PERSONAL LIBERTY AND MARTIAL LAW: A REVIEW OF SOME PAMPHLETS OF THE DAY

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Personal Liberty and Martial Law: A Review of Some Pamphlets of the Day by Edward Ingersoll

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EDWARD INGERSOLL

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PHILADELPHIA:
April, 1862.

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DEAR MONTGOMERY,—I think it much to your honor that you were the first in Philadelphia to take the field in defence of Habeas Corpus, against the extraordinary constitutional assaults that have been made upon it. Many have since drawn their swords in its defence, but I have seen no blade more polished or more effective than your own. I have extended my remarks to the subject of martial law. You and I agreed in thinking that our distinguished fellow townsman, whom Lord John Russel truly spoke of in the House of Lords, as the head of the bar in America, and who he said had argued his case "with much ingenuity;" had made as great a mistake in assuming that the rightful suspension of the writ of Habeas Corpus in America deprived the citizen of all other constitutional guaranties of freedom, as he had in arguing, that the right to suspend the privilege of the writ belonged to the Executive. The subject is, perhaps, already burdened with better criticism than mine, but in these days of our country's calamity, when the despotic hand is abroad and the liberty of the press as well as the writ of Habeas Corpus is suspended; it may not be unbecoming in an humble citizen to give token of the faith that is in him.

Believe me,

Very truly,

Your Friend,

EDWARD INGERSOLL.

John T. Montgomery, Esquire.

PERSONAL LIBERTY AND MARTIAL LAW.

CIVIL WAR and Revolution start strange topics of discussion. If any one, whether lawyer or layman, but an intelligent, not yet impassioned man, having an idea constitutional or legal, or who had ever given a thought to the American Government, had been told so lately as the year 1860, that at this day we would be discussing the question of the rightful power of the President of the United States to arrest and imprison its citizens at his discretion, what would such auditor have said? Would any earthly information have convinced him that such futurity was close at hand? Yet here we have it upon us, in such shape that it cannot be denied; and when the Attorney-General of the United States, Professor Joel Parker at Cambridge, Mr. Reverdy Johnson at Washington, and Mr. Horace Binney at Philadelphia, have written pamphlets to demonstrate that such is the American constitutional law, and above all, we know that the exercise of this power is the now American fact, it seems vain any longer to say it is impossible, and turn from its consideration.

We venture the proposition that governmental madness has never yet accomplished anything in this world. We mean by no means to disparage the element or the idea of popular or individual violence or madness. It is a great idea, of infinite worth and power. When Mr. Stanton, in his proclamation in which he attacked "infidel" France, appealed to this mighty passion of fanaticism, he showed that he understood its value, as Joshua whom he refers to, did, and as all great men have. But he showed too, that though he is a distinguished lawyer, he misunderstood his case politically. The Northern side in this great sectional civil strife in which our unhappy country is embarked, has, we must not forget, possession of the government; possession of the governmental idea. This is what is now called "the Union." It is so far the great element

of the Northern strength. It is the head, the heart, the life of the Northern cause. We can no more afford to forget it, or for a moment to lay it aside, because it is for that moment an incumbrance, or does not advance the purpose immediately in hand, than can a marching army leave behind their General, because he must be carried in a coach, being from an attack of gout, unable to sit his horse. This governmental idea which is the great Northern General, the element of their strength, is we submit, incompatible with madness, fanaticism, revolution. All we agree great ideas, great things to accomplish certain designs, but not the design we have in hand. This spirit has, upon many great occasions, been appealed to with transcendant success; the most famous of all in late days having been that of "infidel" France herself, when by its means, she succeeded in hurling back the armies of Europe which were leagued for her subjection. But no instance can be given in history of its use for governmental purposes. It has overthrown governments but has never upheld them. The latter is our side of the game, and it has enormous advantages, as we have already seen; but it has not all the advantages. This revolutionary power, whatever it may be worth, belongs to revolution. It is a weapon the federal Government cannot use. The popular delight at what is called strong government, which we have seen exhibited in this matter; the idea being that the more violence, and illegal violence, government exhibits the more does it exhibit its earnest passion and the more likely is it to succeed, is in our political situation a profound mistake. If, in a physical encounter, the opponents are equally unskilled, passion is no doubt a great element of success; but government is like pugilistic science, and when one of the parties has that advantage added to his power, he must not only not forget himself in passion, but his skill enables him to take advantage of the passion of his opponent, which he turns to weakness.

The administration is responsible to the people for the peaceful government of the whole country, and to that accountability they will undoubtedly be held. He is the worst enemy, not only to his country, but to the administration, who, in this time of peril, doubts, or suggests to them a doubt, of the wisdom of standing by that Constitution which they have received and sworn to uphold. The ship of state is in a storm, this is not the time to question her staunchness or to suggest alterations in her build. As is said to have been said, by high executive authority upon occasion of a late popular effort to remove from office a secretary of one of the departments, "it is no time for swapping horses when we are swimming the river." Our American horse may be a bad one, a proportion of our people has always disparaged him, and desired a change. If he, however, can-

not now save us, we are surely lost. Our only chance of safety is now in him. Who is so disloyal to the government as he who at this time doubts its practicability; who either from pride of opinion, lust of power, or more ignoble fear, desires that the American guides and landmarks should be set aside, and some others taken in their stead; who questions the integrity or soundness of the great maxims of American free government. Conservatism is our only chance of safety. Conservatism of our own American institutions; such as our forefathers gave, such as our people have lived under and understand. Liberty of speech, liberty of the press, liberty of the person. All wrong perhaps, but the only guides that we know, the only lights that our people recognize, the only landmarks that they understand. They are as essential to the safe conduct of the government in this hour of peril, as they are to the happiness of the people; and it is as great administrative madness in the emergency, to attempt to throw them aside, as it is indicative of popular madness, to be willing to relinquish them. A free press like a free person is of American nature, the inferiority or superiority of which great men have differed about. Bonaparte was strongly of one mind upon the subject, Mr. Jefferson of the other. Good or bad, they are American; our people and government understand them, and they understand no other. A free press would have been our protection against a repetition of such diplomatic blunders as our secretaries committed in the case of "unique" Austria and "infidel" France; not so good a protection no doubt as a good censorship of the press, but still a protection. The only possible chance for the federal government in this our day of calamity, is, as it ought to be, to stand by our American principles.

