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In the Court of Appeals.

THE MAYOR AND CITY COUNCIL OF BALTIMORE, SAMUEL HINDES, AND OTHERS,
Appellants.

vs.

CHARLES HOWARD, CHARLES D. HINKS,
AND OTHERS, *Appellees.*

APPEAL FROM AN ORDER OF THE CIRCUIT COURT FOR BALTIMORE CITY, REFUSING TO GRANT AN INJUNCTION.

REPLY *of* GEO. WM. BROWN *and* FREDERICK W. BRUNE, *Counsel for* CHARLES D. HINKS, *and others, Appellees, to the Argument of* WILLIAM PRICE, *Counsel for Appellants.*

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The Court not being ready to hear this case on the day assigned, directed the Counsel to print and file their arguments.

The material facts of this case, as set forth in the Bill of Complaint, filed by the Appellants, are as follows. On "the 27th of June, 1861, *the exercise of the functions* of the Police Commissioners of the City of Baltimore, (Defendants in this case,) was *suspended by the Government of the United States,* whereupon said Police Commissioners were *put off duty and practically discharged,* the entire Police force which they had established, and which was until then under their control, disbanded, and by authority of the Government of the United States, a Provost Marshal was appointed for the City of Baltimore, and by him an entirely new and distinct Police force was established."

The Act of 1862, chapter 111, passed on the 12th of February, 1862, authorized the Mayor and City Council to pay the Provost Marshal of the United States all arrears of salary and wages then due to the officers and men serving under him, and revoked the power of the said Police Commissioners "to use, draw for, or disburse" any of the funds provided for Police purposes.

The Act of 1862, chapter 131, passed on the 18th of February, 1862, created a new Board of Police Commissioners, and altered in various important particulars the previously existing Police Act.

On the 20th of March, 1862, the Government of the United States withdrew its Police force from the City of Baltimore.

At the time when the first named Police Commissioners were put off duty, as alleged, there remained on deposit in the Farmers and Planters' Bank, subject to their control, about $8,700 of the Police fund. The Bill alleges that $2,800 of this fund still remain undrawn, and prays for an injunction to restrain Defendants from drawing, or paying out said balance, and for a decree that it may be paid to the Mayor and City Council of Baltimore. The Circuit Court refused to grant the Injunction.

By agreement of parties the following facts are added to, and made part of, the case. On the 6th of February, 1862, William H. Gatchell, Treasurer of said Commissioners, drew at Fort Warren a check on the fund in said Bank in favor of Charles D. Hinks, for the sum of $1,000, being for the salary accruing to Hinks, as one of the said Commissioners, from the 6th of August, 1861, to the 6th of February, 1862.

This check was presented for payment by Hinks at the counter of the Bank on the 8th of February, 1862, and payment thereof was refused, in consequence of a notification given to the Bank by the Mayor of the City of Baltimore.

The questions are 1st, whether the Injunction prayed for, should be granted, and 2d, whether Hinks is entitled to the payment of said check for his salary.

The Court is referred to the points made and authorities cited in our Brief already filed, and we shall here confine ourselves

to the grounds taken by the Counsel for the Appellants in his printed argument.

The Complainants have in their Bill stated their case in their own way, and must stand or fall by it as they have chosen to present it. No opportunity has been given to the Defendants to answer the Bill, or to furnish proof of facts.

The allegation in the Bill is that "the exercise of the functions of the Police Commissioners was suspended by the Government of the United States, whereupon said Police Commissioners were put off duty, and practically discharged." This is the bald statement. Neither the means by which this suspension was effected nor the reasons for it are assigned, and not even the plea of civil or military necessity is set up. No charge is made that the Commissioners were guilty of any misconduct; nor even that they harbored any improper or unlawful design. It is not alleged that the Government of the United States designed or attempted to interfere with the fund deposited by the Commissioners in Bank, or with the payment of their salaries, and in the absence of an express allegation no such purpose can be presumed. The mere suspension of the exercise of the functions of a public officer, and putting him off duty, without any cause assigned, does not work a forfeiture of either his salary or his office, even if the act be done by lawful authority. It is not stated by what department of the Government the functions of the Police Commissioners were suspended. The "Government of the United States," is an expression of vague and indeterminate meaning, and leaves in doubt both the source of the authority which is claimed for the act, and the agency by which it was accomplished. Was the act executive, legislative, or judicial? If executive, was it civil or military; by whom was it ordered, and by whom executed? In every constitutional Government all acts of such great and grave importance as the overthrow of the lawfully constituted Police authorities of a City, can only be accomplished by due process of law, formally inaugurated and regularly carried out. More especially is this

