No. 11-299 DISTRICT 30A

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA)
)
v.) FROM COUNTY OF MACON
) NO. 10 CRS 050329
Isaac Hutchison Birch)

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Appellant's Brief

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Appellant's Brief

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Issues Presented

I. Did the Court have jurisdiction; actually hold lawful title demonstrating an unbroken chain of custody over the soil; territorial jurisdiction, and therefore the roads of North-Carolina, and does it have proven jurisdiction; in personum, over a claimant (the 'Appellant') of that organic body politic, proven beyond a reasonable doubt by the State, once jurisdiction was challenged?

II. Did the Court err by failing to give a jury instruction regarding the jury's right to return a special verdict that the court lacked jurisdiction if the State failed to prove beyond a reasonable doubt that the court did have jurisdiction?

III. Does the body politic operating through the procreator and the court have jurisdiction; actually hold lawful title demonstrating an unbroken chain of custody over the soil; territorial jurisdiction, and therefore the roads of North-Carolina, and does it have in personam jurisdiction over a claimant (the 'Appellant') of that organic body politic?

STATEMENT OF THE CASE

Isaac Hutchison Birch (hereinafter "Appellant") was charged with an Implied Consent Driving Under the Influence of an Impairing Substance on 3 March 2010(R pp. 2-11). Appellant challenged the jurisdiction of the State to try him on 21 May 2010 (R pp. 12 – 109 & 113-117). Appellant was found guilty (R pp. 121) by a jury, and sentenced September30, 2010 (R pp. 122-125). Appellant then appealed orally(R pp.125) and in writing (R pp.126-127). The transcription of the record was requested on October 1, 2010 (R pp.129-131) for 1 June 2010, 2 June 2010, and 28 September 2010 to 30 September 2010 (R pp.132-135). The purposed record was served on 28 January 2011 (R pp.137). The record was settled by the silence of the State on the 26 February 2011, and filed in the COURT OF APPEALS on 8 March 2011 and docketed 15 March 2011.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Isaac Hutchison Birch, maintaining his special appearance, appealing as a matter of right - N.C. G.S. § 15A-1444(a); N.C. G.S. § 15A-1442; N.C. G.S. § 15A-1443(b)

STATEMENT OF THE FACTS

Appellant is a Citizen of the de jure State of North-Carolina established 18 December 1776, and put into abeyance by acts of the United States Congress 11 March 1868 - through breach of trust, and enforced by military usurpation and abuse of power on 1 July 1868. Isaac Hutchison Birch, as one of the 'People'; those of Posterity as described in the *U.S. Const. pmbl., U.S. Declar. Ind. N.C. Declaration Rights of 1776,* and recognizes this 12th State as the lawful, legitimate State government, originated by the free people of The State of North-Carolina - a free and independent country.

On 1 June 2010, Appellant made a special appearance for the session of the MACON COUNTY SUPERIOR COURT before JUDGE LETTS, judge presiding, at which time jurisdictional challenge was denied as a motion by LETTS. LETTS signed the Waiver of Counsel for Appellant (T vol. 1 p, 2-4) over objection.

On 2 June 2010, Appellant made a special appearance for the session of the MACON COUNTY SUPERIOR COURT, before JUDGE LETTS, judge presiding. Appellant retracted the previous Waiver of Counsel signed by LETTS, at which time Appellant pointed out his opposition to the 'Certificate of the Judge'

portion of the waiver, to which JUDGE LETTS noted the objection and entered the waiver without Appellant's signature (2T p. 8-10, 13, 14). Appellant inquired if JUDGE LETTS had read the Appellant's Memorandum of Law (R pp. 12-109), LETTS affirmed (2T p. 10, line 4-14).

On 28 September 2010, Appellant made a special appearance for the session of the MACON COUNTY SUPERIOR COURT, before JUDGE MARK POWELL, judge presiding. Appellant, at that time, attempted to serve an ADDENDUM TO MEMORANDUM OF LAW (R pp.113-117), maintaining his special appearance to challenge jurisdiction, which was refused by both the COURT and the STATE. Appellant later that day filed it with the CLERK'S OFFICE and served on the DISTRICT ATTORNEY (3T p. 18).

On 29 September 2010, Appellant made a special appearance for the session of the MACON COUNTY SUPERIOR COURT, before JUDGE MARK POWELL, judge presiding. Appellant was again told to return the following day (4T pp.23).

On 30 September 2010, Appellant made a special appearance for the criminal session of the MACON COUNTY SUPERIOR COURT, before JUDGE MARK POWELL, judge presiding. Appellant again challenged jurisdiction in open court, it was treated as a motion and denied (5T pp. 28-29). Jurisdiction had not been established, and Appellant did not participate in the trial proceeding (T5

pp.31, 33, 63-65), with the intention of maintaining his special appearance, challenging jurisdiction (T5 pp. 33-38, 76-77). JUDGE POWELL gave instruction to the Jury, Appellant was challenging jurisdiction, they were not to hold it against Appellant, and the issue of jurisdiction was not for them to decide; it was a matter in law reserved to the discretion of the judge (T5 pp. 38-39). Appellant also reminded JUDGE POWELL of his de facto oath, his duty the U.S. Constitution, and his obligation to move appropriately for lack of jurisdiction (5T pp.37). JUDGE POWELL and the STATE proceeded with trial without jurisdiction being established once challenged; the STATE offering no rebuttal to the Memorandum of Law and the attached exhibits (5T pp. 64).

SUMMARY OF ARGUMENT

The U.S. Constitution states it is ordained for "*ourselves and our posterity*." It further states: (1) "…*no new State shall be formed or erected within the Jurisdiction of any other State...*", (2) Congress cannot pass bills of attainder and (3) shall guarantee to every State a republican form of government, (4) when Amendments are proposed Congress cannot deprive any State of equal suffrage in the Senate, (5) no person shall be deprived of life, liberty or property without due process of law and (6) rights not granted to Congress are reserved to the People. Federalist Paper #39 states: "*Each State, in ratifying the Constitution, is considered as a **sovereign** body, independent of all others, and only to be bound by its own*

voluntary act. In this relation, then, the new Constitution will,…, be a federal, and not a national constitution." and; "*The idea of a national government involves in it, … an indefinite supremacy over all persons and things, ... Among a people consolidated into one nation, this supremacy is completely vested in the national legislature.... In this relation, then, the proposed government cannot be deemed a national one; …, and leaves to the several States a residuary and inviolable sovereignty over all other objects."*

The conflicts of law are; Two States named North-Carolina have entered the American Union. Both claim the right to exercise lawful jurisdiction over the soil upon individuals within its' borders. The first entered the Union in 1789 as the 12th State, the second on June 25, 1868 as the 39th State. Their only commonality is the soil claimed and name. Their differences are the body politics and constitutions. The fundamental issues presented here are (1) is the 39th State a continuation of the posterity that is mentioned in the Constitution or an unconstitutional new creation, and (2) which body politic holds the lawful and constitutional authority to exercise jurisdiction and demand obedience within the borders of North-Carolina? State citizens with a sworn allegiance to the Constitution of the 12th State or the Nationalized people who have an allegiance to the 39th "State" and, (3) can a Citizen of North-Carolina have a reasonable expectation that a lawful challenge to jurisdiction will have a good faith answer prior to loss of liberty or property?

No evidence has been presented that supports the original State body politic/posterity "re-entered" the Union in 1868. Likewise, no evidence has been presented that supports Congress's authority to annul the original State body politic and their organic laws.

Appellant is a Citizen of, has an oath of allegiance to and recognizes the jurisdiction of the 12th State as the lawful, legitimate State government that has never been annulled by lawful.

These issues have been brought up in the federal Supreme Court and in the County Courts of Gaston, Mecklenburg, Forsyth, Yadkin, Rowan, Wilkes and Union. In every instance they were met with obstruction through avoidance.

Every Constitutional clause and Federalist principle listed in the opening paragraph were violated in order to create the nationalized State of North Carolina. There is no known principle of law that demands legal obedience to usurpation of laws. I therefore challenge the jurisdiction created by Reconstruction with full expectation of a good faith answer from your prosecutors of the law.

ARGUMENT

I. STANDARD OF REVIEW: For Questions regarding jurisdiction, a challenge to the jurisdiction is an affirmative defense, with the burden of persuasion on the accused are no longer authoritative. *State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).*

For questions regarding Plain error: (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in an obstruction of justice and denial of a fair trial. *State v. Bishop, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997); State v. Odom, 307 N.C. 655, 661, 300 S.E.2d 375, 378-9 (1983).*

Abuse of discretion: "a test which requires the reviewing court to determine whether the decision of the trial court is manifestly unsupported by reason or is so arbitrary that it cannot be the result of a reasoned decision" *State v. Locklear, 331 N.C. 239 (1992); N.C.G.S. 15A-1443.*

De novo: a standard of review typically applied to a trial court's legal decisions, as opposed to findings of fact, which do not involve an exercise of discretion. Under a *de novo* standard of review, the reviewing court considers the matter anew and freely substitutes its own judgment for that of the lower court. *NC Dept. of Envt. & Natural Resources v. Carroll, 358 N.C. 649 (2004).*

When a trial court admits evidence over objection, it creates a question of law that is reviewable de novo [*State v. Barber*, 335 N.C. 120 (1993), *State v. Bell*, 164 N.C. App. 83 (2004)].

II. Did the Court have jurisdiction, actually hold lawful title demonstrating an unbroken chain of custody over the soil and therefore the roads of North-Carolina, and does it have in personam jurisdiction, over a

claimant (the 'Appellant') of the organic body politic, proven beyond a reasonable doubt by the State, once jurisdiction was challenged?

DISCUSSION: A Court must have jurisdiction in order to reach the merits of a case - once jurisdiction is challenged, it must be documented, shown, and proven to lawfully exist before a cause may lawfully proceed in a court. *See James Brown v. Richard Keene, also see, 33 U.S. 112, 115(1834), McNutt v GMAC, 298 U.S. 178; Hagans v. Lavine, 415 U.S. 528 (1974); Stuck v. Medical Examiners, 94 Ca2d 751.211 P2s 389; McNutt v. G.M., 56 S. Ct. 789,80 L. Ed. 1135; Thomson v. Gaskiel, 62 S. Ct. 673, 83 L. Ed. 111*. The Court proceeded in plain error by moving to trial without the State bearing the burden of proof of jurisdiction in light of the issues presented in the Memorandum (R pp.22-84), and accompanying exhibits (R pp.85-105). "…jurisdiction is a matter which, when contested, should be proven by the prosecution as a prerequisite to the authority of the court to enter judgment" *Batdorf*. This applies to this case in that jurisdiction must be settled before a trial proceed onto merits. In *Batdorf* the question of jurisdiction arose between NORTH CAROLINA and VIRGINA; in this case it is between two different North-Carolinas that have entered the Union, one de jure, the other de facto.

The Court abused its discretion by its prejudicial decision by ignoring the jurisdictional challenge; treating it as a motion in several instances and denying it

(T vol. 1 p, 2-3; 5T pp. 28-29; 5T pp. 76-77). This was a denial of due process of law.

The Court erred in proceeding with trial and neglected to move itself to dismiss for want of jurisdiction (5T pp. 37). These actions gave the appearance of obstruction of justice; essentially using the 'Chilling Effect Doctrine' to dissuade the exercise of lawful status and standing, ignoring a valid argument in law.

III. Did the Court err by failing to give the jury instruction regarding the jury's right to return a special verdict that the court lacked jurisdiction if the State failed beyond a reasonable doubt to show that the court did have jurisdiction?

DISCUSSION: The Court made it quite clear that the jurisdictional issue was one that was at its' discretion and gave the jury instruction that jurisdiction was not to have an effect on their decision (T5 pp. 38-39). The trial court abused its discretion in giving the jury instruction to ignore any jurisdictional issues, and did not give them instruction to return a special verdict indicating a lack of jurisdiction, if the State did not prove it beyond a reasonable doubt; the Court neglected to place the burden of proof in regard to jurisdiction upon the Plaintiff, as established by *State v. Batdorf.*

IV. Does the body politic operating through the procreator and the court have jurisdiction; actually hold lawful title demonstrating an unbroken chain of custody over the soil; territorial jurisdiction, and therefore the roads of North-Carolina, and

does it have in personam jurisdiction over a claimant (the 'Appellant') of that organic body politic?

DISCUSSION: This is a case of first impression, therefore the standard of review is somewhat clouded. The conflict of law here is that there are two States called 'North Carolina'; two separate body politics, that have entered the American Union, and a State must have a lawful, provable jurisdiction that can withstand a legal challenge (see Am. Jur. 2nd Conflicts of Law, Constitutional Law§1-359); lawful, provable jurisdiction is the foundation and beginning of due process - this is a fundamental concept; a maxim of law. What is being challenged is the constitutionality of the Reconstruction Act of 2 March 1867 (herein after "the Act"), the subsequent military actions taken to enact them, the forced 'constitutional amendment', the resulting laws founded upon this breach of trust, and the forced creation of new States within existing States.

As a seventh generation American, the Appellant has a duty to his forefathers; the grantors, to protect and uphold the public trusts, the indentures of those trusts, the due process enumerated for the trustees and to protect the intent of that which was granted. In the instances of *The Declaration of Independence*, *U.S. Constitution*, *and* *The Constitution of the State of North-Carolina, December 18, 1776* these documents elucidate, with great care and in specific detail, the duty of a

free people, the powers which originated with the People that are granted to these American forms of government, and the limited scope of those powers; the duties and responsibilities of the trustees.

Two State governments named 'The State of North Carolina' have entered the Union, the 12th State; the de jure State (herein after "12th State"), and the 39th State; the de facto State(herein after "39th State"). The 39th State's entrance was erroneously termed as the 12th States re-admittance into the Union, according to the United States Congress; see 15 STAT. 73-74, Ch. 70. The 39th State's was, in fact, not the re-admitting of the 12th State, but rather the admitting of a new State with a different body politic, laws, and fundamental principles. These two body politics of the 12th State and the 39th State are identifiable by their suffrage:

N.C. Const. of 1776

VII. That all freemen, of the age of twenty-one years, ..., shall be entitled to vote for a member of the Senate.

VIII. That all freemen of the age of twenty-one Years, ... shall be entitled to vote for members of the House of Commons

XL. That every foreigner, who comes to settle in this State having first taken an oath of allegiance to the same, ... shall be deemed a free citizen.

And,

N.C. Const. of 1868

Article VI- SUFFRAGE AND ELIGIBILITY TO OFFICE

Section 1. Who may vote.

Every person born in the United States and every person who has been naturalized, 18 years of age, and possessing the qualifications set out in this Article, shall be entitled to vote at any election by the people of the State, except as herein otherwise provided.

Of the 12th State and the 39th State only the 12th State is the lawful, constitutional and legitimate one.

The historical facts are that a new State was created by the Act. There is no evidence that the original State "re-entered" the Union, which it helped to create. Appellant recognizes the 12th State as the lawful, legitimate State government originated by the free people of The State of North-Carolina, as opposed to the 39th State's government that was put in place through the Reconstruction Acts and the coerced passage of the 14th Amendment. THE STATE OF NORTH CAROLINA does not have an unbroken chain of custody which demonstrates a clear title to the land called North-Carolina, and by the nature of its creation, has no jurisdiction over Citizens of The State of North-Carolina.

The Appellant is a Citizen of The State of North-Carolina by declaration and having paid taxes to (R pp.85-89). The State of North-Carolina was in abeyance from 2 July 1868 to 1 December 1997. This original jurisdiction being the lawful body politic of the State of North-Carolina is a trust for the Freemen, which is entitled to governing the laws of the State.

The following historical facts are undisputed and pertinent to the issue at hand:

Because of abuse by the Crown and Parliament, the Freeman of The State of North-Carolina gathered to declare their right to be a free, independent, self-governing people. These People set forth the principal that a government which habitually abuses the law and denies remedy to the people loses its right to govern, and any attempt to govern while denying justice and due process is but usurpation.

The fundamental relationship between a government and a people has long been universally recognized. This relationship consists of two parts: (1) Allegiance, and (2) Protection. Governments are instituted for the purpose of protecting the rights of the people. In return the people have a duty to give allegiance and affinity to support the government. This is stated in the opening sentence of the North-Carolina Constitution of December 18, 1776.

This government of The State of North-Carolina was recognized by 12 other countries/states as the legitimate and the rightful government of the Freeman of The State of North-Carolina. These Freeman chose to purposefully and expressly place into their fundamental and organic laws this universal and reciprocal relationship.

This same fundamental principal was also expressed in *Declaration of Independence*. This document was an indictment against the King of his abuses and usurpations, which violated the universal reciprocal relationship between a government and a people. We, by definition, and of right, seceded from England by issuing the *Declaration of Independence*. This led to organizing a Union of Sovereign States in the form of the Articles of Confederation, which instituted for us a new Federal government.

The War for Independence was won, and Great Britain acknowledged the independence of the several *"free, sovereign and independent States"* in Treaty of Paris, U.S.A-G.B., Sept. 3, 1783, Library of Congress C.N. 32019213. These States included the State of North- Carolina. The title to the property of North-Carolina was transferred from the King to the Freemen of the State.

The *Articles of Confederation and Perpetual Union* created the first form of government under which the several states organized themselves into. This government deemed itself a perpetual Union in article 13 and in its title.

The several States, through the adoption of *U.S. Constituiton*, seceded from the *Articles of Confederation*. The definition of 'secede' according to American Dictionary of the English Language, Noah Webster, 1828 is *"to withdraw from fellowship, communion or association; to separate one's self; as certain ministers seceded from the church of Scotland about the year 1733"*. The Union of States realized the form of Government under the *Articles of Confederation* did not best secure their rights and chose to alter and abolish that form of Government; peaceful secession was their method.

The fundamental principles of this country are the people of the several states had a right to change their form of Government of their own free will and without coercion. This was exampled in our change from the *Articles of Confederation* to *The Constitution for the United States of America*. Each state freely chose to withdraw their consent from the form of government which expressly declared itself "a perpetual Union". The term "a perpetual Union" was left out of the *Constitution for the United States of America*, 1787, and its' ratification was left to the 'People'..

