

# MARYLAND GAZETTE.

T H U R S D A Y, J U L Y 3, 1800.

To the FREEMEN of the Fifth District of MARYLAND.

[Continued from our last.]

### FELLOW-CITIZENS,

OF the "alien act" it is contended, 1st. That it exercises a power nowhere delegated to the federal government. 2d. That it unites legislative and judicial power to those of the executive. 3d. That this union of powers subverts the general principles of free government. 4th. That it subverts the particular organization and positive provisions of the federal constitution.

In order to clear the way for a correct view of the first position, several observations will be premised.

In the first place; it is to be borne in mind, that it being a characteristic feature of the federal constitution, as it was originally ratified, and an amendment thereto having precisely declared, "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 incumbent on this, as in every other exercise of power by the federal government, to prove from the constitution, that it grants the particular power exercised.

The next observation to be made, is, that much confusion and fallacy have been thrown into the question, by blending the two cases of *aliens, members of a hostile nation, and aliens members of friendly nations.* These two cases are so obviously, and so essentially distinct, that it occasions no little surprize that the distinction should have been disregarded; and the surprize is so much the greater, as it appears that the two cases are actually distinguished by two separate acts of congress, passed at the same session, and comprised in the same publication; the one providing for the case of "alien enemies," the other "concerning aliens" indiscriminately; and consequently extending to aliens of every nation in peace and amity with the United States. With respect to alien enemies, no doubt has been intimated, as to the federal authority over them; the constitution having expressly delegated to congress the power to declare war against any nation, and of course to treat it and all its members as enemies. With respect to aliens, who are not enemies, but members of nations in peace and amity with the United States, the power assumed by the act of congress, is denied to be constitutional.

A third observation is, that were it admitted as is contended, that the "act concerning aliens," has for its object, not a *penal*, but a *preventive* justice; it would still remain to be proved that it comes within the constitutional power of the federal legislature; and if within its power, that the legislature has exercised it in a constitutional manner.

In the administration of preventive justice, the following principles have been held sacred; that some probable ground of suspicion be exhibited before some judicial authority; that it be supported by oath or affirmation; that the party may avoid being thrown into confinement, by finding pledges or securities for his legal conduct (sufficient in the judgment of some judicial authority; that he may have the benefit of a writ of habeas corpus, and thus obtain his release, if wrongfully confined; and that he may at any time be discharged from his recognizance, or his confinement, and restored to his former liberty and rights, on the order of the proper judicial authority; if it shall see sufficient cause.

All these principles of the only preventive justice known to American jurisprudence, are violated by the alien act. The ground of suspicion is to be judged of, not by any judicial authority, but by the executive magistrate alone; no oath or affirmation is required; if the suspicion be held reasonable by the president, he may order the suspected alien to depart the territory of the United States, without the opportunity of avoiding the sentence, by finding pledges for his future good conduct; as the president may limit the time of departure as he pleases, the benefit of the writ of habeas corpus may be suspended with respect to the party, although the constitution ordains that it shall not be suspended, unless when the public safety may require it, in case of rebellion or invasion, or of imminent danger thereof, which existed at the passage of the act; and the party being, under the sentence of the president, either removed from the United States, or being punished by imprisonment, or disqualification, never to become a citizen on conviction of not obeying the order of removal, he cannot be discharged from the proceedings against him, and restored to the benefit of his former situation, although the highest judicial authority should see the most sufficient cause for it.

But in the last place, it can never be admitted that the removal of aliens, authorized by the act, is to be considered, not as punishment for an offence; but as a measure of precaution and prevention. If the removal of an alien from a country, into which he has been invited, or the asylum most suspicious to his opponents; a country, where he may have formed the

most tender of connexions, where he may have vested his entire property, and acquired property of the real and permanent, as well as the moveable kind; where he enjoys under the laws, a greater share of the blessings of personal security, and personal liberty, than he can elsewhere hope for, and where he may have nearly completed his probationary title to citizenship; if, moreover, in the execution of the sentence against him, he is to be exposed, not only to the ordinary dangers of the sea, but to the peculiar casualties incident to a crisis of war, and of unnatural licentiousness on that element, and possibly to vindictive purposes, which his emigration itself may have provoked; if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied. And if it be a punishment, it will remain to be inquired, whether it can be constitutionally inflicted, on mere suspicion, by the single will of the executive magistrate, on persons convicted of no personal offence against the laws of the land, nor involved in any offence against the laws of nations, charged on the foreign state of which they are members.

One argument offered in justification of this power exercised over aliens, is, that the admission of them into the country being of favour not of right, the favour is at all times revocable.

To this argument it might be answered, that allowing the truth of the inference, it would be no proof of what is required. A question would still occur, whether the constitution had vested the discretionary power of admitting aliens, in the federal government or in the state governments.

But it cannot be a true inference, that because the admission of an alien is a favour, the favour may be revoked at pleasure. A grant of land to an individual, may be of favour, not of right; but the moment the grant is made, the favour becomes a right, and must be forfeited before it can be taken away. To pardon a malefactor may be a favour, but the pardon is not, on that account, the less irrevocable. To admit an alien to naturalization, is as much a favour, as to admit him to reside in the country; yet it cannot be pretended, that a person naturalized can be deprived of the benefit any more than a native citizen can be disfranchised.

Again, it is said, that aliens not being parties to the constitution, the rights and privileges which it secures, cannot be at all claimed by them.