the case in a Government like ours, where the several States and the United States are clothed with separate and distinct powers clearly marked out and defined by written constitutions, and are equally sovereign in their respective spheres. Nothing can be more certain than that the Police powers within the respective States, belong to the States exclusively. The second article of the Bill of Rights of the State of Maryland declares, "That the people of this State ought to have the sole and exclusive right of regulating the *internal government and police thereof*." The Federal Government, in its whole scope and operation, was designed for national purposes only. For these objects large powers are granted to it, but these powers are carefully described, and to these it is confined. To guard against all danger of misapprehension on this point, it is expressly provided by the 10th Article of the Amendments to the Constitution, that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

It is then clearly the duty of the Complainants, who put their case entirely on the ground that the Police authorities of Baltimore were deprived of all rights under a law of the State of Maryland, by certain action of the General Government, to set forth distinctly what the nature of that action was and the occasion for its exercise, and to show by what constitutional or legal provision it is sanctioned. As they have wholly failed to do this, it is manifest that they have not succeeded in making out any case against the Defendants, and that the rights of the latter remain in all respects unimpaired under the laws of the State of Maryland, and unaffected by the alleged interference of the Government of the United States, whatever it may have been.

The Counsel for the Appellants has strangely endeavored to strengthen the Bill by allegations of fact which are wholly unsupported by any evidence produced in the case, and appear only in his printed argument. He alleges that the Chief Marshal of the Baltimore Police was in earnest sympathy with the mob

which attacked the Massachusetts troops on the 19th of April, that the evidence of this fact came abundantly to light a few days afterwards; that the Government requested the Police Board to remove this Chief Marshal, to put in his place some loyal man whom the Government could trust and would approve; that the Board declined so to do, and *thereupon* the President of the United States laid hands upon the whole Board, and sent them, with their Chief Marshal, as prisoners to Fort Warren.

But the Appellees are prepared to prove, that on the 19th of April, 1861, the Massachusetts troops were rescued from the attack of the mob by the Police authorities of the City, and by the Chief Marshal at the head of his force, and thereby saved from great loss if not from destruction, and that the Government of the United States never made a request of the Board of Police to remove the Chief Marshal. The Board remained in the discharge of their duties, as stated in the Bill of Complaint, until the 27th of June following, more than two months after the unfortunate occurrence of the 19th of April. If then the supension of the Board was the act of the President of the United States, as is alleged in argument, it could not have been for the reasons assigned.

Our argument has proceeded thus far on the theory that the allegation in the Bill that the functions of the Police Commissioners were suspended by the Government of the United States, is fatally defective and insufficient in not alleging legal grounds for such supension, and in failing to set forth the means or process by which it was effected, and also the particular department of the Government by which it was ordered.

Even if this Court could assume, as Mr. Price does, that by "the Government of the United States," the Bill intended to designate the President of the United States, the defect would not be remedied, for it is one of substance and not merely of form, because the President of the United States had no constitutional or legal power to order such suspension.

The argument of the counsel endeavors to meet this difficulty by boldly claiming that the President possesses in time of war, "a sum of human power more mighty than that of the Cæsars—more resistless than that of any king or potentate of the whole earth." This is his own language, and is here quoted, because nothing else could do justice to the enormity of the pretension.