Article VII of the *Constitution for the United States of America* says, *"The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same."* There were thirteen States involved in the *Articles of Confederation*. The new proposed

Constitution for the United States of America went into effect once nine of the thirteen united States, through convention, chose to voluntarily secede from the Government organized under the *Articles of Confederation*. This process could in effect have nine States organized under the new Constitution, leaving four States as sovereign nation States.

The Continental Congress was informed that the Constitution was ratified by the requisite number of nine States on July 2, 1788. On August 13, 1788 the Continental Congress voted to inaugurate the new Government on March 4, 1789. North-Carolina and Rhode Island were not a part of that Government. North-Carolina ratified the new constitution on November 21, 1789, leaving it as a sovereign nation State for approximately eight months. Rhode Island ratified the Constitution on May 29, 1790, leaving it as a sovereign nation State, outside the newly constituted government, for over one year and two months. These two States were not coerced by force of arms to join the Union formed by the new constitution. President Washington did not wage war on North-Carolina or Rhode Island.

On 24 January 1861, The North Carolina Legislature met and directed the people to vote on whether they wanted a convention to consider secession. On Feb. 28, 1861 the vote was held. The call for a convention was defeated by 651 votes, the freemen voted against even considering secession.

On March 4, 1861 Abraham Lincoln, in his first inaugural address declared that he would "*…hold, occupy, and possess the property and places belonging to the government, and collect the duties and impost*"; *see The Congressional Globe, Senate, 37th Congress, 4th Session, pp. 1433-1435.* The seceded Southern States considered these words a declaration of war because the only way Lincoln could execute what he had stated was by force. Lincoln sent reinforcement troops to Fort Sumter. South Carolina chose a preemptive strike on Fort Sumter on April 12, 1861, not allowing the reinforcement troops to land at Fort Sumter.

On April 14, 1861 the Secretary of War notified Governor Ellis of North-Carolina that the Federal Government expected the North-Carolina to furnish 2 regiments of troops to make war on the seceded states - Governor Ellis's refused,*"... Sir, Your dispatch is received, and if genuine which its extraordinary character leads one to doubt, I have to say in reply, that I regard the levy of troops made by the Administration for the purposes of subjugating the States of the South, as in violation of the Constitution, and as a gross usurpation of power. I can be no part to this wicked violation of the laws of the Country and to this war upon the liberties of a free people. You can get no troops from North Carolina...*"; see *North Carolina State Archives, GLB 49.* A convention was held in Raleigh on May 20, 1861 and an Ordinance of Secession was signed; *see Secretary of State Records.*

North Carolina State Archives, SS.XX. Recordkeeping. Records of the State. State Constitutions. State Convention of 1861-1862, Vol. 2.

In July of 1861 both Houses of Congress pass Resolutions stating the Object of the War (Congressional Globe, 37th Congress, 1st Session, Object of the War, pp. 257 *;* Congressional Globe, 37th Congress, 1st Session, Present Condition of the Country, pp.222). The purpose of the War declared by Congress was not to conquer, subjugate, overthrow or interfere with the rights of the seceded states or to overthrow or interfere with the institutions of the seceded states.

In April/May 1865, after the surrender of the two largest confederate armies under Lee and Johnson the war ended and peace is declared by Presidential Proclamations on April 2, 1866; *see 14 STAT. 811-813, No.1* and August 20, 1866; *see, 14 STAT. 814-817, No. 4.*

On December 6, 1865 the eleven previous Confederate States are considered as re-admitted into the Union as lawful states with lawful governments as evidenced by their participation in the amending of the Constitution for the United States of America abolishing slavery; *see 13 STAT. No.52, 774-775*.

The 14th Amendment for the nationalization of citizenship is proposed by the 39th Congress 16 June 1866; *see 14 STAT. 358- 359, No.48*. Congress sends the proposed 14th Amendment to all governments it recognizes as having lawful authority to pass or reject said Amendment. The Government of The State of

North-Carolina organized under the Constitution of 18 December 1776 was recognized by Congress as having such authority, and rejected the purposed amendment.

On March 2, 1867 the United States Congress passed the first Reconstruction Act; *see14 STAT. 428-429, Ch. 153*, based upon the principal that the Southern states were conquered territory having no appropriate civil government - it is this Act that is unconstitutional upon its face, Andrew Johnson was aware of its unconstitutionality vetoing it; see *Congressional Globe, Senate, 39th Congress, 2nd Session, pp.1969-1972*, Andrew Johnson rejected the premise upon which the First Reconstruction Act was based , there were no lawful governments in the Southern states. This was the main argument of his veto, which was drafted principally by the form Chief Justice Pennsylvania Supreme Court, and U.S. Attorney General Jeremiah S. Black. A Congressionally selected group of people residing in North-Carolina were ordered to create a new constitution that was not of the consent of the Freeman of 12th State. The most extreme and amazing feature of the Act was the requirement that each excluded state must ratify the Fourteenth Amendment, in order to again enjoy the status and rights of a State, including representation in Congress, Section 3 of the Act sets forth this compulsive coercion thus imposed upon the Southern States.

The most apt characterization of this compulsive provision, placing these States under military authority, there to remain until they comply, *inter alia*, with this requirement of ratifying the rejected Fourteenth Amendment. The intent of this compulsive characteristic is articulated in a floor debate speech in the U.S. Senate by Senator Doolittle of Wisconsin, a Northerner and a Conservative Republican, in his debate with Senator Henderson:

"…My friend has said what has been said all around me, what is said every day: the people of the South have rejected the constitutional amendment, and therefore we will march upon them and force them to adopt it at the point of a bayonet, and establish military power over them until they adopt do adopt it…"; see *Congressional Globe, 39th Congress, 2nd Session, pp.1644.*

Surely, the authors of our Constitution never contemplated or understood that ratification of a constitutional amendment proposal by a State could lawfully be compelled "at the point of a bayonet", and by subjecting all aspects of civil life in the recalcitrant State to continue military rule, until said State recanted its heresy in rejecting the proposed amendment and yielded the desired ratification to the duress of continued and compelling force (General Order #120,Second Military District, 1868; National Archives RG 94).

It is elementary that any consideration of an amendment proposal from Congress by a State legislature must involve equal freedom on the part of each State to ratify or reject, as its legislature in its deliberation and discretion determine, or by a convention of the people of the respective state. The Constitutional right and power of a State legislature to ratify carries with it, by necessary implication, an unquestioned and unfettered right and power to refuse to ratify, the Act expressly did not allow for rejection.

On July 1, 1868 Government Jonathan Worth surrendered the de jure Government of 12th State under what he deemed military duress, not of the consent of the governed, without legality, and in times of declared peace in a letter addressed to military appointed Governor W.W. Holden; *see The Papers of William Wood Holden, Volume 1, pp.317-318, Raleigh, Division of Archives and History*. Governor Worth was aware that constitutionality of the Acts was being challenged before the U.S. Supreme Court .

Governor Worth referenced judicial obstruction in his letter, he was aware of *Mississippi v. Johnson, 4 Wallace, 475*. The court dismissed it on the technical ground that the court had *"no jurisdiction of a bill to enjoin the President in the performance of his official duties…"* Governor Worth's negative opinion of the Supreme Court was proven accurate based upon subsequent Supreme Court actions and rulings.

The constitutionality of the Act went to the U.S. Supreme Court a 2nd time in the case of *Georgia v. Stanton, 6 Wallace, 50.* The court found an equally technical, yet evasive, reason for declining jurisdiction by holding that the case concerned purely political matters, instead of personal and property rights *"…the rights in danger must be rights of persons or property, not merely political rights"*. The Supreme Court also stated that there was no way in which to determine the results of Major-General John Pope's, execution of the law – this is a absurd perspective considering the body of the Act. The Supreme Court had full authority to act *sua sponte,* instead they abdicated their duty and obligation to protect the rights of the American People; see Federalist Papers #78, thus acting as co-conspirators in usurpation.

The constitutionality of the Reconstruction Acts went to the U.S. Supreme Court a third time, in *Ex Parte McCardle*, 6 Wallace, 318. The US Supreme Court assumed jurisdiction on the constitutionality of the Reconstruction Acts and were argued before the Supreme Court. Before the Supreme Court could enter a judgment, the Radical Republicans in control of Congress, rushed thru a bill repealing the amendment of February 5th, 1867 to the Judicial Act of 1789 (15 STAT. 44, Ch.34), prohibiting the Supreme Court from preceding on any appeal already before it. The arguments in the McCardle case had been finished while the bill was still pending. The court waited until the bill was passed and then

postponed further consideration of the matter until the next term. In the biggest battle between Congress and the Supreme Court in this nation's history, for the first and only time, Congress removes the court's jurisdiction to rule on a case already argued before it.

The last attempt to obtain a definite ruling on the constitutionality of the Reconstruction Acts was made in the case of *Ex Parte Yerger, 8 Wallace, 85*. The Supreme Court assumed jurisdiction and this action was immediately answered by the introduction of a bill in the Senate explicitly prohibiting the Supreme Court from considering any case which involved the validly of the Reconstruction Acts, followed by another prohibiting the judicial review of any act of Congress; *see, Ernest Sutherland Bates, The Story of the Supreme Court,pp.181, 1st ed. 1936* . A compromise was reached outside of court whereby Yerger, upon being turned over to the civil authorities, withdrew his petition. The proposed Acts of Congress were therefore never enacted.

Finally, Congress's ability to control the results of a particular case by restricting the jurisdiction of the judicial branch of the United States, once jurisdiction had been granted was refuted by the U.S. Supreme Court in *United States v. Klein, 80 U.S.128*; however, *Ex Parte Yerger* was the last substantive challenge to the constitutional validity of the Reconstruction Acts; there have been no significant facial challenges to the Act since.

The 30th State as established by the Reconstruction Act of 2 March 1867, has no lawful authority over a Citizen of the 12th State, de jure; The Appellant is a Citizen of the 12th State. The 39th State does not have territorial jurisdiction as it does not have nor can it demonstrate an unbroken chain of custody, demonstrating a clear title, over the land that is North-Carolina. The basis of the Plaintiffs action is a presumption of lawful jurisdiction of its' executive branch of government and of the judicial branch to hear a cause and bring judgment in this action, however an unconstitutional act creates nothing, in *Norton v Shelby County, State of Tennessee 118 U.S. 425* the United States Supreme Court agrees, as does the Federalist, Alexander Hamilton (Federalist Papers #78). Alexander Hamilton's writings express that adhering to the *Constitution for the United States of America* was the intent - It is clear that a legislative act that was contrary to the Constitution is not valid.

Also, the Act purportedly annulled the Constitution of the 12th State. The boundaries of the State were particularly defined in §25 of the *Declaration of rights* of the 1776 Constitution. The Constitution of the 39th State has no defined boundaries for its jurisdiction; *see N.C. Const. of 1868 Art. 1§34* .

In this present matter, the STATE OF NORTH CAROLINA, the Plaintiff, is, in fact, created by an unconstitutional act and without due process of law. This usurpation against the Freemen of 12th, was not done constitutionally or by their

consent. This act was put into place by military threat, coercion, and duress. Nowhere in the history of American jurisprudence have threat, duress, and coercion, utilized with a *Chilling Effect Doctrine*, create a lawfully binding obligation.

Congress' duty was and is to guarantee a republican form of government to the body politic of the 12th State, to protect the Freemen of the 12th State from invasion and usurpation, and not become the invaders and usurpers themselves. Congress' actions are a breach of trust and an abuse of discretion. This duty necessitates that a specific a Body Politic, are the object of what is being guaranteed – in this case, a republican form of government.

There appears to have been a fundamental change, between the year 1787 and the year 1868, in the Federal Government's belief of whom the "People" are. In 1787, the People were the free citizens of any state. These were the people who could alter their form of Government through convention - as we saw in the *Articles of Confederation* to the *Constitution for the United States of America*. In the time frame of 1861 to 1867 we see that Congress thought it appropriate and lawful to execute usurpation, fratricide, and genocide, all in the name of making every person in the United States of America "... subject to the jurisdiction there of…"(14th Article of Amendment). President Lincoln and the United States Congress followed the principal that the People were no longer the citizens of the

several States, but rather, a nationalized people subject to a National government (Federalist Papers #39), which is in contravention, and opposed to, free and independent States. President Lincoln claimed that the people of any one State had no authority to alter or to abolish their Form of Government; that the authority to alter or abolish their Form of Government came solely from the permission of the United States Congress; see *Special Session Message (July 4, 1861), in 7 MESSAGES AND PAPERS, supra note 4, at 3221, 3222* .

Thaddeus Stevens, the 'Father of Reconstruction', Representative of Pennsylvania, regarding Reconstruction states; "Though the President is Commander-in-Chief, Congress is his commander; and God willing, he shall obey. He and his minions shall learn that this is not a Government of kings and satraps, but a Government of the people, and that **Congress is the people**"; see *Congressional Globe, 39th Congress, 2nd Session, pp. 252*.

Thaddeus Steven's ideology is in direct conflict to, and an overthrow of, the founding principle of these organic American forms of government. The representatives of the people are not the people, and cannot substitute their will for the will of the people, , just as a Trustee cannot breach the trust expressed by the Grantor; *see Federalist Papers #78*.

The following Articles of the U,S, Constitution were violated through the forced creation of the 39th State:

Article I § 9 cl. 3 states, *"No bill of attainder ... shall be passed"*. The United States Congress took the position that the people of the State of North-Carolina, de jure, had committed treason by rebelling against the United States Government through the act of secession; *see 15 STAT. 699-700, No.3*.

Art. III § 3 cl. 1 states, *"Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid, and Comfort…"*

No entity within the United States can wage war on a State, nor provoke violence. Abraham Lincoln never recognized the Southern states as leaving the Union, and yet by the Article above, the only way to wage lawful war is on a foreign nation. Abraham Lincoln committed treason by his own justifications, and waged an unjust war.

Art. IV § 3 states, *"New States may be admitted by Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State…"*

This present 39th State was *"erected within the Jurisdiction of another State"* which violates this article of the Constitution for the United States of America.

Article V states, *"The Congress…shall propose amendments to the Constitution… (and) shall be valid to all intents and purposes as part of the*

Constitution…; Provided…that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

The 12th State was not allowed to seat Representatives in Congress until they ratified, and the 14th Amendment became part of the U.S. Constitution. These representatives were William Graham and John Pool, they were denied seats in Congress, the 12th State was denied Suffrage in the Senate, was denied Suffrage in the Senate, during the ratification process of the 14th Amendment

Amendment V states, *"No person…shall be deprived of life, liberty, or property, without due process of law; nor private property be taken for public use without just compensation."*

The Freemen of the 12th State were denied due process when Lincoln waged war. They violated no laws by seceding from the Union, or by defending themselves against the Federal Government's unjust war, therefore denying the Federal Government rights associated with conquest. The Federal Government violated International Law by not using all methods available to avoid war.

On 23 February 1866 Senator Fessenden attempted to justify the war as one of conquest and in doing so sited Vattel's, Law Of Nations as a justification. Senator Fessenden goes on to state his abstract and absurd reasoning justifying the principals of conquest in light of the fact that Congress expressly stated that the Object of the War was not for any purpose of conquest or subjugation. He leaves

out the Object of the War; *see Congressional Globe, 37th Congress, 1st Session, pp. 257; Congressional Globe, 37th Congress, 1st Session, pp.222,* and he fails to address the lawfulness and justness of the war using Vattel's writings; *see Monsieur de Vattel, The Law of Nations (Joseph Chitty, Esq. et al. eds., T.&J.W. Johnson 1853) Book III- OF WAR § 1, 3, 5, 26-32, 35, 38, 39, 183-185 & 201(1758)*. If the 36th thru 40th Congresses and Lincoln had used Vattel as a source prior to invading the Southern States, it would have been proven quickly that the United States was prosecuting an unjust war in violation of The Law of Nations.

Abraham Lincoln refused to meet with any Representatives from the Confederate States of America to discuss peaceful negotiations for the transfer of United States Military Forts. Lincoln did not recognize the Confederate States of America as a sovereign nation; see *Special Session Message, July 4, 1861, in 7 MESSAGES AND PAPERS, supra note 4, at 3221, 3222*. His position was not based upon the violation of any expressed statutes or laws. Lincoln's position was that the Southern States ordinances of secession were null and void, and that they were still States in the Union in rebellion to lawful authority. Lincoln's decision to wage war on Americans - exercising their right of self determination - set precedent, and overturned the fundamental principals these united States were founded upon.

President Lincoln made no attempt to pursue any judicial ruling on the lawfulness of his positions and arguments. Lincoln's disregard or lack of want for judicial ruling is further exemplified by ignoring a ruling from Chief Justice Taney of the Supreme Court of the United States; see *Ex parte Merryman*, *17 F. Cas. 144*. Lincoln ignored this judicial ruling and the orders of the court.

It is apparent that Senator Fessenden's and Lincoln's position is the position ultimately accepted and exercised by Congress on the States to this day. Fessenden's position is untenable. It is impossible to preserve the rights of a State in an unimpaired condition through an unjust war of conquest and subjugation. A Union of several States comprised exclusively of State Citizens cannot be preserved in an unimpaired condition through the Nationalization of citizenship. Simply stated, the Union was destroyed by the Reconstruction Acts. It was not preserved in an unimpaired condition.

Amendment IX states, *"The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people."*

Under this foundation of the Reconstruction Acts, we have many issues before us today, with laws and policies in place, which are beyond the enumerated powers of Congress. Individual States will vote and pass particular legislation, not realizing their diminished status, and then the Federal government steps in to go flagrantly against the people's will. The Reconstruction Acts and the 14th

Amendment are the foundation for virtually every unconstitutional act prosecuted against the States by Congress. This usurpation has been maintained and progressed by Congress and the nationalized states.

