was chosen to preside over the deliberations of the convention, and whom you have as the presiding genius of this body. There he stands before you, Senators, in all the dignity of his high official position to stimulate you in the path of duty, and to remind you, in the history of his own life, that resistance to tyranny is obedience to God. These men had been tried in the fires of the revolution; they understood well, from personal experience, the exigencies of war, and of a war of rebellion. They are an authority which not only are you bound to respect for themselves, but which, as delegates of the people of this State, seals forever your lips and those of every New Yorker, from denying that according to the Consitution the military authority of the Federal Government is subordinate to the civil power in war as well as in peace.

My honorable friend, the Senator from the Nineteenth, says the people were clamorous for these arrests. Sir, I have a great respect for the opinion of the people deliberately expressed, but for popular clamor, none. As a democrat and a republican, in the broad and catholic sense of those terms and not in any partizan sense, I bow to their views when regularly and intelligently expressed, but not as against law and order. In moments of passion and in times of turbulence and faction, it is to me but as the idle wind. Clamor deluged the streets of the fair and gay and festive city of Paris in blood and carnage. It brought the Saviour of mankind to the cross, and bound his holy temples with a crown of thorns. It is said of that eminent divine and good man, though great enthusiast, John Wesley, that in an argument with his sister he claimed for his side this popular cry—*Vox populi, vox dei.* "Yes, brother," said the lady meekly, with the sagacity of her sex which so often penetrates the sophistries and fallacies of our own, "that means, Crucify Him, Crucify Him," and the founder of Methodism was silenced. I have a respect for the decision of the people when expressed in the forms of law such as we witness now every day rolling from the ballot box over the State like the tides of a mighty ocean, in slow and gathering volume and in obedience to the unerring laws of

nature and truth, to overwhelm in its resistless flood the violators of the rights. Your laws and constitutions are all a protest against popular clamor. They are intended to protect the weak and feeble against the violence of the many. They are efficient and sooner or later will be vindicated and upheld against the strong arm of power. We hold our liberties by no such uncertain tenure as popular demand. There is not authority in the Government of the United States in obedience to any popular clamor or otherwise to take from me or you the most trifling article of property. It cannot deprive the most abject fellow being of one moment of liberty except by due course of law. To attempt to do so is a crime against him, against good order, against the liberty of a free people. And, sir, I speak deliberately when I say, in my humble judgment, it will be the duty of his Excellency the Governor in the event of a renewal of the attempt to arrest on the soil of this State any of its citizens by what is called a State warrant, to resist it in such a manner as becomes the executive of a free people, firmly and decidedly, but temperately and with a patriotic spirit, and as befits a State which loves and cherishes the Union, and is resolved to defend it.

I come now to consider the privilege of the writ of *habeas corpus*, which the President has undertaken to

suspend not only in the brief period after the breaking out of the rebellion and preceding the meeting of Congress on the 4th of July, 1861, when there were circumstances of justification for his course, but ever since and without justification. The benefit of this writ is an essential and inherent right of the people—it is that of having the legality of imprisonment inquired into summarily and without delay. It is so regarded in the Constitution which authorizes its suspension under certain circumstances. That provision reads: "The privilege of the writ of *habeas corpus* shall not be suspended unless when in case of rebellion or invasion the public safety may require it." The Constitution no where else refers to this privilege except in the provision before alluded to, which it adopts from Magna Charta. It here speaks of it as a right as much connected with liberty as the air we breathe is with life, as already existing and unquestioned. And so it was. It existed in full force in the colonies from their foundation and in the mother country, from time immemorial. The Supreme Court of the United States so regarded it in the case *ex parte* Buford, reported in 3 Cranch. But let me cite the observations of that distinguished writer whom I have already mentioned, Sir James Mackintosh, in his Review of the Causes of the Revolution of 1688.

"The most ancient of our fundemental laws had declared the principle that no freeman could be imprisoned without legal authority. The immemorial antiquity of writ of *habeas corpus* seems to prove that this principle was coeval with the law of England. In irregular times, however, it had been often violated; and the judges under Charles I pronounced a judgment, which if it had not been condemned by the petition of right would have vested in the crown a legal power of arbitrary imprisonment. By the statute which abolished the Star Chamber, the Parliament of 1641 made some important provisions to facilitate deliverance from illegal imprisonment. For eleven years Lord Shaftsbury struggled to obtain a law which should complete the securities of personal liberty, and at length that great though not blameless man obtained the object of his labors and bestowed on his country the most perfect security against arbitrary imprisonment which has ever been enjoyed by any society of men. It has banished that most dangerous of all modes of oppression from England. It has effected that great object as quietly as irresistibly; it has never in a single instance been resisted or evaded, and it must be the model of all nations who aim at receiving that personal liberty without which no other liberty can subsist."

So much in regard to England. Now in regard to our own country. I have already referred to the opinion of the Supreme Court of the United States; but there is contemporary evidence of some weight. I refer to an incident in the history of the President of the first Continental Congress, Henry Laurens, of South Carolina, who was afterwards sent to Holland to negotiate a loan for Congress, but was captured by a British cruiser, taken to England and imprisoned there. I hope I do not give offence or cause suspicion of treason by referring as an authority to a

citizen of South Carolina. The name of Henry Laurens, like that of Washington and some others of the rebellious States is "freedom's now and fame's." On his liberation from prison the British minister, Lord Shelburne, said, "Well, Mr. Laurens, if we must acknowledge your independence, I shall be grieved for your own sakes. *You will lose the benefit of the habeas corpus act.*" The patriot replied, "We have adopted and we can make laws," He proceeds with the subject, in an account which he himself has left us, as follows:

"Lord Shelburne was so anxious lest by a separation from Great Britain, the United States should lose the benefit of the *habeas corpus* act, as to induce his Lordship to send Sir William Meredith to expostulate with me on the subject; Sir William came to my bedside. I was lying ill with the gout. After a little general conversation, he presented me a thin quarto volume, written and published by himself, on the *habeas corpus* act, desired I would read it with attention, and he would call again. Sir William called in two days, asked if I had perused the book. "Yes, Sir William, and as far as I am competent to judge, it is very ingenious, but it contains nothing substantially new to me. I perceive, however, you cannot in England liberate a prisoner with so much facility as we can do in America. I myself with the aid of an attorney-at-law, have set a common foremast sailor who had been illegally imprisoned on a Saturday afternoon at liberty that very Saturday night, by a writ of *habeas corpus*."