To him it seems a trifle that the exercise of the functions of the Police Commissioners of the City of Baltimore was suspended, that their force was disbanded, and that they themselves were for many months confined in distant military prisons, and finally released without charge against them, or trial had. To him the sovereignty of the State of Maryland, which should cover as with a shield the humblest of its citizens, is nothing, the constitutional provisions which protect private rights and personal liberty are nothing, the guilt or innocence of the individual is nothing, and he offers up all as a sacrifice to executive power. "What the real delinquency of these gentlemen may have been, (he says) is nothing. They may have been guiltless of all design to embarrass the Government, or to take any part either open or covert in aid of the Rebels. If so, it makes the case an unfortunate one, but cannot alter the result. That is for the President to decide, and his decision is final."

Not content with justifying the particular act which he was employed to defend, he invites, and seems to anticipate a still more high handed exercise of executive power which he vindicates in advance. He says, "If a Governor of a State, to put a strong case, shall contrive with a Governor of a State, and these again with another Governor of a still different State, to frustrate the orders of the President to raise new levies of troops—or to intercept the advance of supplies for our armies in the field—or to discourage the raising of money for the pay of the soldiers—or to *contrive any obstruction* to the efficient discharge of the high duties cast upon him, or if the *President shall have reason to suspect such persons of such purposes*, it cannot

be doubted that he may arrest them one and all, *imprison them, or if need be, hang them.*"

The position assumed then, is that in time of war, the American President lawfully possesses an authority greater than that of the most despotic monarch, that he has unlimited power over the liberty and lives of the people, that his will is law, and that from his decision there is no appeal.

Authority for this extraordinary doctrine is claimed to be found in the Constitution of the United States, in a certain act of Congress, and in the decisions of the Supreme Court.

Mr. Price divides the powers of the President into primary and derivative. "The primary powers of the President—in regard to which he is independent of Congress; are (he says) to take care that the laws be faithfully executed, to preserve, protect and defend the Constitution of the United States—and that he may not lack the means of discharging these high and responsible duties, he is made Commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the service of the United States."

The derivative powers of the President are described as those which are, "derived to him through Congress." "These latter powers have reference to the calling forth the militia in the exigencies named, and to the organizing and arming the same when employed in the service of the Government."

On these enumerated powers is based the monstrous assumption, that absolute authority is vested in the President in time of war.

We shall briefly examine them in detail. The duty imposed on the President "to take care that the laws are faithfully executed," requires him to execute the laws which are made by the proper legislative authority. It is a contradiction in terms to say that it authorizes him either to make laws, or to violate them. The same duty is imposed on every executive officer in his own sphere, from the President of the United States, and the Governor of a State, to the Mayor of a City, and the Con-

stable of a ward. It is the duty of all these officers to see that the laws be faithfully executed.

The Constitution of the State of Maryland, Article II, sec. 10, requires the Governor of the State "to take care that the laws be faithfully executed," which is the very language used by the Constitution of the United States, with reference to the President. The Constitutions of many of the States, contain the same provision, in the same language, and, if not in the same yet in similar language, the same duty is imposed on the Governor of every State.

The absurdity of arguing that this language in the Constitution of a State, converts the Governor into an absolute despot, is manifest to all, but the absurdity of contending that the same language in the Constitution of the United States confers absolute power upon the President, is equally great.

The President in his oath of office is required to swear that he will "preserve, protect and defend the Constitution of the United States." This is a duty imposed, not a power granted. The duty is to be performed by obeying the Constitution, and the laws enacted under the Constitution, not by violating them. On this point, Mr. Webster said in the Senate of the United States, on the 7th of May, 1834, (Webster's works, vol. iv, p. 132.) "Would the writer of the protest, argue that the oath itself is any grant of power; or that, because the President is "to preserve, protect, and defend the Constitution," he is, therefore, to use what means he pleases, for such preservation, protection, and defence, or any means, except those which the Constitution and the laws have specifically given him? *Such an argument would be absurd.*" Yet this is precisely the argument of the Appellants' counsel.

The Constitution of Maryland, Article I, sec. 4, requires every officer of the State to take an oath to support the Constitution of the United States, and the Constitution of the State of Maryland. To support the Constitution, means to preserve, protect, and defend it, but no rational person ever imagined that all the

officers who take this oath are clothed with unlimited discretionary powers as to the means they may choose to adopt for that purpose.