Amendment X states, *"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 clear and beyond all reasonable doubt that gross violations of the *Constitution for the United States of America* and inherent, natural rights of the People has taken place and continues to take place. These facts cannot be ignored without perpetuating an already comprised justice system.

We see that our united States of America was established upon the principals that government was founded by consent, for the purpose of securing the inalienable rights of man.

It is a common historical fact that abusive and oppressive governments justification for their abuses in a multitude of manners, i.e., Germany claimed sovereign right to exterminate Jews, some seek biased judiciaries, some seek dictatorial rights of a dictator. This list is virtually endless.

The Federalist Papers #78 tells us the judiciary should be a bulwark between the people and an over-reaching legislature. Our system of government consists of 4 parts: (1) the People (2) the Legislative (3) the Executive and (4) the

Judiciary branches. We once had in our American system of government of checks and balances designed to prevent and stop abuses. What we have today is a mere shadow and mockery of those fundamental principles. In our system, the checks and balances were designed to operate between the executive, legislative, and judiciary in a just and honorable manner, confined within the trust indentures which are constitutions; public trusts. The concept that the governments can violate laws, abuse their discretion, breach their duties as servants to the public trust, and abuse the People until such time that the People rise up violently, is despotic and treasonous, and violates the Laws of Nature and Natures 'God', and the fundamental purpose of a justice system.

The purpose of the Military Government was to maintain Military control while a new government with a new constitution was created by the dictates of Congress. This "new" government would not be allowed Representation in Congress until such time as it ratified the 14th Amendment and the 14th Amendment became part of the Federal Constitution. This new federally mandated State constitution was not a government for the Freeman of the State - a majority of the Freemen were forbidden to participate in the 'new elections' by the bills of attainder in the form of pains and penalties.

A candid review of the attempted adjudication of this issue is clear. The actions of the court that originated this Appeal originated demonstrate that the

courts chose to use avoidance, technicalities and incorrect reasoning as a means to not address this issue. This renders justice impossible. The clarity of the unlawfulness of these actions is apparent to a rational mind. To have a sworn duty to uphold justice and law and then claim technicalities and avoidance as a legal position to maintain unconstitutional acts and usurpations, in spite of well-known and well-documented facts in American jurisprudence and history, would be equal to claiming that Neil Armstrong and Buzz Aldrin worked together to rob a Wells Fargo Truck in Des Moines, Iowa on July 20, 1969 while the world was watching them on the surface of the moon. This is absurd reasoning.

Undeterred by the historical facts and fundamental principles of the jurisprudence of liberty and freedom, there is a concept that with time Reconstruction became valid. This concept is stated by Walter Suthon in the *Tulane Law Review*; see Walter J. Suthon, Jr , *Dubious Origin Of The Fourteenth Amendment,* 28 TULANE L.R. 22(1953).

Mr. Suthon's Treatise on the unconstitutionality of Reconstruction and the 14th Amendment is lacking, his words fail to take several important issues into consideration. The Reconstruction Acts made three fundamental changes in our government all through coercion: (1) It changed the Body Politic (2) this changed Body politic changed the fundamental laws of the states by executing new constitutions under federal dictates(3) Body Politics operating under new

constitutions adopted the 14th amendment to the United States Constitution, which created a nationalized citizenship.

Mr. Suthon's belief, that the original Body Politics, removed by Reconstruction, taking 'charge of', and 'administering' the laws and governments resulting from Reconstruction somehow reverses Reconstruction and re-establishes lawful government, is incorrect. The only way for lawful government to be re-established, after usurpation, is for the people to go back to their organic Law. Only the organic body politic with a Title interest in the land, can exercise this right and it must be done in proper standing as a Citizen of the respective State/Country. A United States citizen by the 14th amendment has no interest in Title or Trust to the respective State in which they 'reside', and are in an adversarial relationship to the State by their upholding the overthrow of lawful government; perpetuating usurpation and are a subject class citizen to the Federal Government ; see *Elk vs. Wilkins, 112 US 94*.

A United States citizen does not possess the unalienable Rights enumerated in the Bill of Rights; see*US vs. Valentine 288 F. Supp. 597*; also see *Jones vs. Temmer, 829 F.Supp. 1226,* and is considered to be a citizen of the District of Columbia. There are misconceptions as to the creation of a *"United States citizen."* Some believe that this was an extension of citizenship for the freed blacks only. We need only look at the writings and

speeches from that time frame in order to understand the original intent. James Blaine made a political speech on August 29, 1866 in Skowhegan, Maine on the purpose and object of the proposed 14th Amendment. Congressman Blaine is very clear that United States citizenship was intended as a national citizenship which includes both black and white citizens; see *James G. Blaine, Political Discussions 1856–1886, pp.64(The Henry Bill Publishing Company 1887)*.Congressman Blaine further explained the intentions of the 14th amendment and Reconstruction in his autobiography; see *James G. Blaine, Twenty Years of Congress 1861-1881 Vol. 2, pp. 300,303,312-313 (The Henry Bill Publishing Company 1886)*. It must be remembered Congressman Blaine was in full support of both the 14th Amendment and Reconstruction measures. It was unnecessary for Congressman Blaine to add in the statement *"…all prohibited the existence of any form of slavery"* since slavery was abolished by constitutional amendment approximately two years earlier. The particularity of Blaine's perspective is his belief of the heresy and adverse theory of State-rights.

It should be needless to state that usurpation and unlawful acts of coercion create no lawfully binding obligation on anyone; unconstitutional acts create no law, confer no rights, impose no duties, afford no protections, and create no offices. Acts of such offices have no validity and are merely executed under the

color of authority; the office is rendered inoperative as if it had never been in existence; see *Norton v. Shelby County, 6 S.Ct. 1121,* also see *Federalist Papers #78, also see 16 Am Jur Sec 177*). An unconstitutional act is fraud upon the people and fraud conveys nothing.

CONCLUSION

In order for the NORTH CAROLINA COURT OF APPEALS to answer the question presented, it must also be asked and considered in the answering of that question: Does Congress have lawful constitutional authority to annul states in times of peace, under the principle of conquest of an unjust war? Does Congress have lawful constitutional authority to deny equal suffrage in the Senate to a State? Does Congress have the lawful authority to coerce the adoption of the 14th Amendment to states that had previously rejected it? Does Congress have the lawful constitutional authority to commit the political crime of treason through a coup d'état, overthrowing State governments and ordering the amending of the Constitution for the United States of America? Does this set the precedent that coercion has binding force in law, which all persons are required to give obedience?

Relief Sought

The Appellant seeks remedy to this action in the following manner;

1. That the "State"/Trial Court that prosecuted this action provide written proof beyond reasonable doubt, of the lawfulness of the due process of

the Reconstruction Acts of Congress that created it, to include the Constitutional authority for said Acts and show how the resulting "State" is a State of the consent of the posterity of the people who compacted together under the United States Constitution, and provide the exact day, time, reason, and lawful justification for the 12th state of the union to be lawfully annulled

2. Or, If the "State"/Trial Court that is prosecuting this action simply refuses to put on the record it's foundational and originating authority, and the foundation of its purported authority over the inhabitants of North-Carolina organized under the Constitution of December 18, 1776, then in law there was no action and all lower court judgments are void.

3. Or, The Court of Appeals should reverse the trial court's verdict.

Respectfully submitted, this 16th day of May, 2011.

By.../s/Isaac Hutchison Birch
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the Appellant certifies that the foregoing brief, which is prepared using a proportional font, is less than 8,750 words (excluding cover, indexes, tables of authorities, certificates of service, this certificate of compliance and appendixes) as reported by the word-processing software.

/s/Isaac Hutchison Birch
Appellant

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served an electronic copy of the above and foregoing Appellant Brief upon Jess D. Mekeel, Assistant Attorney General, North Carolina Department of Justice, Crime Control Section, 9001 Mail Service Center, Raleigh, NC 27699-9001, by sending the copy via email to jmekeel@ncdoj.gov.

This 16th day of May, 2011.

/s/ Isaac Hutchison Birch

CONTENTS OF THE APPENDIX

THE COURT: Mr. Birch, if you would step around, please.

MS. HORNSBY WELCH: Your Honor, I misspoke. He did not sign a waiver in district court. Judge Davis entered one for him.

THE COURT: 10 CRS 5069. Good morning, Mr. Birch. I need to find out what you want to do about an attorney. You can hire your own, represent yourself, or ask for a court-appointed attorney.

MR. BIRCH: I don't see any need for one right now until the issue at hand is resolved.

THE COURT: And what is the issue at hand?

MR. BIRCH: Jurisdiction of the state, sir.

THE COURT: Oh, okay. Just have a seat and I'll hear you.

MR. BIRCH: Before we went on the record, I'm reserving all my rights.

THE COURT: You're going to have to talk a little louder so she can take down everything you say.

This is 10 CRS 50329.

MR. BIRCH: Before we went on the record, I'm reserving all my rights. I filed a notice. I think the paperwork stands for itself.

THE COURT: Do you wish to be heard on this?

MR. BIRCH: Like I said, I believe it stands for

itself.

THE COURT: Okay. Your motion is denied. What do you want to do about an attorney, hire your own, represent yourself, or ask for court-appointed counsel?

MR. BIRCH: It wasn't a motion, sir.

THE COURT: Okay. Show that the defendant refuses to answer the Court; the Court will therefore enter a waiver of counsel for the defendant, Mr. Birch.

When does this matter need to be set for trial?

MR. ARNOLD: We're prepared to try this case now, your Honor.

MR. BIRCH: I object.

THE COURT: Objection is overruled.

When do you want to schedule this for trial?

MR. ARNOLD: Let's hold it open this week, if we can get to it. If not, the week of 6/28 will be just fine.

THE COURT: Mr. Birch, your jury trial will be this week. You need to stay in touch with the DA's office. The jury will be coming in in the morning, and we'll let you know when your matter is called for trial.

MR. BIRCH: Aren't Rule 15(a) under the General Statute -- isn't Rule 15(a) in force right now?

THE COURT: Yes, sir, it is. And I have made my ruling, and my ruling is final. You have a nice day. We'll be in touch with you.

THE COURT: Mr. Birch, come on down, please.

Mr. Birch, are you ready to proceed?

MR. BIRCH: Sir, there needs to be a correction in the court. This action is not ready for trial. I am here by special appearance to challenge jurisdiction. And the district attorney's office has had the opportunity since April 5th to answer that challenge, and they have not done so. They haven't given anything at all. So there is no action until lawful, provable jurisdiction is established, and I believe that I have presented evidence that is substantial enough to challenge that jurisdiction.

THE COURT: Sir, I have heard no evidence.

MR. BIRCH: The memorandum of the law has been submitted to you, and also the notice of prearraignment jurisdiction or -- excuse me, prearraignment special appearance to challenge jurisdiction.

THE COURT: Sir, what you put in the court file is not evidence.

MR. BIRCH: Okay.

THE COURT: If you wish to proceed on some motion, you may do so now.

MR. BIRCH: Well, I would consider it a plea in bar, sir, to challenge jurisdiction based upon the constitutionality of the Reconstruction Acts. And, basically, the Reconstruction Acts are what established the

jurisdiction of this state, and it's in contravention to Article IV, Section III of the United States Constitution.

THE COURT: Any other argument?

MR. BIRCH: That is the argument, sir.

THE COURT: Sir, your motion is denied.

Do you have any other motions?

MR. BIRCH: It's not a motion, sir. It's a plea at bar. And due process of law requires lawful, provable jurisdiction to be established. I'm not waiving my special appearance.

THE COURT: Sir, we're going to start a trial in a few moments. You will have a chance to select a jury.

MR. BIRCH: I have no intention of proceeding without due process being followed.

THE COURT: Yes, sir. I'm not going to be your attorney. I'll tell you what needs to be done like such as ask the jurors questions if you wish to do so. If you don't want to do so, that's fine.

MR. BIRCH: Due process of law has to be established, and I am here by special appearance to challenge jurisdiction.

THE COURT: Do you have any other motions?

MR. BIRCH: I'm here to challenge jurisdiction.

THE COURT: All right. I think we're ready for the jury.

"Mr. Birch, that is what you need to do." No. That's not my job. That's an attorney's job.

MR. BIRCH: Sir, I have a copy of your oath of office here. "I will endeavor to support and maintain the Constitution of the United States of America." And I understand the Civil Rules of Procedure, and I believe that function over form is of greater precedence. You understand -- I mean, it's very clear, all somebody has to do is go to the archive and look all this stuff up. It's not like it's some big secret. It was done in the open. I feel you have an obligation to move appropriately because jurisdiction has not been established.

THE COURT: Sir, I have ruled against you on that issue, and you can participate in the trial or you can choose not to. That's your decision.

MR. BIRCH: I just don't want to waste the jurors' time, you know. And to be honest, I don't see a point in the jury trial because they can't hear the merits of the case anyway. And it's wasting their time. It's wasting money in fact of the State of North Carolina, which I don't see the point in it, sir.

And I appreciate your consideration and your actually speaking with me. Actually I was expecting you to be much more adversarial. But I think that you should -- have you read the memorandum in its entirety?

THE COURT: Sir, I have looked through it. I won't say I have read every page of it. But I have looked through it. I did not know which case was going to be called for trial -- I heard your case was one that may be called for trial. But we didn't know until this morning. There were two others that were mentioned.

MR. BIRCH: Yes, I'm aware of that.

THE COURT: And I think possession of firearm by felon was one of the ones that might have been called for trial.

We're going to take a break now, and you can participate or not participate. I'm going to tell the jury you're challenging the jurisdiction of the Court, and that's not to be held against you in any way.

Anything from the State?

MS. HORNSBY WELCH: No, sir.

THE COURT: We'll be in recess for ten minutes.

(Whereupon, a recess was taken.)

THE COURT: We're ready for the jury.

(Whereupon, the jury entered the courtroom.)

THE COURT: Members of the jury, before we start hearing opening statements or evidence, I need to go over one particular point.

Mr. Birch, the defendant, has challenged the jurisdiction of this Court over him. And he has a right to

do that. And whether it's jurisdiction or not is a question of law for the judge to decide, and I have ruled against him. That's not to affect your decision in this case in any way when you're trying to decide whether the State has proved beyond a reasonable doubt if someone is guilty of an offense.

There's also certain documents in law that say in certain cases if you challenge the jurisdiction of a Court and you go ahead and participate in the proceeding, you have waived that. And that's always a concern when you're challenging the jurisdiction. So if Mr. Birch decides not to participate in this trial in some particular way, you are not to hold that against him. It has nothing to do with what you have to decide. He's just challenging the jurisdiction of the Court, as he has a right to do.

Does the State wish to make an opening statement?

MS. HORNSBY WELCH: No, sir.

THE COURT: Ready to present evidence?

MS. HORNSBY WELCH: Yes, sir. Your Honor, the State would call Officer Matt Breedlove.

(Whereupon, MATTHEW BREEDLOVE, having been duly sworn, testified as follows:)

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DIRECT EXAMINATION

BY MS. HORNSBY WELCH:

one day and say, "Come down here and argue." The transcript has to be ordered and paid for. The record on appeal has to be prepared.

I never did do much appellate work, but I know this much about it. There may be briefs. There may not be briefs. There may be oral argument. There may not be oral argument. It's really complicated.

Do you plan to represent yourself, hire an attorney or apply for an appointed attorney?

MR. BIRCH: I'm sorry?

THE COURT: Do you wish to represent yourself on the appeal?

MR. BIRCH: I'll deal with those issues later, sir.

THE COURT: So you're not asking to be appointed an appellate attorney?

MR. BIRCH: No, I am not.

THE COURT: All right.

Anything else from the State?

MS. HORNSBY WELCH: No, sir.

THE COURT: Mr. Birch, anything else?

MR. BIRCH: Well, I would really like some further explanation in regard to the Court's decision to ignore due process in regard to the jurisdictional challenge.

THE COURT: Sir, I have overruled your objection I think at least three times, maybe four.

March 2, 1867.
1866, ch. 236.
Ante, p. 231.

CHAP. CLII. — *An Act to amend an Act entitled "An Act authorizing the Construction of a Jail in and for the District of Columbia," approved* June [*July*] *twenty-five, eighteen hundred and sixty-six.*

Repeal of part of section six of act of 1866, ch. 236.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That so much of the sixth section of the act entitled "An act authorizing the construction of a jail in and for the District of Columbia," approved *June* [July] twenty-five, eighteen hundred and sixty-six, as specifies the amounts to be raised and paid into the treasury of the United States by the cities of Washington and Georgetown, respectively, before the completion of said jail, is hereby repealed.

City of Washington to pay $78,000 as its part for building jail in the District of Columbia.

SEC. 2. *And be it further enacted,* That it shall be the duty of the proper authorities of the city of Washington, and they are hereby required, to raise, by tax or otherwise, and pay into the treasury of the United States, at or before the time of the completion of said jail, the sum of seventy-eight thousand dollars; and it shall be the like duty of the proper authorities of the city of Georgetown, and they are hereby required, to raise, by tax or otherwise, and pay into the treasury of the United States, at or before the time of the completion of said jail, the sum of twelve thousand dollars.

Georgetown to pay $12,000.

APPROVED, March 2, 1867.

March 2, 1867.

CHAP. CLIII. — *An Act to provide for the more efficient Government of the Rebel States.*

Preamble.

WHEREAS no legal State governments or adequate protection for life or property now exists in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas; and whereas it is necessary that peace and good order should be enforced in said States until loyal and republican State governments can be legally established: Therefore,

See Vol. xv. pp. 2, 14, 29, 30.

Certain rebel States to be divided into military districts and subjected to military authority.
First District.
Second District.
Third District.
Fourth District.
Fifth District.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said rebel States shall be divided into military districts and made subject to the military authority of the United States as hereinafter prescribed, and for that purpose Virginia shall constitute the first district; North Carolina and South Carolina the second district; Georgia, Alabama, and Florida the third district; Mississippi and Arkansas the fourth district; and Louisiana and Texas the fifth district.