We thus see that not only was the value of this privilege well understood, but it was exercised with more facility even in the colonies than in the mother country. When therefore the framers of the Consti-

tution speak of the writ as a remedy existing and its privilege only to be suspended at a particular emergency, they speak of it as a right as common law, as their birthright derived from the land of their fathers. It was in fact peculiar to Great Britain and her colonies, and therefore by every fair rule of construction any doubt as to its meaning or to provisions affecting it, is to be examined in the light of English practice and authority. The clause in our Constitution authorizing the suspension of the privilege is, it is claimed, not clear as to what department of the Government has that power, and that the necessity for its exercise is properly to be judged of by the executive. But granting that the Constitution is not explicit,—though the contrary is the fact, the English constitution will at least aid us to a conclusion. The bill of rights asserts that the power of suspending laws is not in the crown but in Parliament; and we find accordingly that since 1688 although the privilege of the writ has repeatedly been suspended in England, it has never been attempted by the King. An act of Parliament has always been passed for the purpose. When, therefore, the Constitution authorizes its suspension here, without saying by what department, it intends by no other means than by law. The Constitution is however explicit. That instrument is not a crude and undigested mass of

provisions. It is a perfectly arranged and logical document. It not only distributes the powers of the Government among the different departments, but each department is treated of by itself, and we find accordingly that the legislative, judicial and executive branches are disposed of in separate articles. In the article treating of the legislative department occurs this clause in relation to *habeas corpus*, and in that section of it restricting the powers of Congress. It is evident therefore that the makers of the Constitution considered the suspension a legislative power from this circumstance; but above and beyond this it is a sound rule and in fact the only sound rule, to construe what is written or what is said, in connexion with the subject matter immediately under consideration.

But we are not left to English analogy or logical deduction to determine this question. The same contemporaneous authority which I have already cited—the ratification of the Constitution by the New York convention, disposes of this point as directly as it does the other. Thus in enumerating the rights of the people to which the constitution conforms, the delegates say:

"Every person restrained of his liberty is entitled to an enquiry into the lawfulness of such restraint and to a removal thereof if unlawful, and that such enquiry or removal ought not to be denied or delayed except when on account of public

danger *the Congress shall suspend* the privilege of the writ of *habeas corpus*."

The Constitution as it stands they thus declare to be consistent with the exercise of the power of suspension by Congress. It never entered into their heads to suppose that the executive would claim the power—the one man power, against which they had been fighting for seven long and dreary years. On the contrary, they thought the power of Congress itself was a little too broad, and accordingly they recommended a restriction that the suspension should not continue for a longer period than six months. Now observe the language in which this recommendation is made :

"That the privilege of the *habeas corpus* shall not be suspended for a longer term than six months or until twenty days after the meeting of the Congress next following *the passing the act for such suspension*."

This recommendation assumes as a matter of course that the suspension would necessarily be by act of Congress. It is unnecessary to pursue the argument further. And, in fact, the friends of the President seem at last to have abandoned the case. The newspapers of this day come to us publishing an act of Congress authorizing him to suspend the privilege. As the lawyers say, this is a *cognovit*—a confession of the usurpation hitherto.

But the concession comes too late. The mischief has been done. The confidence of the people when bestowed is generous and indulgent of error committed with good motives and for justifiable ends. Before the meeting of Congress on the 4th of July, 1861, the acts of the President in this regard were overlooked, for Congress could not act, and the people submitted because there was an apparent impending necessity. Since that time there has been no justification. Congress did not choose to act, when it assembled in the summer of 1861, thereby either leaving it to be inferred that the necessity no longer existed, or what is more true that body felt disposed to allow the course of the President to continue. There was thus no alternative; except for the people of this State, in the majesty of their strength, to rise and declare their want of confidence. The vote has been taken and it stands with all its consequences—the proof of a divided people as regards this policy of the administration in the conduct of the war.

I deplore its results as an Union-loving man. They are more disastrous to our cause than the loss of an hundred battles. This war has been upheld by the people of this State because they desired to see the obligations of the Constitution enforced against the miserable oligarchy of the South and to

crush their unjustifiable rebellion against the government and authority of the Union But they did not intend that their rulers should disregard the Constitution towards them. It is an inconsistency which the future historian will point out as at once inexplicable and unfortunate, that the federal administration while seeking to enforce the constitutional duties of the rebels, has been itself guilty of violations of its constitutional obligations to the people of the loyal States, where the courts are open, the judges pure, and the authorities vigilant to punish treason. The consequence of this departure from principle has been painfully apparent. Whatever may have been the guilt of many of those arrested and confined—and I doubt not that many were guilty—it is no less true that innocent men have been incarcerated through political or personal enmity and the servile zeal of subordinates, till their health has been destroyed and their intellects crazed. It is thus the people have become divided and depressed. They stand aghast at the frightful despotism into which, if it be not checked, the country must fall. Sir, I have done.