The powers conferred on the President by the Constitution are carefully and distinctly enumerated and described, with the manifest design of confining him strictly to them, but if the duty of preserving, protecting and defending the Constitution and of taking care that the laws are faithfully executed, invests him with all the powers which he in his wisdom or folly may choose to consider necessary for those objects, the enumeration is superfluous and absurd, and serves only to create doubt and confusion. Nothing was necessary, except to declare that in time of war, the President of the United States, should be clothed with absolute power. If this were really the intention of the framers of the instrument, it is to be presumed, that they were wise enough, and honest enough to say so plainly. The fact, that they have not so said, is conclusive evidence that they did not so mean.

The Statute of February 28, 1795, whence Mr. Price deduces what he calls the "derivative powers" of the President, authorizes him to call forth the militia whenever the United States shall be invaded, or be in imminent danger of invasion. The Supreme Court in Martin vs. Mott, 12 Wheat 19, held that this act is constitutional, and that, under it, the President is the exclusive and final judge, whether the exigency has arisen on which the militia is to be called out, on the principle laid down by the Court, that "whenever a Statute gives a discretionary power, *to any person*, to be exercised by him, upon his own opinion of certain facts, it is a sound rule of construction, that the Statute constitutes him the sole and exclusive judge of the existence of those facts." This is the Statute which, as thus construed by the Supreme Court, is supposed by the Counsel for the Appellants, to confer dictatorial powers on the President. Any comment on such a position, seems to be unnecessary. The Statute and the decision speak for themselves, and

show only that a power has been conferred on the President by Congress, to call out the militia in case of actual or seriously threatened invasion, and that the President has been made the exclusive judge, as to whether the exigency has arisen. The power is special, not general, and is in strict conformity with the clause in the Constitution, which declares that Congress shall have power "to provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions."

The case of Luther vs. Borden, 7 Howard, 1, which is also relied on by the Counsel of Appellants, has little bearing on this case. When an attempt was made to establish a revolutionary government in Rhode Island, and to sustain it by armed force, the Legislature of the State acting under the government established by the charter of Charles II, in 1663, declared the State under martial law. By this charter, the right "to use and exercise the law martial," was provided for "in such cases only as occasion shall necessarily require." The Court held, that the Legislature had the power thus to protect itself from destruction by armed rebellion, and that it was the sole judge of the existence of the necessity. The Court say, "unquestionably a State may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order, and free institutions, and is necessary to the States of this Union as to any other government." The Act of February 28th, 1795, above referred to, provided that "in case of an insurrection in any State against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State, or of the executive, when the legislature cannot be convened, to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection." Upon the application of the Governor under the charter government, the President recognized him as the executive power of the State, and took measures to call out

the militia to support his authority, if it should be found necessary to interfere. The only bearing of the decision on the powers of the President, is that it was held that Congress has delegated to the President by said Act the power to decide for the purposes of that Act, whether a government organized in a State, is the duly constituted government of that State; and that after he has decided this question, the Courts of the United States are bound to follow his decision. The case is no authority for the position assumed by Mr. Price, unless he can show, as he certainly cannot, 1st, That Congress has a right to declare martial law in the United States, and, 2d, that it has actually done so.

It is contended by the Counsel for the Appellants, that these "transcendent powers of the President," as he delights to call them, "are confined to times of insurrection, or invasion, or of imminent danger of invasion," or in other words, that they do not belong to him during peace, but spring spontaneously into existence on the outbreak of war. If this be so, it is very remarkable that the Constitution which is so clear, and explicit as to all other grants of power, should be so obscure in regard to the most important of them all. It is unaccountable that it should make no distinction between the powers, which belong to the President in time of war, and those which appertain to him during peace.

The Constitution confers on him the authority of Commander-in-chief, and this is all. At all times, both in peace and war, he is "Commander-in-chief of the army and navy of the United States," and he is Commander-in-chief "of the militia of the several States, when called into the actual service of the United States."

But although he is appointed to command, he is not authorized to call out the militia, unless he is empowered to do so by act of Congress. Congress alone can provide for calling out the militia, and for the following purposes: "to execute the laws of the Union, suppress insurrections, and repel invasions." It was not designed that the militia of the States should remain permanently in the service of the United States, but whenever

called out they are to remain under the command of the President. What human mind could infer from this that dictatorial powers were intended to be conferred upon him?