This subject of the governmental control over personal liberty has been discussed in the pamphlets above referred to, in two points of view: *First*, as a power derivable to the executive from the Constitution itself, in what we may call the Habeas Corpus clause. *Second*, as a military incident to the executive power, the President being, by the Constitution, the head of the military power of the government. This latter view of the matter, although excluded by Mr. Binney from his consideration of the subject, is in fact comprehended in it. Although he argues only the power of suspending the Habeas Corpus, he infers and takes for granted that this exclusion from discharge from arrest, carries with it also the right to arrest and imprison, as well as to hold. This goes to show, as is, we submit, the truth, that the question involved, is after all, divide it as you will and point it as you please, the great question of personal liberty as opposed to governmental restraint of that liberty for its own purposes whatever they may be.

The clause in question, which appears in the ninth section of the first article of the Constitution, is in these words: "The privilege of the writ of Habeas Corpus shall not be suspended unless, when in cases of rebellion or invasion, the public safety may require it."

The Federal Constitution of 1787 has, during more than seventy years, been the subject of very extended and elaborate consideration. This more or less in all and every part of it. Many books have been written in elucidation and explanation of its every clause and section. This particular Habeas Corpus clause has been over and again at the hands of judges, legislators and text writers, a frequent subject of thought and comment. It came up broadly for the consideration of the nation and its legislators, in the year 1807, when the question of action under its provisions was practically before the public. Thus during the seventy years of the existence of this fundamental law of our Government, this particular subject has been before a free, talking, writing, thinking people, and has been, as history shows, during that time freely and much discussed, written and talked about. It was always, and by everybody, considered a matter of vast and vital importance; perhaps of vaster and more vital importance than any one other matter of our fundamental law. During this long period of time, and this frequent handling of the matter, there has been no whisper of difference of opinion or views upon this point.* All have been agreed that the power to suspend the privilege of the writ of Habeas Corpus was a legislative power. It has been so asserted and assumed by authors, legislators and judges, and upon occasions innumerable. No dissent has ever been given, no doubt has ever been expressed. This popular right, as claimed, was supposed to have a great historical root. It had not been created by Americans in 1787; but had always, in their books of history, been claimed by them as of great ancestral foundation and descent.

In this condition of the subject, which we have stated very briefly, and which would well bear a fuller statement, for it is important to every argument fully to understand the condition and position of the subject-matter at the time when the question for discussion was first suggested, this constitutional point, as it is claimed to be, was first taken. In 1861 this American right was violated, as would have been said be-

* Mr. Lieber, to whom Mr. Binney dedicates his pamphlet, and whose work, on civil liberty and self-government, is spoken of as containing "some striking and impressive remarks upon the mere negation of power to government," says, at p. 131, vol. 1, "We have seen already under what circumstances our Constitution permits the suspension of the Habeas Corpus, and that this cannot be done by the President alone, but by Congress only, need hardly be mentioned."

fore that day, or as the writers above named tell us, it was enquired into and found to have no foundation,—in fact that there was no such existence. It was found that the proper exercise of the constitutional provision for the suspension of the privilege of the writ of Habeas Corpus, was the exercise of an executive not of a legislative power.

To support the affirmative of this proposition required, beside the usual positive argument, an abnegation of the past, and closing of the book of history, which was extremely difficult. It required belief, that the men who had just carried America through a bloody political struggle of more than seven years' duration, a struggle for political liberty, had laid aside their dear bought experience of humanity and of government, and attempted something new, something utopian, something not analogous to the past, but which yet those best practised of all political philosophers dreamed would live in the future. It was not only necessary to furnish the new eyes for our observation of the clause, but to close the old ones. This, the exclusion of what is called the English analogy, was plainly the most difficult part of the author's task. It well might prove so to any legal mind. The right so to exclude historical authority in this question of personal liberty; the truth of the averment that "the language of the Habeas Corpus clause in the Constitution was new, and is peculiar," (p. 7,) which is the foundation of the whole argument, has been so completely taken from beneath the author's feet, that it would be now both presumptuous and unnecessary to attempt here, again, what has been already so thoroughly done.* It has been shown, that the words of the clause instead of being new, as is claimed for them, and purposed to express some new and unprecedented idea; are individually and in the precise collocation in which we have them in the Constitution, to be found in precedents innumerable, in English and American history,—both judicial and legislative. Our title to this, our precious inheritance of English analogy, in this question of popular liberty, having been thus written in the skies, Mr. Binney's pamphlet is answered; for he himself concedes, that unless this English analogy can be excluded, what he calls the legal argument is conclusive against his view.† Still the subject is of such vast importance, and the "ingenuity"

* On this point of the history of the words of the clause, we may refer especially to a learned and much labored pamphlet by James F. Johnston, Esquire, of Philadelphia, entitled "The Suspending Power and the writ of Habeas Corpus."

† The value of pedigree in showing title to liberty, seems to be differently esteemed by Sir Dudley Diggs. We quote from his address to the Lords, as one of a Committee of the Commons, on occasion of a conference during the proceedings which led to the Petition of right: "Whilst we, the Commons, out of our good affections, were seeking for money, we found, I cannot say a book of the Law, but