President to assign army officer to command each district.

SEC. 2. *And be it further enacted,* That it shall be the duty of the President to assign to the command of each of said districts an officer of the army, not below the rank of brigadier-general, and to detail a sufficient military force to enable such officer to perform his duties and enforce his authority within the district to which he is assigned.

Military force to be detailed.
Commanders of districts, their powers and duties.
Local civil tribunals.
Military tribunals.
State interference declared null.

SEC. 3. *And be it further enacted,* That it shall be the duty of each officer assigned as aforesaid, to protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals; and to this end he may allow local civil tribunals to take jurisdiction of and to try offenders, or, when in his judgment it may be necessary for the trial of offenders, he shall have power to organize military commissions or tribunals for that purpose, and all interference under color of State authority with the exercise of military authority under this act, shall be null and void.

Persons under military arrest to be speedily tried.
Punishment.
Sentences of military tribunals.

SEC. 4. *And be it further enacted,* That all persons put under military arrest by virtue of this act shall be tried without unnecessary delay, and no cruel or unusual punishment shall be inflicted, and no sentence of any military commission or tribunal hereby authorized, affecting the life or liberty of any person, shall be executed until it is approved by the officer in command of the district, and the laws and regulations for the govern-

ment of the army shall not be affected by this act, except in so far as they conflict with its provisions: *Provided*, That no sentence of death under the provisions of this act shall be carried into effect without the approval of the President.

Sentences of death.

SEC. 5. *And be it further enacted*, That when the people of any one of said rebel States shall have formed a constitution of government in conformity with the Constitution of the United States in all respects, framed by a convention of delegates elected by the male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident in said State for one year previous to the day of such election, except such as may be disfranchised for participation in the rebellion or for felony at common law, and when such constitution shall provide that the elective franchise shall be enjoyed by all such persons as have the qualifications herein stated for electors of delegates, and when such constitution shall be ratified by a majority of the persons voting on the question of ratification who are qualified as electors for delegates, and when such constitution shall have been submitted to Congress for examination and approval, and Congress shall have approved the same, and when said State, by a vote of its legislature elected under said constitution, shall have adopted the amendment to the Constitution of the United States, proposed by the Thirty-ninth Congress, and known as article fourteen, and when said article shall have become a part of the Constitution of the United States, said State shall be declared entitled to representation in Congress, and senators and representatives shall be admitted therefrom on their taking the oath prescribed by law, and then and thereafter the preceding sections of this act shall be inoperative in said State: *Provided*, That no person excluded from the privilege of holding office by said proposed amendment to the Constitution of the United States, shall be eligible to election as a member of the convention to frame a constitution for any of said rebel States, nor shall any such person vote for members of such convention.

Conditions upon which such States shall be declared entitled to representation in Congress.

Delegates to conventions to form constitution, by whom elected.

Provisions of constitutions as to the elective franchise.

Constitutions to be ratified by popular vote; to be approved by Congress.

The States to adopt the amendment to the Constitution. *Ante*, p. 358.

Senators and representatives to be admitted upon taking the oath, and this act becomes inoperative.

Proviso.

Certain persons not eligible as members of the constitutional convention.

SEC. 6. *And be it further enacted*, That, until the people of said rebel States shall be by law admitted to representation in the Congress of the United States, any civil governments which may exist therein shall be deemed provisional only, and in all respects subject to the paramount authority of the United States at any time to abolish, modify, control, or supersede the same; and in all elections to any office under such provisional governments all persons shall be entitled to vote, and none others, who are entitled to vote, under the provisions of the fifth section of this act; and no person shall be eligible to any office under any such provisional governments who would be disqualified from holding office under the provisions of the third *article* of said constitutional amendment.

The civil government of such States to be provisional only until they are admitted to representation.

Who may vote in elections to office under provisional governments, and who are eligible to office.

Vol. xv. p. 4.

SCHUYLER COLFAX,
Speaker of the House of Representatives.
LA FAYETTE S. FOSTER,
President of the Senate, pro tempore.

IN THE HOUSE OF REPRESENTATIVES,
March 2, 1867.

The President of the United States having returned to the House of Representatives, in which it originated, the bill entitled "An act to provide for the more efficient government of the rebel States," with his objections thereto, the House of Representatives proceeded, in pursuance of the Constitution, to reconsider the same; and

Resolved, That the said bill do pass, two thirds of the House of Representatives agreeing to pass the same.

Attest:
EDWD. McPHERSON,
Clerk of H. R. U. S.

33 U.S. 112 (____)
8 Pet. 112

JAMES BROWN, PLAINTIFF IN ERROR
v.
RICHARD R. KEENE.

Supreme Court of United States.

113 *113 The case was argued on the question of jurisdiction, and on the merits, by Mr Clay, for the plaintiff in error; and by Mr Brent, for the defendant.

114 *114 Mr Chief Justice MARSHALL delivered the opinion of the Court.

115 *115 This appeal is from a decree of the court of the United States for the district of Louisiana. The first error assigned in the proceedings is, that the petition, which, in the practice of Louisiana, is substituted for a declaration, does not show, with sufficient certainty, that the parties were within the jurisdiction of the court. If this objection be well founded, it is undoubtedly fatal.

The petition avers, that the plaintiff, Richard Raynal Keene, is a citizen of the state of Maryland; and that James Brown, the defendant, is a citizen or resident of the state of Louisiana, holding his fixed and permanent domicil in the parish of St Charles. The petition, then, does not aver positively, that the defendant is a citizen of the state of Louisiana, but in the alternative, that he is a citizen or a resident. Consistently with this averment, he may be either.

The additional words of description, "holding his fixed and permanent domicil in the parish of St Charles," do not aid this defective description. A citizen of the United States may become a citizen of that state in which he has a fixed and permanent domicil; but the petition does not aver that the plaintiff is a citizen of the United States. The question is, whether the jurisdiction of the court is sufficiently shown by these averments.

The constitution extends the judicial power to "controversies between citizens of different states;" and the judicial act gives jurisdiction, "in suits between a citizen of the state where the suit is brought, and a citizen of another state."

The decisions of this court require, that the averment of jurisdiction shall be positive, that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from its averments.

In Bingham v. Cabot et al., 3 Dall. 382, 1 Cond. Rep. 170, the court held clearly, that it was necessary to set forth the citizenship (or alienage, when a foreigner was concerned) of the respective parties, in order to bring the case within the jurisdiction of the court, and that the record was, in that respect, defective.

In Abercrombie v. Dupuis and another, 1 Cranch 343, the plaintiffs below aver, "that they do
116 severally reside without *116 the limits of the district of Georgia, to wit, in the state of Kentucky." The defendant is called "Charles Abercrombie, of the district of Georgia, aforesaid." The judgment in favour of the plaintiff below was reversed on the authority of the

case of Bingham v. Cabot.

In Wood v. Wagnon, 2 Cranch 9, the judgment in favour of the plaintiff below was reversed, because his petition did not show the jurisdiction of the court. It stated the plaintiff to be a citizen of the state of Pennsylvania, and James Wood, the defendant, to be "of Georgia, aforesaid."

Capron v. Vanorden, 2 Cranch 126, was reversed, because the declaration did not state the citizenship or alienage of the plaintiff in the circuit court.

The same principle has been constantly recognized in this court.

The answer of James Brown asserts, that both plaintiff and defendant are citizens of the state of Louisiana.

Without indicating any opinion on the question, whether any admission in the plea can cure an insufficient allegation of jurisdiction in the declaration, we are all of opinion that this answer does not cure the defect of the petition. If the averment of the answer may be looked into, the whole averment must be taken together. It is, that both plaintiff and defendant are citizens of Louisiana.

The decree of the court for the district of Louisiana is to be reversed, that court not having jurisdiction; and the appeal to be dismissed.

The cross appeal, Keene v. Brown, is to be dismissed, the court having no jurisdiction.

This cause came on to be heard on the transcript of the record from the district court of the United States, for the eastern district of Louisiana, and was argued by counsel; on consideration whereof, it is the opinion of this court, that the said district court could not entertain jurisdiction of this cause, and that, consequently, this court has not jurisdiction in this cause, but for the purpose of reversing the judgment of the said district court entertaining said
117 jurisdiction: whereupon, it is ordered and adjudged by this court, that the judgment of *117 the said district court be, and the same is hereby reversed, and that this writ of error be, and the same is hereby dismissed, for the want of jurisdiction. All of which is hereby ordered to be certified to the said district court, under the seal of this court.

THE CONGRESSIONAL GLOBE.

THE OFFICIAL PROCEEDINGS OF CONGRESS, PUBLISHED BY JOHN C. RIVES, WASHINGTON, D. C.

THIRTY-SEVENTH CONGRESS, 1st SESSION. FRIDAY, JULY 26, 1861. NEW SERIES.....No. 17.

the navies of Great Britain, or of France either. I shall make no unnecessary exposure, because I am a friend of my country, and will not expose its weakness; but, at the same time, I want to protect it and to preserve it in all its parts. I believe, from what I have heard, that this same marine steam battery of Edwin A. Stevens is calculated, in a very great degree, to effect the purposes we desire at this time. It has over eight thousand horse power, and it is calculated to run at a speed of twenty-one miles an hour. It is a terrible engine of defense and attack. It is believed that it can run between the forts in Charleston harbor with perfect impunity, and, if necessary, destroy that town; it is believed that it can stand before New Orleans and hold it in subjection; and thus bring these men to reason in the places and at the points where they are the most vulnerable, and where they can be assaulted and assailed and brought to reason.

It has been pronounced to be unfit by scientific men, it is said. I know that it has been examined by scientific men, and I know that they have pronounced in favor of its character; and I know that the genius which designed and devised it, although now gone, will rest in the memory of scientific men forever.

Another objection is, that $500,000 have already been expended upon it. Sir, that is a reason cogent and strong to my mind why this board should examine it. If we have expended $500,000 upon this work, let us not abandon it without further inspection. Let us make the necessary additional appropriations if it is desirable and worthy; if unfit, let it be entirely put an end to and abandoned on the report of a competent investigating committee. Suppose it should prove to be valuable and desirable, and should cost $800,000 to finish it. One of your two or three hundred regiments alone costs $1,000,000 a year. After all, I ask, can it do any harm to have this work examined by a competent board of officers? If it is unworthy they will condemn it, and no harm will come of it; if worthy, it is taking a step towards making a necessary defense of our coast, and perhaps of carrying "the war into Africa."

Mr. FESSENDEN. Mr. President, the simple question before the Senate is this: whether they will authorize a board of officers to spend nearly a million dollars on this old concern which was begun nearly twenty years ago. The Senate, the other day, on consideration of the whole subject, decided that they would not authorize anybody to spend any money on this battery before they knew something about its condition. They were willing, on the suggestion of one of the Senators from New Jersey, to have a commission appointed to report on the subject. That they agreed to, as it was urged; and that has passed both Houses, I suppose. It passed this body without any difficulty, and I believe it passed the other. I am ready to stand to that. Let a board be appointed to examine this work and report to Congress, and then let Congress have the power to say whether they will spend the money.

Not satisfied with that, the friends of this work wish that the board we have appointed to examine and spend money with regard to small steamers comparatively, shall have the power, if they see fit, to spend more than half of it in completing this vessel. I will give no such power to anybody on a work which was begun twenty years ago, and has been abandoned almost as long. As to the fact that we have spent $500,000, and therefore ought to complete it, it is an old rule that no wise man sends good money after bad; and if we have wasted $500,000, it is no reason why we should now throw away $1,000,000 on this work.

Mr. TEN EYCK. Let us inquire.

Mr. FESSENDEN. I am willing to inquire, but I want to inquire first, before expending any more money. Now, what will be the object? What will be the result? These men have but a single duty to perform. They are to inquire whether we can build certain smaller classes of iron-clad steamers; an experiment that has been tried, I believe, and found feasible; and if so, to do it. That we have authorized; that I am willing to stand to; but if we confer this additional power on them, instead of having their attention confined to that single thing which we wish to have done as soon as possible, they will be beset and bedeviled by all the appliances that can be brought to bear on them by this twenty-years-old concern, which nobody, who has a reasonable degree of judgment on the subject, has believed to be good for anything up to this time. Sir, I am opposed to the whole thing. I never will agree to give any set of men the power to spend $1,000,000 on a matter which has been condemned by public opinion and the voice of Congress for so many years. Let us have it, at any rate, before ourselves again before we proceed to action.

The PRESIDING OFFICER, (Mr. FOSTER in the chair.) The question is on the motion to reconsider the vote disagreeing to the amendment of the House.

The motion was not agreed to.

MESSAGE FROM THE HOUSE.

A message from the House of Representatives, by Mr. ETHERIDGE, its Clerk, announced that the House insisted on its amendment to the bill of the Senate (No. 3) providing for the better organization of the military establishment, disagreed to by the Senate, and asks a conference on the disagreeing votes of the two Houses thereon, and has appointed Mr. FRANCIS P. BLAIR, jr., Mr. JOHN J. CRITTENDEN, and Mr. ABRAHAM B. OLIN, managers of the same on the part of the House.

The message further announced that the House had passed the bill of the Senate (No. 41) supplementary to an act entitled "An act to authorize a national loan, and for other purposes," with an amendment; in which the concurrence of the Senate was requested.

The message further announced that the House had agreed to the amendments of the Senate to the bill (H. R. No. 76) to provide for the payment of the police organized by the United States for the city of Baltimore, to enable the Mint to furnish small gold coins, and to provide for the manufacture or purchase of field signals.

The message further announced that the House had agreed to the report of the committee of conference on the disagreeing votes of the two Houses on the bill (H. R. No. 25) making additional appropriations for the legislative, executive, and judicial expenses of the Government for the year ending June 30, 1862, and appropriations of arrearages for the year ending June 30, 1861.

The message further announced that the Speaker had signed the following enrolled bills; which thereupon received the signature of the President *pro tempore:*

A bill (S. No. 14) for the better organization of the Marine Corps;

A bill (S. No. 42) in addition to the "Act to authorize the employment of volunteers to aid in enforcing the laws and protecting public property," approved 22d July, 1861; and

A bill (H. R. No. 53) relative to the Marine Corps, to fix the compensation of the officers thereof, and for other purposes.

BILLS BECOME LAWS.

A message from the President of the United States, by Mr. NICOLAY, his Private Secretary, announced that the President had approved and signed, on the 24th instant, the following bills:

A bill (S. No. 21) for the relief of the widows and orphans of the officers, seamen, and marines of the United States sloop-of-war Levant, and for other purposes; and

A bill (S. No. 32) to provide for a temporary increase of the Navy.

OBJECT OF THE WAR.

Mr. JOHNSON, of Tennessee. I move that the resolution which I introduced yesterday be now taken up, and considered by the Senate.

The motion was agreed to; and the Senate resumed the consideration of the following resolution:

Resolved, That the present deplorable civil war has been forced upon the country by the disunionists of the southern States now in revolt against the constitutional Government and in arms around the capital; that in this national emergency Congress, banishing all feeling of mere passion or resentment, will recollect only its duty to the whole country; that this war is not prosecuted upon our part in any spirit of oppression, nor for any purpose of conquest or subjugation, nor for the purpose of overthrowing or interfering with the rights or established institutions of those States, but to defend and maintain the supremacy of the Constitution and all laws made in pursuance thereof, and to preserve the Union, with all the dignity, equality, and rights of the several States unimpaired; that as soon as these objects are accomplished the war ought to cease.

Mr. POLK. I indicated yesterday, on hearing the resolution read, that I would probably offer an amendment to it. I now move to amend the resolution by striking out all after the word "southern," in the second line, down to the word "capital," inclusive in the third line, and to insert in lieu thereof the words, "and the northern States;" so that it will read:

"That the present deplorable civil war has been forced upon the country by the disunionists of the southern and the northern States," &c.

Mr. JOHNSON, of Tennessee. I trust this amendment will not be adopted. The resolution does nothing but set forth a single fact particularly, as it has occurred since this contest commenced. I hope the Senate will reject the amendment, and pass the resolution just as it is.

Mr. POLK. As the yeas and nays were ordered on the resolution yesterday, I hope the Senate will indulge me with the yeas and nays on this amendment. I think it contains a truth that ought to be embodied in the resolution.

The yeas and nays were ordered.

Mr. HALE. As I want to vote understandingly, I would be obliged to the Senator from Missouri if he would tell us of any northern States in revolt against the constitutional Government; because, with his amendment, it will read:

"That the present deplorable civil war has been forced upon the country by the disunionists of the southern and northern States now in revolt against the constitutional Government, and in arms around the capital."

Mr. POLK. No, sir; those words are proposed to be stricken out; so that it will read:

"That the present deplorable civil war has been forced upon the country by the disunionists of the southern and the northern States; that in this national emergency," &c.

Mr. COLLAMER. I really desire to have the gentleman inform us whether he knows of the existence of any disunionists in the North? I think we ought not, impliedly even, to assert that of which there is no foundation of belief. Now, I do not know, and never heard of the existence of any disunionists in the northern States—in revolt, I mean.

Mr. POLK. The Senator asks me if I know of any such persons, and then he asks if there is any ground of belief. There is a difference betwixt knowledge and a ground of belief.

Mr. COLLAMER. I mean in revolt.

Mr. POLK. That part is not in the resolution at all as I purpose to amend it. If the Senator had paid attention to the amendment he would have seen that that is not in it. I believe there are disunionists in the North as well as in the South; and I have seen what purport to be speeches made in different places on the 4th of July, by gentlemen who were congratulating the country upon the fact that there was now to be a dissolution of the Union. I ask that the resolution, as it will read if the amendment be adopted, be read.

The Secretary read it, as follows:

Resolved, That the present deplorable civil war has been forced upon the country by the disunionists of the southern and the northern States; that in this national emergency Congress, banishing all feeling of mere passion or resentment, will recollect only its duty to the whole country; that this war is not prosecuted upon our part in any spirit of oppression, nor for any purpose of conquest or subjugation, nor purpose of overthrowing or interfering with the rights or established institutions of those States, but to defend and maintain the supremacy of the Constitution and all laws made in pursuance thereof, and to preserve the Union, with all the dignity, equality, and rights of the several States unimpaired; that as soon as these objects are accomplished the war ought to cease.