Larger powers are granted to the Governor of Maryland by the Constitution of the State. Article II, section 9, declares that, "The Governor shall be commander-in-chief of the land and naval forces of the State, and may call out the militia to repel invasions, suppress insurrections, and enforce the execution of the laws; but shall not take command in person without consent of the Legislature." And similar powers, with some variations, are vested in the Governors of all the other States.

It follows then that if the provisions of the Constitution and the Laws of the United States on which Mr. Price relies to establish absolute power in the President are adequate for that purpose, similar provisions in the Constitutions of the different States are sufficient to clothe the Governors also with absolute powers, and we, who supposed ourselves to be the freest people on earth, are the least so; for we are governed by a supreme despot at Washington, and the people of each State have beside, a petty despot in their own State Capital.

The only powers which a condition of war confers on the President beyond those which he possesses in time of peace, are such as belong to every commander-in-chief when actually in the field. The President has no war powers other than these. Whether a commander-in-chief be President, Governor, or simply General, he must, when directing the operations of an army in the field, have and exercise all the authority necessary for the conduct of the campaign, or the particular enterprise in which he is engaged.* Whenever and wherever a war is waged, there must be a commander-in-chief, and the laws of war give him ample control over the soldiers under his command, and large powers against the enemy which he is called on to subdue; but he is not placed above the laws and Constitution of his

* See on this point the able pamphlet of the Hon. B. R. Curtis, on Executive Power.

country, and has no right to interfere with its civil institutions. The civil magistrates, its people, its institutions and its laws, are all outside of and beyond his jurisdiction. So clear and fundamental was this principle considered by the founders of the State of Maryland, that it was made and still continues part of the Bill of Rights, which expressly declares, in the 27th Article, "That *in all cases, and at all times*, the military ought to be under strict subordination to and control of the civil power."

The case of Mitchell *vs.* Harmony, 13 How. 115, decided by the Supreme Court of the United States, sheds some light on this subject. The question was whether a commanding general in the field had a right to appropriate private property to the public service; and it was decided that such an appropriation might be made in case it should be rendered necessary by an immediate and pressing danger, or urgent necessity existing at the time, and not admitting of delay, but not otherwise. In delivering the opinion of the Court the Chief Justice said—"Our duty is to determine under what circumstances private property may be taken from the owner by a military officer in time of war. And the question here is: whether the law permits it to be taken, to ensure the success of any enterprise against a public enemy, which the commanding officer may deem it advisable to undertake. And we think it very clear that the law does not permit it. The case mentioned by Lord Mansfield in delivering his opinion in Mostyn *vs.* Fabrigas (1 Cowp. 180) illustrates the principle of which we are speaking. Captain Gambier of the British army, by the order of Admiral Boscawen, pulled down the houses of some sutlers on the coast of Nova Scotia who were supplying the sailors with spirituous liquors, the health of the soldiers being injured by frequenting them. The motive was evidently a laudable one and the act done for the public service. Yet it was an invasion of the rights of private property and without the authority of law; and the officer who executed the order was held liable to an action, and

the sutlers recovered damages against him to the value of the property destroyed. This case shows how carefully the rights of property are guarded by the laws of England; and they are certainly not less valued nor less securely guarded under the Constitution and laws of the United States."

Private property then cannot be taken to ensure the success of a military enterprise, nor to prevent the health and discipline of troops being injured by the sale of spirituous liquors. It can only be taken in case it should be rendered necessary by an immediate and pressing danger, or urgent necessity existing at the time.

But the public rights of a great city and a sovereign State—not an enemy—are entitled to far higher consideration than private property. It has never been decided that a commanding general could deprive the cities and States of his own country of their political rights, on the plea of danger or urgent necessity.