To this reasoning, also, it might be answered, that although aliens are not parties to the constitution, it does not follow that the constitution has vested in congress an absolute power over them. The parties to the constitution may have granted, or retained, or modified the power over aliens, without regard to that particular consideration.

But a more direct reply is, that it does not follow, because aliens are not parties to the constitution, as citizens are parties to it, that whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws, than they are parties to the constitution; yet it will not be disputed, that as they owe on one hand, a temporary obedience, they are entitled in return, to their protection and advantage.

If aliens had no rights under the constitution, they might not only be banished, but even capitally punished, without a jury or the other incidents to a fair trial. But so far as a contrary principle been carried, in every part of the United States, that except on charges of treason, an alien has, besides all the common privileges, the special one of being tried by a jury, of which one half may be also aliens.

It is said, further, that by the law and practice of nations, aliens may be removed at discretion, for offences against the law of nations; that congress are authorized to define and punish such offences; and that to be dangerous to the peace of society is, in aliens, one of those offences.

The distinction between alien enemies and alien friends is a clear and conclusive answer to this argument. Alien enemies are under the law of nations and liable to be punished for offences against it. Alien friends, except in the single case of public ministers, are under the municipal law, and must be tried and punished according to that law only.

This argument, also, by referring the alien act, to the power of congress to define and punish offences against the law of nations, yields the point that the act is of a *penal*, not merely of a preventive operation. It must in truth be so considered. And if it be a penal act, the punishment it inflicts must be justified by some offence that deserves it.

It is said, that the right of removing aliens is an incident to the power of war, vested in congress by the constitution.

This is a former argument in a new shape only; and is answered by repeating, that the removal of alien enemies is an incident to the power of war; that the removal of alien friends is not an incident to the power of war.

It is said, that congress are by the constitution to protect each state against invasion; and that the means of preventing invasion, are included in the power of protection against it.

The power of war in general, having been before granted by the constitution; this clause must either be a mere specification for greater caution and certainty, of which there are other examples in the instrument; or be the injunction of a duty, superadded to a grant of the power. Under either explanation, it cannot enlarge the power of congress on the subject. The power and the duty to protect each state against an invading enemy, would be the same under the general power, if this regard to greater caution had been omitted.

Invasion is an operation of war. To protect against invasion is an exercise of the power of war. A power therefore not incident to war, cannot be incident to a particular modification of war. And as the removal of alien friends has appeared to be no incident to a general state of war it cannot be incident to a partial state, or a particular modification of war.

Nor can it ever be granted, that a power to act on a case when it actually occurs, includes a power over all the means that may tend to prevent the occurrence of the case. Such a latitude of construction would render unavailing, every practicable definition of particular and limited powers. Under the idea of preventing war in general, as well as invasion in particular, not only an indiscriminate removal of all aliens, might be enforced; but a thousand other things still more remote from the operations and precautions appertenant to war might take place. A bigotted or tyrannical nation might threaten us with war, unless certain religious or political regulations were adopted by us; yet it never could be inferred, if the regulations which would prevent war, were such as congress had otherwise no power to make, that the power to make them would grow out of the purpose they were to answer. Congress have power to suppress insurrections; yet it would not be allowed to follow, that they might employ all the means tending to prevent them; of which a system of moral instruction for the ignorant, and provident support for the poor, might be regarded as among the most efficacious.

One argument for the power of the general government to remove aliens would have been passed in silence, if it had appeared under any authority inferior to that of a report, made to the house of representatives by a committee, and approved by the house. The doctrine on which this argument is founded, is of so new and so extraordinary a character, and strikes so radically at the political system of America, that it is proper to state it in the very words of the report.

"The act [concerning aliens] is said to be unconstitutional, because to remove aliens is a direct breach of the constitution, which provides, by the 9th section of the 1st article, that the migration or importation of such persons as any of the states shall think proper to admit, shall not be prohibited by the congress, prior to the year 1808."

Among the answers given to this objection to the constitutionality of the act, the following very remarkable one is extracted.

"Thirdly, that as the constitution has given to the states no power to remove aliens, during the period of the limitation under consideration, in the meantime, on the construction assumed, there would be no authority in the country, empowered to send away dangerous aliens which cannot be admitted."

The reasoning here used, would not, in any view, be conclusive;—because there are powers exercised by most other governments, which, in the United States, are withheld by the people, both from the general government and from the state governments. Of this sort are many of the powers prohibited by the declarations of right prefixed to the constitutions, or by clauses in the constitutions, in the nature of such declarations. Nay, so far is the political system of the United States distinguishable from that of other countries, by the caution with which powers are delegated and defined; that in one very important case, even of commercial regulation and revenue, the power is absolutely locked up against the hands of both governments. A tax on exports can be laid by no constitutional authority whatever. Under a system thus peculiarly guarded, there could scarcely be no absurdity in supposing, that alien friends, who, if guilty of treasonable machinations, may be punished, or if suspected on probable grounds, may be secured by pledges or imprisonment, in like manner with permanent citizens, were never meant to be subjected to banishment by any arbitrary and unusual process, either under one government or the other.

But it is not the inconclusiveness of the general reasoning in this passage which chiefly calls the attention to it. It is the principle assumed by it, that the powers held by the states are given to them by the constitution of the United States; and the inference from this principle, that the powers supposed to be necessary which are not so given to the states, are