The PRESIDING OFFICER. The question is on the amendment offered by the Senator from

A joint resolution (No. 5) to pay to the widow of the late Stephen A. Douglas the amount due to him as a Senator at the time of his death.

The SPEAKER announced as the first business in order the call of States for bills of which previous notice had been given.

JUDGE DOUGLAS.

Mr. COX. I desire to call up the resolution of the Senate to pay the representatives of Judge Douglas the compensation due him as Senator.

No objection being made, the resolution was taken up and read by its title, as follows:

A resolution (S. No. 5) to pay to the widow of Stephen A. Douglas the amount due to him as Senator at the time of his death.

The resolution, which was read, directs the proper officer to pay to the widow of the late Senator Stephen A. Douglas the amount of compensation due to him at the time of his death, being $750, out of any money in the Treasury not otherwise appropriated.

Mr. RICHARDSON. Is an amendment in order now?

The SPEAKER. It is.

Mr. RICHARDSON. I move to amend by adding "and mileage, being $1,084." I desire to make a simple statement to the House in reference to this amendment. Mr. Douglas was in the Senate during the called session, which, under the law, I think entitles him to the mileage. The pay proper for three months there is no question about; and the question of mileage is the only one to which I desire to call the attention of the House. He having taken his seat after the 4th of March, which was during this session of Congress, he was equitably entitled to his mileage; and therefore I move the amendment.

The amendment was agreed to.

The joint resolution was then ordered to be read a third time.

It was accordingly read the third time, and passed.

Mr. COX moved to reconsider the vote by which the resolution was passed; and also moved that the motion to reconsider be laid on the table.

The latter motion was agreed to.

CIVIL APPROPRIATION BILL.

Mr. STEVENS. I move that House bill No. 26, making additional appropriations for sundry civil expenses of the Government for the year ending June 30, 1862, and appropriations for arrearages for the year ending June 30, 1861, with the Senate amendments thereto, be taken from the Speaker's table, and referred to the Committee of Ways and Means, and be printed.

The motion was agreed to.

LEGISLATIVE APPROPRIATION BILL.

Mr. STEVENS. I move that House bill No. 25, making additional appropriations for the legislative, executive, and judicial expenses of the Government for the year ending June 30, 1862, and appropriations of arrearages for the year ending June 30, 1861, be referred to the Committee of Ways and Means, and be printed.

The motion was agreed to.

REFUNDING DUTIES ON IMPORTED ARMS.

Mr. STEVENS, by unanimous consent, from the Committee of Ways and Means, reported back a bill to refund duties upon arms imported by States.

The bill was read a first and second time.

The bill was ordered to be engrossed, and read a third time; and being engrossed, it was accordingly read the third time, and passed.

ENROLLED BILL.

Mr. GRANGER, from the Committee on Enrolled Bills, reported as truly enrolled an act to authorize the employment of volunteers to aid in enforcing the laws and protecting public property; when the Speaker signed the same.

ORGANIZATION OF MILITARY ESTABLISHMENT.

Mr. BLAIR, of Missouri. I ask the unanimous consent of the House to take from the Speaker's table a bill (S. No. 3) for the better organization of the military establishment, and refer it to the Committee on Military Affairs.

No objection being made, the bill was taken from the table, read a first and second time, and referred to the Committee on Military Affairs.

ORGANIZATION OF A HOME GUARD.

Mr. BLAIR, of Missouri, by unanimous consent, introduced a bill for the organization of a volunteer home guard to aid in enforcing the laws and protecting public property, in the several States where the same may be deemed necessary, and for arming the same; which was read a first and second time, referred to the Committee on Military Affairs, and ordered to be printed.

OHIO AND OTHER VOLUNTEERS.

Mr. PENDLETON, of Ohio. I ask the unanimous consent of the House to take from the Speaker's table House bill No. 57, with the Senate amendments thereto, for the relief of the Ohio and other volunteers.

No objection being made, the bill and amendments were taken up for consideration.

The Senate amendments were read, as follows:

Line eight of the preamble, after the word "until," strike out "twelve days after their assembling at the place of rendezvous in said State appointed by the general order of said Department," and insert: "some days after their organization and acceptance as companies by the Governor of said State."

Line five, section one, strike out "assembling at the place of rendezvous in," and insert: "organization and acceptance of companies by the Governor of."

The amendments of the Senate were severally agreed to.

Mr. PENDLETON, of Ohio, moved to reconsider the vote by which the amendments were agreed to; and also moved to lay the motion to reconsider on the table.

The latter motion was agreed to.

MARSHALS OF DISTRICTS, ETC.

Mr. BINGHAM. I ask unanimous consent to take from the Speaker's table Senate bill No. 16, concerning the Attorney General and the attorneys and marshals of the several districts, for the purpose of reference merely.

No objection being made, the bill was taken up, read a first and second time, and referred to the Committee on the Judiciary.

MAINTENANCE OF THE UNION, ETC.

Mr. VANDEVER asked unanimous consent of the House to introduce the following resolution:

Resolved, That the maintenance of the Constitution, the preservation of the Union, and the enforcement of the laws, are sacred trusts which must be executed; that no disaster shall discourage us from the most ample performance of this high duty; and we pledge to the country and the world the employment of every resource, national and individual, for the suppression, overthrow, and punishment of rebels in arms.

Mr. STEVENS. I must object. I do not believe that any resolution of this kind, from any quarter, is calculated to do any good or to strengthen our hands.

INCREASE OF THE REGULAR ARMY.

Mr. McCLERNAND. With the permission of the House, I wish to propound a question to the chairman of the Committee on Military Affairs. I wish to know the position of the question pending between the two Houses in relation to the increase of the regular Army. Will the chairman inform me?

Mr. BLAIR, of Missouri. I will state to the gentleman from Illinois, that the House passed a bill for raising eleven regiments of volunteers, of twenty-two hundred men each, upon the plan proposed, making them volunteers instead of regulars. The Senate passed a bill making it eleven regiments regular troops. The House amended the Senate bill by substituting its own. As so amended it has been sent back to the Senate.

The SPEAKER then proceeded with the call of States for bills and joint resolutions, of which previous notice had been given.

Mr. JOHNSON, by unanimous consent, introduced a joint resolution extending the benefit of the act of Congress entitled "An act in addition to certain acts granting bounty lands to certain officers and soldiers who have been engaged in the military service of the United States," approved March 3, 1855, to the officers and soldiers engaged in quelling the present rebellion, and to their widows and minor children, and moved that it be referred to a select committee of five.

The motion to refer to a select committee was not agreed to.

The resolution was referred to the Committee on Public Lands.

DISTRICT OF COLUMBIA.

Mr. ASHLEY asked the unanimous consent of the House to introduce a joint resolution providing for the transfer of that portion of the District of Columbia formerly belonging to the United States.

Mr. COX. I object to that, until we have settled some other things.

Mr. ASHLEY. I move to suspend the rules.

The SPEAKER. The motion is not in order during this call of States for bills.

ARMS OF VOLUNTEERS.

Mr. HOLMAN introduced a joint resolution in relation to the arms of volunteers; which was read a first and second time, and referred to the Committee on Military Affairs.

UNITED STATES COURTS.

Mr. PORTER introduced a bill to amend the act entitled "An act to establish the judicial courts of the United States," approved September 24, 1789, and touching certain official bonds; which was read a first and second time, and referred to the Committee on the Judiciary.

The SPEAKER then proceeded to call the States for resolutions:

NATIONAL DIFFICULTIES.

Mr. NOBLE. I offer the following resolution:

Resolved, That the contest now existing between the Government of the United States and the disloyal organizations now existing in certain States which are now waging an unjustifiable war upon the constitutional authority of the Government, should be treated and regarded by all loyal citizens not as a sectional war, nor an anti-slavery war, nor a war of conquest or subjugation, but simply as a war for the maintenance of the Government, the suppression of rebellion, and the preservation of all the rights of all the States full and undiminished as they were purchased by the blood of the Revolution of 1776, and secured by all the provisions and compromises of the Federal Constitution, and for no other purpose whatever.

Mr. BURNETT. I desire to debate that resolution.

The SPEAKER. Then the resolution goes over under the rule.

PRESENT CONDITION OF THE COUNTRY.

Mr. CRITTENDEN. Mr. Speaker, I had the honor, on a late day, of offering a resolution on which I desire a vote of the House, but which was not then receivable under the rules. I now offer that resolution, and move the previous question upon it.

The Clerk read the resolution, as follows:

Resolved by the House of Representatives of the Congress of the United States, That the present deplorable civil war has been forced upon the country by the disunionists of the southern States, now in arms against the constitutional Government, and in arms around the capital; that in this national emergency, Congress, banishing all feelings of mere passion or resentment, will recollect only its duty to the whole country; that this war is not waged on their part in any spirit of oppression, or for any purpose of conquest or subjugation, or purpose of overthrowing or interfering with the rights or established institutions of those States, but to defend and maintain the *supremacy* of the Constitution, and to preserve the Union with all the dignity, equality, and rights of the several States unimpaired; and that as soon as these objects are accomplished the war ought to cease.

Mr. CRITTENDEN. Mr. Speaker, I have asked the previous question upon the resolution.

The SPEAKER. The Chair will remind the gentleman from Kentucky that no debate is in order on the resolution. If debate arises, it must go over.

Mr. HOLMAN. By unanimous consent, I hope the gentleman from Kentucky will be heard.

Mr. CRITTENDEN. I rise for the purpose of asking of the House the great favor of their unanimous consent to allow me to make an explanation of that resolution.

Mr. BURNETT. I desire to make one remark personal to myself.

Mr. McCLERNAND. I object.

Mr. BURNETT. Then I will be compelled, if the gentleman will not permit me to do that, to object to my colleague speaking.

Mr. McCLERNAND. The gentleman must take his own course.

Mr. LOVEJOY. I move to lay the resolution upon the table.

Mr. COX. I demand the yeas and nays upon that motion.

The yeas and nays were not ordered.

The House refused to lay the resolution upon the table.

of the morning hour. I simply want a vote on it.

The motion was not agreed to.

EXTENSION OF PATENTS.

Mr. WILLIAMS. I yield to the Senator from West Virginia, to allow him to call up another private bill.

Mr. WILLEY. I move to take up House bill No. 1059, which has been reported from the Committee on Patents.

The motion was agreed to; and the bill (H. R. No. 1059) for the relief of Sylvanus Sawyer and William E. Ward was considered as in Committee of the Whole. It proposes to authorize the Commissioner of Patents, upon due application made to him, to extend the patents of Sylvanus Sawyer, for an improvement in machinery for cutting ratan, dated June 24, 1851, and which expired on the 24th of June, 1865, and the patent of William E. Ward, for an improved machine for making rivets and screw blanks, dated December 28, 1852, and which expired on the 28th of December, 1866, upon the same evidence and principles as if applications had been made to him by these patentees respectively in due time prior to the expiration of the patents. In case the Commissioner on due inquiry shall extend such patents, or either of them, all persons who shall have made use of the inventions or machines, or either of them, between the periods of the expiration of the patents and their extension by the Commissioner, shall be relieved from all liability for that use.

The bill was reported to the Senate, ordered to a third reading, read the third time, and passed.

GOVERNMENT OF SOUTHERN STATES—VETO.

Mr. WILLIAMS. I now move that the Senate proceed to the consideration of the message of the President of the United States, returning to the House of Representatives, with his objections, the bill (H. R. No. 1134) to provide for the more efficient government of the rebel States.

The motion was agreed to.

The PRESIDENT *pro tempore*. The message of the President of the United States will be read.

The Secretary read the message, as follows:

To the House of Representatives:

I have examined the bill "to provide for the more efficient government of the rebel States" with the care and anxiety which its transcendant importance is calculated to awaken. I am unable to give it my assent for reasons so grave that I hope a statement of them may have some influence on the minds of the patriotic and enlightened men with whom the decision must ultimately rest.

The bill places all the people of the ten States therein named under the absolute domination of military rulers; and the preamble undertakes to give the reason upon which the measure is based, and the ground upon which it is justified. It declares that there exist in those States no legal governments and no adequate protection for life or property, and asserts the necessity of enforcing peace and good order within their limits. Is this true as matter of fact?

It is not denied that the States in question have each of them an actual government, with all the powers, executive, judicial, and legislative, which properly belong to a free State. They are organized like the other States of the Union, and like them they make, administer, and execute the laws which concern their domestic affairs. An existing *de facto* government, exercising such functions as these, is itself the law of the State upon all matters within its jurisdiction. To pronounce the supreme law-making power of an established State illegal is to say that law itself is unlawful.

The provisions which these governments have made for the preservation of order, the suppression of crime, and the redress of private injuries, are in substance and principle the same as those which prevail in the northern States and in other civilized countries. They certainly have not succeeded in preventing the commission of all crime, nor has this been accomplished anywhere in the world. There, as well as elsewhere, offenders sometimes escape for want of vigorous prosecution, and occasionally, perhaps, by the inefficiency of courts or the prejudice of jurors. It is undoubtedly true that these evils have been much increased and aggravated, North and South, by the demoralizing influences of civil war and by the rancorous passions which the contest has engendered. But that these people are maintaining local governments for themselves which habitually defeat the object of all government, and render their own lives and property insecure, is in itself utterly improbable, and the averment of the bill to that effect is not supported by any evidence which has come to my knowledge. All the information I have on the subject convinces me that the masses of the southern people and those who control their public acts, while they entertain diverse opinions on questions of Federal policy, are completely united in the effort to reorganize their society on the basis of peace, and to restore their mutual prosperity as rapidly and as completely as their circumstances will permit.

The bill, however, would seem to show upon its face that the establishment of peace and good order is not its real object. The fifth section declares that the preceding sections shall cease to operate in any State where certain events shall have happened. These events are, first, the selection of delegates to a State convention by an election at which negroes shall be allowed to vote; second, the formation of a State constitution by the convention so chosen; third, the insertion into the State constitution of a provision which will secure the right of voting at all elections to negroes and to such white men as may not be disfranchised for rebellion or felony; fourth, the submission of the constitution for ratification to negroes and white men not disfranchised, and its actual ratification by their vote; fifth, the submission of the State constitution to Congress for examination and approval, and the actual approval of it by that body; sixth, the adoption of a certain amendment to the Federal Constitution by a vote of the Legislature elected under the new constitution; seventh, the adoption of said amendment by a sufficient number of other States to make it a part of the Constitution of the United States. All these conditions must be fulfilled before the people of any of these States can be relieved from the bondage of military domination; but when they are fulfilled, then immediately the pains and penalties of the bill are to cease, no matter whether there be peace and order or not, and without any reference to the security of life or property. The excuse given for the bill in the preamble is admitted by the bill itself not to be real. The military rule which it establishes is plainly to be used, not for any purpose of order or for the prevention of crime, but solely as a means of coercing the people into the adoption of principles and measures to which it is known that they are opposed, and upon which they have an undeniable right to exercise their own judgment.

I submit to Congress whether this measure is not, in its whole character, scope, and object, without precedent and without authority, in palpable conflict with the plainest provisions of the Constitution, and utterly destructive to those great principles of liberty and humanity for which our ancestors on both sides of the Atlantic have shed so much blood and expended so much treasure.

The ten States named in the bill are divided into five districts. For each district an officer of the Army, not below the rank of brigadier general, is to be appointed to rule over the people; and he is to be supported with an efficient military force to enable him to perform his duties and enforce his authority. Those duties and that authority, as defined by the third section of the bill, are "to protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, all disturbers of the public peace or criminals." The power thus given to the commanding officer over all the people of each district is that of an absolute monarch. His mere will is to take the place of all law. The law of the States is now the only rule applicable to the subjects placed under his control, and that is completely displaced by the clause which declares all interference of State authority to be null and void. He alone is permitted to determine what are rights of person or property, and he may protect them in such way as in his discretion may seem proper. It places at his free disposal all the lands and goods in his district, and he may distribute them without let or hinderance to whom he pleases. Being bound by no State law, and there being no other law to regulate the subject, he may make a criminal code of his own; and he can make it as bloody as any recorded in history, or he can reserve the privilege of acting upon the impulse of his private passions in each case that arises. He is bound by no rules of evidence; there is indeed no provision by which he is authorized or required to take any evidence at all. Everything is a crime which he chooses to call so, and all persons are condemned whom he pronounces to be guilty. He is not bound to keep any record or make any report of his proceedings. He may arrest his victims wherever he finds them, without warrant, accusation, or proof of probable cause. If he gives them a trial before he inflicts the punishment he gives it of his grace and mercy, not because he is commanded so to do.

To a casual reader of the bill it might seem that some kind of trial was secured by it to persons accused of crime; but such is not the case. The officer "may allow local civil tribunals to try offenders," but of course this does not require that he shall do so. If any State or Federal court presumes to exercise its legal jurisdiction by the trial of a malefactor without his special permission, he can break it up, and punish the judges and jurors as being themselves malefactors. He can save his friends from justice, and despoil his enemies contrary to justice.

It is also provided that "he shall have power to organize military commissions or tribunals;" but this power he is not commanded to exercise. It is merely permissive, and is to be used only "when in his judgment it may be necessary for the trial of offenders." Even if the sentence of a commission were made a prerequisite to the punishment of a party, it would be scarcely the slightest check upon the officer, who has authority to organize it as he pleases, prescribe its mode of proceeding, appoint its members from among his own subordinates, and revise all its decisions. Instead of mitigating the harshness of his single rule, such a tribunal would be used much more probably to divide the responsibility of making it more cruel and unjust.