In this case there is no allegation of danger nor of necessity. The State of Maryland was not an enemy of the United States, had not raised the standard of revolution, and had taken no steps to do so, but continued a member of the Union with all her rights to self government and privileges unimpaired. Nor did the City of Baltimore occupy a hostile attitude. On the 19th of April a serious riot had occurred in her streets in which both soldiers and citizens were killed. But the mob was quelled and perfect order and quiet restored by her own authorities without any assistance from the government of the United States. At no time was there any interference with the regular administration of the laws by the Courts, which continued always open.

The case of Carpenter, claimant, *vs.* the United States, decided in June, 1863, by Chief Justice Taney, in the Circuit Court of the United States, on an appeal from the District Court, fully sustains the views which we have endeavored to maintain. The question was, whether the Secretary of the Treasury could

prohibit a citizen of Charles county, in Maryland, from transporting to his home, without a permit, merchandize purchased in Baltimore. Under the Acts of Congress of 13th of July, 1861, and May 20th, 1862, this power was claimed by the Secretary, who established certain regulations, by one of which the shipment of goods like those in question, without a permit, was prohibited; and by another, goods were forfeited if any false statement were made or deception practiced in obtaining the permit.

The Chief Justice says of these regulations, "They are, in their nature and scope, legislative acts, changing the law as it stood before, not according to the judgment and discretion of the Legislature, but according to the discretion and judgment of the Secretary. They compel the inhabitants of a particular portion of the State, where the trade was formerly free, to exhibit to the officers of the United States an invoice of their purchases made for domestic use, compel them to take oaths not required by any previous law, to ask and obtain permission to carry home what they have purchased, to pay the collector for his permission, and inflict as a penalty the forfeiture of the whole of the goods mentioned in the permit, if the custom house officer is deceived in any one particular. These are serious and important alterations in the law, and if they can constitutionally be made, it must be done by legislative power, and not by an officer of the executive branch of the Government, whose duty it is to execute the law—not to make it. And I think that Congress did not intend nor attempt to authorize the regulations which the Secretary has prescribed, and that the construction he has given to these laws is an erroneous one.

"But if these regulations had been made directly by Congress, they could not be sustained by a Court of Justice, whose duty it is to administer the law according to the Constitution of the United States. For, from the commencement of the Government to this day, it has been admitted on all hands, and

repeatedly decided by the Supreme Court, that the United States have no right to interfere with the internal and domestic trade of a State. They have no right to compel it to pass through their custom houses, nor to tax it. This is so plainly set forth in the Constitution that it has never been supposed to be open to controversy or question. Undoubtedly the United States may take proper measures to prevent trade with the enemy. But it does not, by any means, follow that they may disregard the limits of their own powers, as prescribed by the Constitution, or the rights and powers reserved to the States and the people. A civil war, or any other war, does not enlarge the powers of the Federal Government over the States or the people, beyond what the compact has given to it in time of war. A state of war does not annul the 10th Article of the Amendments to the Constitution, which declares that 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' Nor does a civil war, or any other war, absolve the Judicial Department from the duty of maintaining, with an even and firm hand, the rights and powers of the Federal Government and of the States, and of the citizen, as they are written in the Constitution, which every Judge is sworn to support."

The application of this case to the one before the Court, is too plain for comment. The executive department of the Government had no more right to interfere with the internal police of Maryland, than with its internal trade, and such right which does not exist in peace, is not conferred by a state of war.

The people of the thirteen States by whom the Government of the United States was established, had had ample experience of insurrections and wars, foreign and domestic, and, with good reason, were especially jealous of military and executive power. They had recently passed through a long revolutionary struggle with Great Britain, which had taxed to the uttermost their capa-

city for endurance; but no such imperial powers were found necessary, or ever had been claimed or exercised by any executive officer, State or Federal. If it had been intended to confer such powers on the President on the occurrence of any exigency whatever, neither the occasion itself, nor the extent of the authority, would have been left in doubt.

In adopting the Constitution, the people supposed that they were establishing a Government fortified with the most ample guarantees of liberty, and with grants of power to every department most carefully guarded and limited; and unless it be really so, they were grossly deceived and defrauded. If the vast powers now claimed for the President, had then been asserted as his prerogative, the Constitution would have been rejected with abhorrence. No one would have been bold enough to raise a voice in its defense.