Several provisions, dictated by the humanity of Congress, have been inserted in the bill, apparently to restrain the power of the commanding officer; but it seems to me that they are of no avail for that purpose. The fourth section provides: first, that trials shall not be unnecessarily delayed; but I think I have shown that the power is given to punish without trial, and if so, this provision is practically inoperative. Second, cruel or unusual punishment is not to be inflicted; but who is to decide what is cruel and what is unusual? The words have acquired a legal meaning by long use in the courts. Can it be expected that military officers will understand or follow a rule expressed in language so purely technical, and not pertaining in the least degree to their profession? If not, then each officer may define cruelty according to his own temper, and if it is not usual, he will make it usual. Corporal punishment, imprisonment, the gag, the ball and chain, and the almost insupporta-

ble forms of torture invented for military punishment lie within the range of choice. Third, the sentence of a commission is not to be executed without being approved by the commander, if it affects life or liberty, and a sentence of death must be approved by the President. This applies to cases in which there has been a trial and sentence. I take it to be clear, under this bill, that the military commander may condemn to death without even the form of a trial by a military commission, so that the life of the condemned may depend upon the will of two men instead of one.

It is plain that the authority here given to the military officer amounts to absolute despotism. But, to make it still more unendurable, the bill provides that it may be delegated to as many subordinates as he chooses to appoint; for it declares that he shall "punish or cause to be punished." Such a power has not been wielded by any monarch in England for more than five hundred years. In all that time no people who speak the English language have borne such servitude. It reduces the whole population of the ten States—all persons, of every color, sex, and condition, and every stranger within their limits—to the most abject and degrading slavery. No master ever had a control so absolute over his slave as this bill gives to the military officers over both white and colored persons.

It may be answered to this that the officers of the Army are too magnanimous, just, and humane to oppress and trample upon a subjugated people. I do not doubt that Army officers are as well entitled to this kind of confidence as any other class of men. But the history of the world has been written in vain if it does not teach us that unrestrained authority can never be safely trusted in human hands. It is almost sure to be more or less abused under any circumstances, and it has always resulted in gross tyranny where the rulers who exercise it are strangers to their subjects, and come among them as the representatives of a distant Power, and more especially when the Power that sends them is unfriendly. Governments closely resembling that here proposed have been fairly tried in Hungary and Poland, and the suffering endured by those people roused the sympathies of the entire world. It was tried in Ireland, and, though tempered at first by principles of English law, it gave birth to cruelties so atrocious that they are never recounted without just indignation. The French Convention armed its deputies with this power, and sent them to the southern departments of the republic. The massacres, murders, and other atrocities which they committed show what the passions of the ablest men in the most civilized society will tempt them to do when wholly unrestrained by law.

The men of our race in every age have struggled to tie up the hands of their Governments and keep them within the law; because their own experience of all mankind taught them that rulers could not be relied on to concede those rights which they were not legally bound to respect. The head of a great empire has sometimes governed it with a mild and paternal sway; but the kindness of an irresponsible deputy never yields what the law does not extort from him. Between such a master and the people subjected to his domination there can be nothing but enmity; he punishes them if they resist his authority; and if they submit to it he hates them for their servility.

I come now to a question which is, if possible, still more important. Have we the power to establish and carry into execution a measure like this? I answer, certainly not, if we derive our authority from the Constitution, and if we are bound by the limitations which it imposes. This proposition is perfectly clear: that no branch of the Federal Government, executive, legislative, or judicial, can have any just powers except those which it derives through and exercises under the organic law of the Union. Outside of the Constitution we have no legal authority more than private citizens, and within it we have only so much as that instrument gives us. This broad principle limits all our functions and applies to all subjects. It protects not only the citizens of States which are within the Union, but it shields every human being who comes or is brought under our jurisdiction. We have no right to do in one place more than in another that which the Constitution says we shall not do at all. If, therefore, the southern States were in truth out of the Union, we could not treat their people in a way which the fundamental law forbids.

Some persons assume that the success of our arms in crushing the opposition that was made in some of the States to the execution of the Federal laws reduced those States and all their people, the innocent as well as the guilty, to the condition of vassalage, and gave us a power over them which the Constitution does not bestow or define or limit. No fallacy can be more transparent than this. Our victories subjected the insurgents to legal obedience, not to the yoke of an arbitrary despotism. When an absolute sovereign reduces his rebellious subjects he may deal with them according to his pleasure, because he had that power before; but when a limited monarch puts down an insurrection he must still govern according to law. If an insurrection should take place in one of our States against the authority of the State government and end in the overthrow of those who planned it, would that take away the rights of all the people of the counties where it was favored by a part or a majority of the population? Could they for such a reason be wholly outlawed and deprived of their representation in the Legislature? I have always contended that the Government of the United States was sovereign within its constitutional sphere; that it executed its laws like the States themselves by applying its coercive power directly to individuals; and that it could put down insurrection with the same effect as a State and no other. The opposite doctrine is the worst heresy of those who advocated secession, and cannot be agreed to without admitting that heresy to be right.

Invasion, insurrection, rebellion, and domestic violence were anticipated when the Government was framed, and the means of repelling and suppressing them were wisely provided for in the Constitution; but it was not thought necessary to declare that the States in which they might occur should be expelled from the Union. Rebellions, which were invariably suppressed, occurred prior to that out of which these questions grow; but the States continued to exist and the Union remained unbroken. In Massachusetts, in Pennsylvania, in Rhode Island, and in New York, at different periods in our history, violent and armed opposition to the United States was carried on; but the relations of those States to the Federal Government were not supposed to be interrupted or changed thereby after the rebellious portions of their population were defeated and put down. It is true that in these earlier cases there was no formal expression of a determination to withdraw from the Union; but it is also true that in the southern States the ordinances of secession were treated by all the friends of the Union as mere nullities, and are now acknowledged to be so by the States themselves. If we admit that they had any force or validity, or that they did in fact take the States in which they were passed out of the Union, we sweep from under our feet all the grounds upon which we stand in justifying the use of Federal force to maintain the integrity of the Government.

This is a bill passed by Congress in time of peace. There is not in any one of the States brought under its operation either war or insurrection. The laws of the States and of the Federal Government are all in undisturbed and harmonious operation. The courts, State and Federal, are open and in the full exercise of their proper authority. Over every State comprised in these five military districts life, liberty, and property are secured by State laws and Federal laws, and the national Constitution is everywhere in force and everywhere obeyed. What, then, is the ground on which this bill proceeds? The title of the bill announces that it is intended "for the more efficient government" of these ten States. It is recited by way of preamble that no legal State governments "nor adequate protection for life or property" exist in those States, and that peace and good order should be thus enforced. The first thing which arrests attention upon these recitals, which prepare the way for martial law, is this: that the only foundation upon which martial law can exist under our form of government is not stated or so much as pretended. Actual war, foreign invasion, domestic insurrection—none of these appear, and none of these in fact exist. It is not even recited that any sort of war or insurrection is threatened. Let us pause here to consider, upon this question of constitutional law and the power of Congress, a recent decision of the Supreme Court of the United States, in *ex parte* Milligan.

I will first quote from the opinion of the majority of the court:

"Martial law cannot arise from a threatened invasion. The necessity must be actual and present, the invasion real, such as effectually closes the courts and deposes the civil administration."

We see that martial law comes in only when actual war closes the courts and deposes the civil authority; but this bill, in time of peace, makes martial law operate as though we were in actual war, and become the cause instead of the consequence of the abrogation of civil authority. One more quotation:

"It follows, from what has been said on this subject, that there are occasions when martial law can be properly applied. If in foreign invasion or civil war the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theater of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority thus overthrown, to preserve the safety of the Army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course."

I now quote from the opinion of the minority of the court, delivered by Chief Justice Chase:

"We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists. Where peace exists the laws of peace must prevail."

This is sufficiently explicit. Peace exists in all the territory to which this bill applies. It asserts a power in Congress in time of peace to set aside the laws of peace and to substitute the laws of war. The minority, concurring with the majority, declares that Congress does not possess that power. Again, and if possible more emphatically, the Chief Justice, with remarkable clearness and condensation, sums up the whole matter as follows:

"There are under the Constitution three kinds of military jurisdiction—one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within States or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of the States maintaining adhesion to the national Government, when the public danger requires its exercise. The first of these may be called jurisdiction under military law, and is found in acts of Congress prescribing Rules and Articles of War, or otherwise providing for the government of the national forces; the second may be distinguished as military government, superseding as far as may be deemed expedient the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated martial law proper, and is called into action by Congress, or temporarily when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President in times of insurrection or invasion or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights."

It will be observed that of the three kinds of military jurisdiction which can be exercised or created under our Constitution there is but one that can prevail in time of peace, and that is the code of laws enacted by Congress for the government of the national forces. That body of military law has no application to the citizen, nor even to the citizen soldier enrolled in the militia in time of peace. But this bill is not a

part of that sort of military law, for that applies only to the soldier and not to the citizen, while, contrariwise, the military law provided by this bill applies only to the citizen and not to the soldier.

I need not say to the representatives of the American people that their Constitution forbids the exercise of judicial power in any way but one, that is, by the ordained and established courts. It is equally well known that in all criminal cases a trial by jury is made indispensable by the express words of that instrument. I will not enlarge on the inestimable value of the right thus secured to every freeman or speak of the danger to public liberty in all parts of the country which must ensue from a denial of it anywhere or upon any pretense. A very recent decision of the Supreme Court has traced the history, vindicated the dignity, and made known the value of this great privilege so clearly that nothing more is needed. To what extent a violation of it might be excused in time of war or public danger may admit of discussion, but we are providing now for a time of profound peace, where there is not an armed soldier within our borders except those who are in the service of the Government. It is in such a condition of things that an act of Congress is proposed which if carried out would deny a trial by the lawful courts and juries to nine million American citizens and to their posterity for an indefinite period. It seems to be scarcely possible that any one should seriously believe this consistent with a Constitution which declares in simple, plain, and unambiguous language that all persons shall have that right, and that no person shall ever in any case be deprived of it. The Constitution also forbids the arrest of the citizen without judicial warrant, founded on probable cause. This bill authorizes an arrest without warrant at the pleasure of a military commander. The Constitution declares that "no person shall be held to answer for a capital or otherwise infamous crime unless on presentment by a grand jury." This bill holds every person not a soldier answerable for all crimes and all charges without any presentment. The Constitution declares that "no person shall be deprived of life, liberty, or property without due process of law." This bill sets aside all process of law, and makes the citizen answerable in his person and property to the will of one man, and as to his life to the will of two. Finally, the Constitution declares that "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;" whereas this bill declares martial law (which of itself suspends this great writ) in time of peace, and authorizes the military to make the arrest, and gives to the prisoner only one privilege, and that is, a trial "without unnecessary delay." He has no hope of release from custody, except the hope, such as it is, of release by acquittal before a military commission.

The United States are bound to guaranty to each State a republican form of government. Can it be pretended that this obligation is not palpably broken if we carry out a measure like this, which wipes away ever vestige of republican government in ten States, and puts the life, property, liberty, and honor of all the people in each of them under the domination of a single person clothed with unlimited authority?

The Parliament of England, exercising the omnipotent power which it claimed, was accustomed to pass bills of attainder; that is to say, it would convict men of treason and other crimes by legislative enactment. The person accused had a hearing, sometimes a patient and fair one; but generally party prejudice prevailed instead of justice. It often became necessary for Parliament to acknowledge its error and reverse its own action. The fathers of our country determined that no such thing should occur here. They withheld the power from Congress and thus forbade its exercise by that body; and they provided in the Constitution that no State should pass any bill of attainder. It is therefore impossible for any person in this country to be constitutionally convicted or punished for any crime by a legislative proceeding of any sort. Nevertheless, here is a bill of attainder against nine million people at once. It is based upon an accusation so vague as to be scarcely intelligible, and found to be true upon no credible evidence. Not one of the nine millions was heard in his own defense. The representatives of the doomed parties were excluded from all participation in the trial. The conviction is to be followed by the most ignominious punishment ever inflicted on large masses of men. It disfranchises them by hundreds of thousands, and degrades them all—even those who are admitted to be guiltless—from the rank of freemen to the condition of slaves.

The purpose and object of the bill, the general intent which pervades it from beginning to end, is to change the entire structure and character of the State governments, and to compel them by force to the adoption of organic laws and regulations which they are unwilling to accept if left to themselves. The negroes have not asked for the privilege of voting; the vast majority of them have no idea what it means. This bill not only thrusts it into their hands, but compels them, as well as the whites, to use it in a particular way. If they do not form a constitution with prescribed articles in it, and afterward elect a Legislature which will act upon certain measures in a prescribed way, neither blacks nor whites can be relieved from the slavery which the bill imposes upon them. Without pausing here to consider the policy or impolicy of Africanizing the southern part of our territory, I would simply ask the attention of Congress to that manifest, well-known, and universally acknowledged rule of constitutional law which declares that the Federal Government has no jurisdiction, authority, or power to regulate such subjects for any State. To force the right of suffrage out of the hands of the white people and into the hands of the negroes is an arbitrary violation of this principle.

This bill imposes martial law at once, and its operations will begin so soon as the general and his troops can be put in place. The dread alternative between its harsh rule and compliance with the terms of this measure is not suspended, nor are the people afforded any time for free deliberation. The bill says to them, take martial law first, then deliberate. And when they have done all that this measure requires them to do, other conditions and contingencies, over which they have no control, yet remain to be fulfilled before they can be relieved from martial law. Another Congress must first approve the constitutions made in conformity with the will of this Congress, and must declare these States entitled to representation in both Houses. The whole question thus remains open and unsettled, and must again occupy the attention of Congress, and in the mean time the agitation which now prevails will continue to disturb all portions of the people.

The bill also denies the legality of the governments of ten of the States which participated in the ratification of the amendment to the Federal Constitution abolishing slavery forever within the jurisdiction of the United States, and practically excludes them from the Union. If this assumption of the bill be correct their concurrence cannot be considered as having been legally given, and the important fact is made to appear that the consent of three fourths of the States—the requisite number—has not been constitutionally obtained to the ratification of that amendment, thus leaving the question of slavery where it stood before the amendment was officially declared to have become a part of the Constitution.

That the measure proposed by this bill does violate the Constitution in the particulars mentioned, and in many other ways which I forbear to enumerate, is too clear to admit of the least doubt. It only remains to consider whether the injunctions of that instrument ought to be obeyed or not. I think they ought to be obeyed for reasons which I will proceed to give as briefly as possible.

In the first place, it is the only system of free government which we can hope to have as a nation. When it ceases to be the rule of our conduct we may perhaps take our choice between complete anarchy, a consolidated despotism, and a total dissolution of the Union; but national liberty, regulated by law, will have passed beyond our reach.

It is the best frame of government the world ever saw. No other is or can be so well adapted to the genius, habits, or wants of the American people. Combining the strength of a great empire with unspeakable blessings of local self-government, having a central power to defend the general interests, and recognizing the authority of the States as the guardians of industrial rights, it is "the sheet-anchor of our safety abroad and our peace at home." It was ordained "to form a more perfect Union, establish justice, insure domestic tranquillity, promote the general welfare, provide for the common defense, and secure the blessings of liberty to ourselves and to our posterity." These great ends have been attained heretofore, and will be again, by faithful obedience to it; but they are certain to be lost if we treat with disregard its sacred obligations.

It was to punish the gross crime of defying the Constitution and to vindicate its supreme authority that we carried on a bloody war of four years' duration. Shall we now acknowledge that we sacrificed a million lives and expended billions of treasure to enforce a Constitution which is not worthy of respect and preservation?

Those who advocated the right of secession alleged in their own justification that we had no regard for law, and that their rights of property, life, and liberty would not be safe under the Constitution as administered by us. If we now verify their assertion, we prove that they were in truth and in fact fighting for their liberty, and instead of branding their leaders with the dishonoring name of traitors against a righteous and legal Government, we elevate them in history to the rank of self-sacrificing patriots, consecrate them to the admiration of the world, and place them by the side of Washington, Hampden, and Sidney. No, let us leave them to the infamy they deserve, punish them as they should be punished, according to law, and take upon ourselves no share of the odium which they should bear alone.

It is a part of our public history which can never be forgotten that both Houses of Congress, in July, 1861, declared in the form of a solemn resolution that the war was and should be carried on for no purpose of subjugation, but solely to enforce the Constitution and laws, and that when this was yielded by the parties in rebellion the contest should cease, with the constitutional rights of the States and of individuals unimpaired. This resolution was adopted and sent forth to the world unanimously by the Senate, and with only two dissenting voices in the House. It was accepted by the friends of the Union in the South, as well as in the North, as expressing honestly and truly the object of the war. On the faith of it many thousands of persons in both sections gave their lives and their fortunes to the cause. To repudiate it now by refusing to the States and to the individuals within them the rights which the Constitution and laws of the Union would secure to them is a breach of our plighted honor for which I can imagine no excuse, and to which I cannot voluntarily become a party.

The evils which spring from the unsettled state of our Government will be acknowledged by all. Commercial intercourse is impeded, capital is in constant peril, public securities fluctuate in value, peace itself is not secure, and the sense of moral and political duty is impaired. To avert these calamities from our country it is imperatively required that we should immediately decide upon some course of administration which can be steadfastly

adhered to. I am thoroughly convinced that any settlement or compromise or plan of action which is inconsistent with the principles of the Constitution will not only be unavailing, but mischievous; that it will but multiply the present evils instead of removing them. The Constitution, in its whole integrity and vigor, throughout the length and breadth of the land, is the best of all compromises. Besides, our duty does not, in my judgment, leave us a choice between that and any other. I believe that it contains the remedy that is so much needed, and that if the coördinate branches of the Government would unite upon its provisions they would be found broad enough and strong enough to sustain in time of peace the nation which they bore safely through the ordeal of a protracted civil war. Among the most sacred guarantees of that instrument are those which declare that "each State shall have at least one Representative," and that "no State, without its consent, shall be deprived of its equal suffrage in the Senate." Each House is made the "judge of the elections, returns, and qualifications of its own members," and may, "with the concurrence of two thirds, expel a member." Thus, as heretofore urged—

"In the admission of Senators and Representatives from any and all of the States there can be no just ground of apprehension that persons who are disloyal will be clothed with the powers of legislation, for this could not happen when the Constitution and laws are enforced by a vigilant and faithful Congress." * * * * "When a Senator or Representative presents his certificate of election, he may at once be admitted or rejected; or, should there be any question as to his eligibility, his credentials may be referred for investigation to the appropriate committee. If admitted to a seat, it must be upon evidence satisfactory to the House of which he thus becomes a member, that he possesses the requisite constitutional and legal qualifications. If refused admission as a member for want of due allegiance to the Government, and returned to his constituents, they are admonished that none but persons loyal to the United States will be allowed a voice in the legislative councils of the nation, and the political power and moral influence of Congress are thus effectively exerted in the interests of loyalty to the Government and fidelity to the Union."