The truth is that no such powers were ever supposed to lurk within the Constitution, either by those who prepared, or those who accepted it. If there had been a suspicion of their existence, the fact would somewhere appear in the debates of the Convention which formed the Constitution, or in the discussions which took place in the different States prior to its adoption; for the Constitution had enemies in every State, who placed in the strongest light before the people every objection that could be urged against it. But we find nothing of the kind.

The Counsel for the Appellant may well say, as he does, that "these transcendent powers of the President have remained from the adoption of the Constitution to the present time, nearly a sealed book to the Courts and the profession,"—not because wars had not been waged by the United States, nor because cases had not arisen and been discussed, and decided in the Courts involving the war powers of the President, but because the discovery of the existence of such latent powers in the Constitution required a description of reasoning, and the application of rules of interpretation, which have never yet received the

sanction of Courts of Justice in this or any other free country. But the seals have at last been broken, the oracle has spoken, and the new reading of the Constitution has been published to the world.

Fortunately the doctrines so long hidden, and now for the first time revealed, are so directly in opposition to the plain letter as well as the spirit of the Constitution, that they carry their condemnation on their face. They are anti-American, anti-republican, and slavish, and just so far as they are practically enforced, do they transport us as a people backward from the enjoyment of the blessings of constitutional liberty—the result of so many ages of struggle and sacrifice—to the barbarous methods of Asiatic despotism.

The authorities cited by Mr. Price, going to show that the official acts of an officer *de facto*, are sometimes regarded as valid, so far as the rights of third persons are concerned, in order to prevent the injustice which would otherwise follow, have no application to this case. This is a question involving not the rights of third persons, but the right of an officer duly appointed, to the payment of his salary out of the fund provided for the purpose. It never was held that the existence of an officer *de facto*, deprived an officer *de jure* of the salary belonging to his office, the duties of which he was ready and willing to perform.

The argument of Mr. Price discusses at length the right of the President to suspend the writ of habeas corpus. This right he maintains that the President possesses under the Constitution without the necessity of any legislation by Congress. And having established this right to his own satisfaction, he uses it as a stepping stone to reach the conclusion that the President is also clothed with the other "transcendent powers" which are claimed for him.

It has been decided by Chief Justice Taney, in the case of Merryman, that the President possesses no such power, and all

the attempts which have since been made to invalidate the authority of that decision, have only served to vindicate its correctness and to illustrate the conclusiveness of the reasoning by which it is sustained.

The great questions which have been discussed in this case, are not, however, necessarily involved in the point really at issue. Whatever may be the powers of the President or the government of the United States, it is sufficient to say, for the purposes of this case, that the *suspension* of the *exercise of the functions of the Police Commissioners* by the government of the United States, without legal process or cause assigned, and without even an attempt or intention either to remove them from office, or to stop their salary, cannot, on any principle of law, or justice, deprive them of the compensation to which they are legally entitled. And this view is sustained by the Acts of Assembly to which I have referred.

The act of 1862, ch. 111, does not entitle the Appellants to claim the fund in Bank, nor to ask for an injunction, nor does it deprive Hinks of his salary. It indeed directs payment to be made by the city to the force appointed by the Provost Marshal, but it does not remove these Commissioners from office. It repeals the article of the code which authorizes them to draw for or disburse money for police purposes, but does not attempt to invalidate any disbursements previously made or drafts previously drawn. Before this act was passed, the draft for the payment of the salary of C. D. Hinks had been drawn and duly presented for payment at the bank where the fund was deposited. This, as is shown by the authorities cited in my Brief, constituted an *appropriation* of the fund to the amount of the check, which the Legislature had no right to interfere with, and did not attempt to do so. It was not until afterwards, by the passage of the act of 1862, ch. 131, that the Commissioners were removed from office.

The act of 1860, ch. 7, which appointed these Commissioners by name, fixed their salary, and the acceptance of the office by them constituted a contract on the part of the State that their salary should be paid. This contract continued until the law was repealed. Until then, they were legally entitled to the office and to the salary pertaining to it. The fact that they were prevented from discharging the duties of the office by a superior force, did not in any matter affect or impair their rights.