And is it not far better that the work of restoration should be accomplished by simple compliance with the plain requirements of the Constitution than by a recourse to measures which in effect destroy the States, and threaten the subversion of the General Government? All that is necessary to settle this simple but important question, without further agitation or delay, is a willingness on the part of all to sustain the Constitution and carry its provisions into practical operation. If to-morrow either branch of Congress would declare that, upon the presentation of their credentials, members constitutionally elected and loyal to the General Government would be admitted to seats in Congress, while all others would be excluded, and their places remain vacant until the selection by the people of loyal and qualified persons; and if, at the same time, assurance were given that this policy would be continued until all the States were represented in Congress, it would send a thrill of joy throughout the entire land, as indicating the inauguration of a system which must speedily bring tranquillity to the public mind.

While we are legislating upon subjects which are of great importance to the whole people, and which must affect all parts of the country, not only during the life of the present generation, but for ages to come, we should remember that all men are entitled at least to a hearing in the councils which decide upon the destiny of themselves and their children. At present ten States are denied representation, and when the Fortieth Congress assembles on the 4th day of the present month, sixteen States will be without a voice in the House of Representatives. This grave fact, with the important questions before us, should induce us to pause in a course of legislation which, looking solely to the attainment of political ends, fails to consider the rights it transgresses, the law which it violates, or the institutions which it imperils.

ANDREW JOHNSON.

WASHINGTON, *March* 2, 1867.

The PRESIDENT *pro tempore*. This bill is now to be reconsidered by the Senate according to the provisions of the Constitution; and the question is, Shall the bill pass, the objections of the President of the United States to the contrary notwithstanding?

Mr. JOHNSON. Mr. President, while doing, as I sincerely do, full justice to the motives of the President in refusing to sign the bill now before us, I cannot but regret that he felt himself compelled by a sense of duty to come to that conclusion, and I also regret the tone which his message in several portions of it assumes. It contains, as I think, some legal propositions which are unsound, and many errors of reasoning which upon examination will be found apparent. And above all do I lament the course he has thought it his duty to pursue, because I see, as I believe, that it may result in continued turmoil and peril, not only to the South, but to the entire country. I rise, therefore, for the purpose of stating very briefly, in addition to the reasons which I assigned when the bill was formerly before us, why I cast the vote which I then gave, and why I shall give the same vote now. [Applause in the galleries.]

The PRESIDENT *pro tempore*. Order will be observed in the galleries, or they will be cleared.

Mr. JOHNSON. I hope it will not for a moment be supposed by those whom I am addressing that I am now governed, or was governed before, by any desire or expectation of popular applause. My motives, if I know myself, were and are pure and patriotic. I see before me a distressed, a desolated country, and in the measure before you I think I see the means through which it may be rescued and restored ere long to prosperity and a healthful condition, and the free institutions of our country preserved.

Mr. President, I have reached that period of life when I can have no other ambition than that of serving my country. During the whole period of our troubles I have hoped and believed that the war would terminate successfully, and that that accomplished, our forms of Government as devised by our fathers would be even the more firmly established, securing to the States all the powers they possessed without dispute before the war, and which they thought, as I think, cannot be exercised at all by the General Government, and securing to that Government the powers granted it, which the States are equally incompetent to discharge. But we are now, though the war has successfully terminated, in a condition which fills every reflecting man with anxiety. Without examining the motives of our brethren in the South in attempting to dissever our Union and to establish a confederacy of their own, it is sufficient to say that in my opinion if they had succeeded the cause of constitutional liberty would for years, if not forever, have terminated.

The effort, thank God, has failed. The power of the Government under the providence of God has proved able to arrest and defeat it, and the South now, as I believe, is willing in good faith and anxious to abide by the result. The question to be decided is and has been from the period of the war's termination, how is the Government to be restored to its original integrity, and the States, as vital to that integrity, to be restored to their former constitutional condition? The opinion entertained by me during the war, and since—often expressed in the Senate and upon other suitable occasions—is that the moment the insurrection was suppressed the States where it prevailed remained in the Union with all the rights and obligations before belonging to them, and that the General Government had no power to limit these in any way whatever; that the authority to change their government belongs exclusively to their own people, subject only to the restrictions expressed or implied of the Constitution of the General Government; that this freedom from control is applicable to every department of that Government. In my view, therefore, they were and are as entirely without the jurisdiction of the Executive as of Congress. The authority delegated to Congress to preserve our institutions, State and Federal, by suppressing insurrections aimed at their existence cannot be even tortured with any show of plausibility into an authority to destroy them.

I consequently think that no terms can be exacted, either by the President or by Congress, as conditions to be performed before they are entitled to representation in the Senate and House of Representatives. And in nothing that I have ever said or written upon the subject have I attempted to justify upon constitutional grounds the authority of the Executive to enforce conditions upon the States as preliminary to their right of representation. The ground upon which I have maintained and do maintain the constitutionality of the present State governments of the South is that the people of such States have, since they were exacted, complied with them and framed their constitutions accordingly. The late and the now President took a different view. They both seem to have supposed that these States were not within the Union so as to be entitled to representation in Congress until they should comply with such conditions as they might stipulate, and that they had the authority, without the sanction of Congress, to require such conditions.

In my judgment, in this they were right in part, but not in the whole. They were right in holding that the States are entitled to representation; but not because they had the authority to impose the conditions which they exacted, but because the people had adopted them. It is unnecessary, on this occasion, to state what those conditions were. In my opinion they were as unconstitutional as are to be found in the present bill. Congress, however, from the first has been of opinion, as their conduct shows, that notwithstanding the people of these States fulfilled these presidential conditions, they were not restored to the right of representation until Congress should so declare, and this, as manifested in the recent congressional elections, is to be esteemed the present judgment of the country. This being so, how are the States to be restored? It can only be done in fact upon their submitting to the conditions which Congress may require. Failing to do so, they must remain in the condition in which they are, liable to taxation without representation, and to be governed, not only without, but against their will.

I impute no improper motives either to Congress or to the Executive, the past or the present. I accord purity of purpose and patriotic designs to both; but with all becoming respect I differ in opinion from both. I seek, however, as vital to the prosperity of the country, if not to the continuing existence of our institutions, the complete restoration of the Union; and I now see no way of accomplishing it but by the adoption of the measure on your table.

Mr. President, we are now, in my opinion, by the course which Congress deems it its duty to pursue, (though very much to my regret) in a state of *quasi* war. Our condition is virtually revolutionary. Ten States are held and treated as conquered provinces, and they are so held and treated as in the judgment of the dominant party being enemies of the Union and of the Government. This condition of things is full of peril to all we should hold dear. It must be arrested, or our Government will sooner or later be destroyed. So thinking, were I to hesitate a moment longer to give my sanction to a measure which promises, as I believe the one upon your table does, to terminate it, I should be false to the true interest, honor, and very safety of the nation. We are told in the message before you (and quotations from a recent decision of the Supreme Court are given in support of the opinion) that such military force as this bill provides cannot be constitutionally resorted to, the war having terminated. As a question of law I concur in that opinion. But if that question should be presented to that court hereafter, when will it

112 U.S. 94 (1884)

ELK
v.
WILKINS.

Supreme Court of United States.

Argued April 23, 1884.
Decided November 3, 1884.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

97 *97 *Mr. A.J. Poppleton* and *Mr. John L. Webster* for plaintiff in error.

Mr. G.M. Lambertson for defendant in error.

98 *98 MR. JUSTICE GRAY delivered the opinion of the court. He stated the facts in the foregoing language, and continued:

The plaintiff, in support of his action, relies on the first clause of the first section of the Fourteenth Article of Amendment of the Constitution of the United States, by which "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside;" and on the Fifteenth Article of Amendment, which provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

This being a suit at common law, in which the matter in dispute exceeds $500, arising under the Constitution of the United States, the Circuit Court had jurisdiction of it under the act of March 3, 1875, ch. 137, § 1, even if the parties were citizens of the same State. 18 Stat. 470; *Ames v. Kansas,* 111 U.S. 449. The judgment of that court, dismissing the action with costs, must have proceeded upon the merits, for, if the dismissal had been for want of jurisdiction, no costs could have been awarded. *The Mayor v. Cooper,* 6 Wall. 247; *Mansfield & Coldwater Railway v. Swan,* 111 U.S. 379. And the only point argued by the defendant in this court is whether the petition sets forth facts enough to constitute a cause of action.

The decision of this point, as both parties assume in their briefs, depends upon the question whether the legal conclusion, that under and by virtue of the Fourteenth Amendment of the Constitution the plaintiff is a citizen of the United States, is supported by the facts alleged in the petition and admitted by the demurrer, to wit: The plaintiff is an Indian, and was born in the United States, and has severed his tribal relation to the Indian tribes, and fully and completely surrendered himself to the jurisdiction of the United States, and still continues to be subject to the jurisdiction of the United States, and is a *bona fide* resident of the State of Nebraska and city of Omaha.

The petition, while it does not show of what Indian tribe the plaintiff was a member, yet, by the
99 allegations that he "is *99 an Indian, and was born within the United States," and that "he had severed his tribal relation to the Indian tribes," clearly implies that he was born a member of one of the Indian tribes within the limits of the United States, which still exists and is

recognized as a tribe by the government of the United States. Though the plaintiff alleges that he "had fully and completely surrendered himself to the jurisdiction of the United States," he does not allege that the United States accepted his surrender, or that he has ever been naturalized, or taxed, or in any way recognized or treated as a citizen, by the State or by the United States. Nor is it contended by his counsel that there is any statute or treaty that makes him a citizen.

The question then is, whether an Indian, born a member of one of the Indian tribes within the United States, is, merely by reason of his birth within the United States, and of his afterwards voluntarily separating himself from his tribe and taking up his residence among white citizens, a citizen of the United States, within the meaning of the first section of the Fourteenth Amendment of the Constitution.

Under the Constitution of the United States, as originally established, "Indians not taxed" were excluded from the persons according to whose numbers representatives and direct taxes were apportioned among the several States; and Congress had and exercised the power to regulate commerce with the Indian tribes, and the members thereof, whether within or without the boundaries of one of the States of the Union. The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign States; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the President and Senate, or through acts of Congress in the ordinary forms of legislation. The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States. They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian. Indians and their property, exempt from taxation by treaty or statute of the
100 United States, could not be taxed *100 by any State. General acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them. Constitution, art. 1, sects. 2, 8; art. 2, sect. 2; *Cherokee Nation* v. *Georgia,* 5 Pet. 1; *Worcester* v. *Georgia,* 6 Pet. 515; *United States* v. *Rogers,* 4 How. 567; *United States* v. *Holliday,* 3 Wall. 407; *Case of the Kansas Indians,* 5 Wall. 737; *Case of the New York Indians,* 5 Wall. 761; *Case of the Cherokee Tobacco,* 11 Wall. 616; *United States* v. *Whiskey,* 93 U.S. 188; *Pennock* v. *Commissioners,* 103 U.S. 44; *Crow Dog's Case,* 109 U.S. 556; *Goodell* v. *Jackson,* 20 Johns. 693; *Hastings* v. *Farmer,* 4 N.Y. 293.

The alien and dependent condition of the members of the Indian tribes could not be put off at their own will, without the action or assent of the United States. They were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe, or such members of it as chose to remain behind on the removal of the tribe westward, to be citizens, or authorizing individuals of particular tribes to become citizens on application to a court of the United States for naturalization, and satisfactory proof of fitness for civilized life; for examples of which see treaties in 1817 and 1835 with the Cherokees, and in 1820, 1825 and 1830 with the Choctaws, 7 Stat. 159, 211, 236, 335, 483, 488; *Wilson* v. *Wall,* 6 Wall. 83; Opinion of Attorney-General Taney, 2 Opinions of Attorneys General, 462; in 1855 with the Wyandotts, 10 Stat. 1159; *Karrahoo* v. *Adams,* 1 Dillon, 344, 346; *Gray* v. *Coffman,* 3 Dillon, 393; *Hicks* v. *Butrick,* 3 Dillon, 413; in 1861 and in March, 1866, with the Pottawatomies, 12 Stat. 1192; 14 Stat. 763; in 1862 with the Ottawas, 12 Stat. 1237; and the Kickapoos, 13 Stat. 624; and acts of Congress of March 3, 1839, ch. 83, § 7, concerning the Brothertown Indians, and of March 3, 1843, ch. 101, § 7, August 6, 1846, ch. 88, and March 3, 1865, ch. 127, § 4, concerning the Stockbridge Indians, 5 Stat. 351, 647; 9 Stat. 55; 13 Stat. 562. See also treaties with the Stockbridge Indians in 1848 and 1856, 9 Stat. 955; 11 Stat. 667; 7 Opinions of Attorneys General, 746.

101 Chief Justice Taney, in the passage cited for the plaintiff *101 from his opinion in *Scott* v. *Sandford,* 19 How. 393, 404, did not affirm or imply that either the Indian tribes, or individual members of those tribes, had the right, beyond other foreigners, to become citizens of their own will, without being naturalized by the United States. His words were: "They" (the Indian tribes) "may, without doubt, like the subjects of any foreign government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from

any other foreign people." But an emigrant from any foreign State cannot become a citizen of the United States without a formal renunciation of his old allegiance, and an acceptance by the United States of that renunciation through such form of naturalization as may be required by law.

The distinction between citizenship by birth and citizenship by naturalization is clearly marked in the provisions of the Constitution, by which "no person, except a natural born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President;" and "the Congress shall have power to establish an uniform rule of naturalization." Constitution, art. 2, sect. 1; art. 1, sect. 8.

By the Thirteenth Amendment of the Constitution slavery was prohibited. The main object of the opening sentence of the Fourteenth Amendment was to settle the question, upon which there had been a difference of opinion throughout the country and in this court, as to the citizenship of free negroes (*Scott* v. *Sandford,* 19 How. 393); and to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and owing no allegiance to any alien power, should be citizens of the United States and of the State in which they reside. *Slaughter-House Cases,* 16 Wall. 36, 73; *Strauder* v. *West Virginia,* 102 U.S. 303, 306.

This section contemplates two sources of citizenship, and two sources only: birth and
102 naturalization. The persons declared *102 to be citizens are "all persons born or naturalized in the United States, and subject to the jurisdiction thereof." The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance. And the words relate to the time of birth in the one case, as they do to the time of naturalization in the other. Persons not thus subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts, or collectively, as by the force of a treaty by which foreign territory is acquired.

Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations.

This view is confirmed by the second section of the Fourteenth Amendment, which provides that "representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." Slavery having been abolished, and the persons formerly held as slaves made citizens, this clause fixing the apportionment of representatives has abrogated so much of the corresponding clause of the original Constitution as counted only three-fifths of such persons. But Indians not taxed are still excluded from the count, for the reason that they are not citizens. Their absolute exclusion from the basis of representation, in which all other persons are now included, is wholly inconsistent with their being considered citizens.

103 So the further provision of the second section for a proportionate *103 reduction of the basis of the representation of any State in which the right to vote for presidential electors, representatives in Congress, or executive or judicial officers or members of the legislature of a State, is denied, except for participation in rebellion or other crime, to "any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States," cannot apply to a denial of the elective franchise to Indians not taxed, who form no part of the people entitled to representation.

It is also worthy of remark, that the language used, about the same time, by the very Congress which framed the Fourteenth Amendment, in the first section of the Civil Rights Act of April 9, 1866, declaring who shall be citizens of the United States, is "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed." 14 Stat. 27;

Rev. Stat. § 1992.

Such Indians, then, not being citizens by birth, can only become citizens in the second way mentioned in the Fourteenth Amendment, by being "naturalized in the United States," by or under some treaty or statute.

The action of the political departments of the government, not only after the proposal of the Amendment by Congress to the States in June, 1866, but since the proclamation in July, 1868, of its ratification by the requisite number of States, accords with this construction.

While the Amendment was pending before the legislatures of the several States, treaties containing provisions for the naturalization of members of Indian tribes as citizens of the United States were made on July 4, 1866, with the Delawares, in 1867 with various tribes in Kansas, and with the Pottawatomies, and in April, 1868, with the Sioux. 14 Stat. 794, 796; 15 Stat. 513, 532, 533, 637.

The treaty of 1867 with the Kansas Indians strikingly illustrates the principle that no one can become a citizen of a nation without its consent, and directly contradicts the supposition that a member of an Indian tribe can at will be alternately a citizen of the United States and a member of the tribe.

104 That treaty not only provided for the naturalization of members *104 of the Ottawa, Miami, Peoria, and other tribes, and their families, upon their making declaration, before the District Court of the United States, of their intention to become citizens; 15 Stat. 517, 520, 521; but, after reciting that some of the Wyandotts, who had become citizens under the treaty of 1855, were "unfitted for the responsibilities of citizenship;" and enacting that a register of the whole people of this tribe, resident in Kansas or elsewhere, should be taken, under the direction of the Secretary of the Interior, showing the names of "all who declare their desire to be and remain Indians and in a tribal condition," and of incompetents and orphans as described in the treaty of 1855, and that such persons, and those only, should thereafter constitute the tribe; it provided that "no one who has heretofore consented to become a citizen, nor the wife or children of any such person, shall be allowed to become members of the tribe, except by the free consent of the tribe after its new organization, and unless the agent shall certify that such party is, through poverty or incapacity, unfit to continue in the exercise of the responsibilities of citizenship of the United States, and likely to become a public charge." 15 Stat. 514, 516.

Since the ratification of the Fourteenth Amendment, Congress has passed several acts for naturalizing Indians of certain tribes, which would have been superfluous if they were, or might become, without any action of the government, citizens of the United States.

By the act of July 15, 1870, ch. 296, § 10, for instance, it was provided that if at any time thereafter any of the Winnebago Indians in the State of Minnesota should desire to become citizens of the United States, they should make application to the District Court of the United States for the District of Minnesota, and in open court make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens, and should also make proof to the satisfaction of the court that they were sufficiently intelligent and prudent to control their affairs and interests, that they had adopted the habits of civilized life, and had for
105 at least five years before been able to support themselves and their families; and thereupon *105 they should be declared by the court to be citizens of the United States, the declaration entered of record, and a certificate thereof given to the applicant; and the Secretary of the Interior, upon presentation of that certificate, might issue to them patents in fee simple, with power of alienation, of the lands already held by them in severalty, and might cause to be paid to them their proportion of the money and effects of the tribe held in trust under any treaty or law of the United States; and thereupon such persons should cease to be members of the tribe, and the lands so patented to them should be subject to levy, taxation, and sale, in like manner with the property of other citizens. 16 Stat. 361. By the act of March 3, 1873, ch. 332, § 3, similar provision was made for the naturalization of any adult members of the Miami tribe in Kansas, and of their minor children. 17 Stat. 632. And the act of March 3, 1865, ch. 127, before referred to, making corresponding provision for the naturalization of any of the chiefs, warriors, or heads of families of the Stockbridge Indians, is re-enacted in section 2312 of the Revised Statutes.

The act of January 25, 1871, ch. 38, for the relief of the Stockbridge and Munsee Indians in the State of Wisconsin, provided that "for the purpose of determining the persons who are members of said tribes and the future relation of each to the government of the United States," two rolls should be prepared under the direction of the Commissioner of Indian Affairs, signed by the sachem and councillors of the tribe, certified by the person selected by the Commissioner to superintend the same, and returned to the Commissioner; the one, to be denominated the citizen roll, of the names of all such persons of full age, and their families, "as signify their desire to separate their relations with said tribe, and to become citizens of the United States," and the other, to be denominated the Indian roll, of the names of all such "as desire to retain their tribal character and continue under the care and guardianship of the United States;" and that those rolls, so made and returned, should be held as a full surrender and relinquishment, on the part of all those of the first class, of all claims to be known or
106 considered as members of the tribe, or to be interested *106 in any provision made or to be made by the United States for its benefit, "and they and their descendants shall thenceforth be admitted to all the rights and privileges of citizens of the United States." 16 Stat. 406.

The Pension Act exempts Indian claimants of pensions for service in the army or navy from the obligation to take the oath to support the Constitution of the United States. Act of March 3, 1873, ch. 234, § 28; 17 Stat. 574; Rev. Stat. § 4721.

The recent statutes concerning homesteads are quite inconsistent with the theory that Indians do or can make themselves independent citizens by living apart from their tribe. The act of March 3, 1875, ch. 131, § 15, allowed to "any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned, or may hereafter abandon, his tribal relations," the benefit of the homestead acts, but only upon condition of his "making satisfactory proof of such abandonment, under rules to be prescribed by the Secretary of the Interior;" and further provided that his title in the homestead should be absolutely inalienable for five years from the date of the patent, and that he should be entitled to share in all annuities, tribal funds, lands and other property, as if had maintained his tribal relations. 18 Stat. 420. And the act of March 3, 1884, ch. 180, § 1, while it allows Indians "located on public lands" to "avail themselves of the homestead laws as fully and to the same extent as may now be done by citizens of the United States," provides that the form and the legal effect of the patent shall be that the United States does and will hold the land for twenty-five years in trust for the Indian making the entry, and his widow and heirs, and will then convey it in fee to him or them. 23 Stat. 96.

The national legislation has tended more and more towards the education and civilization of the Indians, and fitting them to be citizens. But the question whether any Indian tribes, or any members thereof, have become so far advanced in civilization, that they should be let out of the state of pupilage, and admitted to the privileges and responsibilities of citizenship, is a
107 question to be decided by the nation whose wards they are *107 and whose citizens they seek to become, and not by each Indian for himself.

There is nothing in the statutes or decisions, referred to by counsel, to control the conclusion to which we have been brought by a consideration of the language of the Fourteenth Amendment, and of the condition of the Indians at the time of its proposal and ratification.

The act of July 27, 1868, ch. 249, declaring the right of expatriation to be a natural and inherent right of all people, and reciting that "in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship," while it affirms the right of every man to expatriate himself from one country, contains nothing to enable him to become a citizen of another, without being naturalized under its authority. 15 Stat 223; Rev. Stat. § 1999.

The provision of the act of Congress of March 3, 1871, ch. 120, that "hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty," is coupled with a provision that the obligation of any treaty already lawfully made is not to be thereby invalidated or impaired; and its utmost possible effect is to require the Indian tribes to be dealt with for the future through the legislative and not through the treaty-making power. 16 Stat. 566; Rev. Stat. § 2079.

In the case of *United States* v. *Elm,* 23 Int. Rev. Rec. 419, decided by Judge Wallace in the District Court of the United States for the Northern District of New York, the Indian who was held to have a right to vote in 1876 was born in the State of New York, one of the remnants of a tribe which had ceased to exist as a tribe in that State; and by a statute of the State it had been enacted that any native Indian might purchase, take, hold and convey lands, and, whenever he should have become a freeholder to the value of one hundred dollars, should be liable to taxation, and to the civil jurisdiction of the courts, in the same manner and to the same
108 extent as a citizen. N.Y. Stat. 1843, ch. 87. The condition of the tribe from which he *108 derived his origin, so far as any fragments of it remained within the State of New York, resembled the condition of those Indian nations of which Mr. Justice Johnson said in *Fletcher* v. *Peck,* 6 Cranch, 87, 146, that they "have totally extinguished their national fire, and submitted themselves to the laws of the States;" and which Mr. Justice McLean had in view, when he observed in *Worcester* v. *Georgia,* 6 Pet. 515, 580, that in some of the old States, "where small remnants of tribes remain, surrounded by white population, and who, by their reduced numbers, had lost the power of self-government, the laws of the State have been extended over them, for the protection of their persons and property." See also, as to the condition of Indians in Massachusetts, remnants of tribes never recognized by the treaties or legislative or executive acts of the United States as distinct political communities, *Danzell* v. *Webquish,* 108 Mass. 133; *Pells* v. *Webquish,* 129 Mass. 469; Mass. Stat. 1862, ch. 184; 1869, ch. 463.

The passages cited as favorable to the plaintiff from the opinions delivered in *Ex parte Kenyon,* 5 Dillon, 385, 390, in *Ex parte Reynolds,* 5 Dillon, 394, 397, and in *United States* v. *Crook,* 5 Dillon, 453, 464, were *obiter dicta.* The *Case of Reynolds* was an indictment in the Circuit Court of the United States for the Western District of Arkansas for a murder in the Indian country, of which that court had jurisdiction if either the accused or the dead man was not an Indian, and was decided by Judge Parker in favor of the jurisdiction, upon the ground that both were white men, and that, conceding the one to be an Indian by marriage, the other never was an Indian in any sense. 5 Dillon, 397, 404. Each of the other two cases was a writ of habeas corpus; and any person, whether a citizen or not, unlawfully restrained of his liberty, is entitled to that writ. *Case of the Hottentot Venus,* 13 East, 195; *Case of Dos Santos,* 2 Brock. 493; *In re Kaine,* 14 How. 103. In *Kenyon's Case,* Judge Parker held that the court in which the prisoner had been convicted had no jurisdiction of the subject matter, because the place of the commission of the act was beyond the territorial limits of its jurisdiction, and, as
109 was truly said, "this alone would be conclusive of this case." 5 Dillon, *109 390. In *United States* v. *Crook,* the Ponca Indians were discharged by Judge Dundy because the military officers who held them were taking them to the Indian Territory by force and without any lawful authority; 5 Dillon, 468; and in the case at bar, as the record before us shows, that learned judge concurred in the judgment below for the defendant.

The law upon the question before us has been well stated by Judge Deady in the District Court of the United States for the District of Oregon. In giving judgment against the plaintiff in a case resembling the case at bar, he said: "Being born a member of `an independent political community' — the Chinook — he was not born subject to the jurisdiction of the United States — not born in its allegiance." *McKay* v. *Campbell,* 2 Sawyer, 118, 134. And in a later case he said: "But an Indian cannot make himself a citizen of the United States without the consent and co-operation of the government. The fact that he has abandoned his nomadic life or tribal relations, and adopted the habits and manners of civilized people, may be a good reason why he should be made a citizen of the United States, but does not of itself make him one. To be a citizen of the United States is a political privilege which no one, not born to, can assume without its consent in some form. The Indians in Oregon, not being born subject to the jurisdiction of the United States, were not born citizens thereof, and I am not aware of any law or treaty by which any of them have been made so since." *United States* v. *Osborne,* 6 Sawyer, 406, 409.

Upon the question whether any action of a State can confer rights of citizenship on Indians of a tribe still recognized by the United States as retaining its tribal existence, we need not, and do not, express an opinion, because the State of Nebraska is not shown to have taken any action affecting the condition of this plaintiff. See *Chirac* v. *Chirac,* 2 Wheat. 259; *Fellows* v.

Blacksmith, 19 How. 366; *United States* v. *Holliday,* 3 Wall. 407, 420; *United States* v. *Joseph,* 94 U.S. 614, 618.

The plaintiff, not being a citizen of the United States under the Fourteenth Amendment of the Constitution, has been deprived of no right secured by the Fifteenth Amendment, and cannot maintain this action.

Judgment affirmed.

110 *110 MR. JUSTICE HARLAN, with whom concurred MR. JUSTICE WOODS, dissenting.

Mr. Justice Woods and myself feel constrained to express our dissent from the interpretation which our brethren give to that clause of the Fourteenth Amendment which provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The case, as presented by the record, is this: John **Elk**, the plaintiff in error, is a person of the Indian race. He was born within the territorial limits of the United States. His parents were, at the time of his birth, members of one of the Indian tribes in this country. More than a year, however, prior to his application to be registered as a voter in the city of Omaha, he had severed all relations with his tribe, and, as he alleges, fully and completely surrendered himself to the jurisdiction of the United States. Such surrender was, of course, involved in his act of becoming, as the demurrer to the petition admits that he did become, a *bona fide* resident of the State of Nebraska. When he applied in 1880 to be registered as a voter, he possessed, as is also admitted, the qualifications of age and residence in State, county, and ward, required for electors by the Constitution and laws of that State. It is likewise conceded that he was entitled to be so registered, if, at the time of his application, he was a citizen of the United States; for, by the Constitution and laws of Nebraska every citizen of the United States, having the necessary qualifications of age and residence in State, county, and ward, is entitled to vote. Whether he was such citizen is the single question presented by this writ of error.

It is said that the petition contains no averment that **Elk** was taxed in the State in which he resides, or had ever been treated by her as a citizen. It is evident that the court would not have held him to be a citizen of the United States, even if the petition had contained a direct averment that he was taxed; because its judgment, in legal effect, is, that, although born within the territorial limits of the United States, he could not, if at his birth a member of an Indian
111 tribe, acquire national citizenship *111 by force of the Fourteenth Amendment, but only in pursuance of some statute or treaty providing for his naturalization. It would, therefore, seem unnecessary to inquire whether he was taxed at the time of his application to be registered as a voter; for, if the words "all persons born ... in the United States and subject to the jurisdiction thereof," were not intended to embrace Indians born in tribal relations, but who subsequently became *bona fide* residents of the several States, then, manifestly, the legal status of such Indians is not altered by the fact that they are taxed in those States.

While denying that national citizenship, as conferred by that amendment, necessarily depends upon the inquiry whether the person claiming it is taxed in the State of his residence, or has property therein from which taxes may be derived, we submit that the petition does sufficiently show that the plaintiff is taxed, that is, belongs to the class which, by the laws of Nebraska, are subject to taxation. By the Constitution and laws of Nebraska all real and personal property, in that State, are subject to assessment and taxation. Every person of full age and sound mind, being a resident thereof, is required to list all of his personal property for taxation. Const. Neb., art. 9, § 1; Compiled Stat. of Neb., ch. 77, pp. 400-1. Of these provisions upon the subject of taxation this court will take judicial notice. Good pleading did not require that they should be set forth, at large, in the petition. Consequently, an averment that the plaintiff is a citizen and *bona fide* resident of Nebraska implies, in law, that he is subject to taxation, and is taxed, in that State. Further: The plaintiff has become so far incorporated with the mass of the people of Nebraska that, being, as the petition avers, a citizen and resident thereof, he constitutes a part of her militia. Comp. Stat. Neb., ch. 56. He may, being no longer a member of an Indian tribe, sue and be sued in her courts. And he is counted in every apportionment of

representation in the legislature; the requirement of her Constitution being, that "the legislature shall apportion the Senators and Representatives according to the number of inhabitants, excluding Indians not taxed and soldiers and officers of the United States army." Const. Neb., art. 3, § 1.

112 *112 At the adoption of the Constitution there were, in many of the States, Indians, not members of any tribe, who constituted a part of the people for whose benefit the State governments were established. This is apparent from that clause of article 1, section 3, which requires, in the apportionment of representatives and direct taxes among the several States "according to their respective numbers," the exclusion of "Indians not taxed." This implies that there were, at that time, in the United States, Indians who were taxed, that is, were subject to taxation, by the laws of the State of which they were residents. Indians not taxed were those who held tribal relations, and, therefore, were not subject to the authority of any State, and were subject only to the authority of the United States under the power conferred upon Congress in reference to Indian tribes in this country. The same provision is preserved in the Fourteenth Amendment; for, now, as at the adoption of the Constitution, Indians in the several States, who are taxed by their laws, are counted in establishing the basis of representation in Congress.

By the act of April 9, 1866, entitled "An Act to protect all persons in the United States in their civil rights, and furnish means for their vindication" (14 Stat. 27), it is provided that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." This, so far as we are aware, is the first general enactment making persons of the Indian race citizens of the United States. Numerous statutes and treaties previously provided for all the individual members of particular Indian tribes becoming, in certain contingencies, citizens of the United States. But the act of 1866 reached Indians not in tribal relations. Beyond question, by that act, national citizenship was conferred directly upon all persons in this country, of whatever race (excluding only "Indians not taxed"), who were born within the territorial limits of the United States, and were not subject to any foreign power. Surely every one must admit that an Indian, residing in one of the States, and subject to taxation there, became, by force alone of the act of 1866, a
113 citizen of the United States, although *113 he may have been, when born, a member of a tribe. The exclusion of Indians not taxed evinced a purpose to include those subject to taxation in the State of their residence. Language could not express that purpose with more distinctness than does the act of 1866. Any doubt upon the subject, in respect to persons of the Indian race residing in the United States or Territories, and not members of a tribe, will be removed by an examination of the debates, in which many distinguished statesmen and lawyers participated in the Senate of the United States when the act of 1866 was under consideration.

In the bill as originally reported from the Judiciary Committee there were no words excluding "Indians not taxed" from the citizenship proposed to be granted. Attention being called to this fact, the friends of the measure disclaimed any purpose to make citizens of those who were in tribal relations with governments of their own. In order to meet that objection, while conforming to the wishes of those desiring to invest with citizenship all Indians permanently separated from their tribes, and who, by reason of their residence away from their tribes, constituted a part of the people under the jurisdiction of the United States, Mr. Trumbull, who reported the bill, modified it by inserting the words "excluding Indians not taxed." What was intended by that modification appears from the following language used by him in debate:

"Of course we cannot declare the wild Indians who do not recognize the government of the United States, who are not subject to our laws, with whom we make treaties, who have their own laws, who have their own regulations, whom we do not intend to interfere with or punish for the commission of crimes one upon the other, to be the subjects of the United States in the sense of being citizens. They must be excepted. The Constitution of the United States excludes them from the enumeration of the population of the United States when it says that Indians not taxed are to be excluded. It has occurred to me that, perhaps, the amendment would meet the views of all gentlemen, which used these constitutional words, and said that all
114 persons born in the United States, excluding *114 Indians not taxed, and not subject to any foreign power, shall be deemed citizens of the United States." Cong. Globe, 1st Sess., 39th Congress, p. 527.

In replying to the objections urged by Mr. Hendricks to the bill even as amended, Senator Trumbull said:

"Does the Senator from Indiana want the wild roaming Indians, not taxed, not subject to our authority, to be citizens of the United States — persons that are not to be counted in our government? If he does not, let him not object to this amendment that brings in *even* [only] *the Indian when he shall have cast off his wild habits, and submitted to the laws of organized society and become a citizen.*" Ibid. 528.

The entire debate shows, with singular clearness, indeed, with absolute certainty, that no Senator who participated in it, whether in favor of or in opposition to the measure, doubted that the bill, as passed, admitted, and was intended to admit, to national citizenship Indians who abandoned their tribal relations, and became residents of one of the States or Territories, within the full jurisdiction of the United States. It was so interpreted by President Johnson, who, in his veto message, said:

"By the first section of the bill all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States. This provision comprehends the Chinese of the Pacific States, *Indians subject to taxation,* the people called Gypsies, as well as the entire race designated as blacks, persons of color, negroes, mulattoes, and persons of African blood. Every individual of those races, born in the United States, is, by the bill, made a citizen of the United States."

It would seem manifest, from this brief review of the history of the act of 1866, that one purpose of that legislation was to confer national citizenship upon a part of the Indian race in this country — such of them, at least, as resided in one of the States or Territories, and were subject to taxation and other public burdens. And it is to be observed that, whoever was included within the terms of the grant, contained in that act, became citizens of the United
115 States, without any record of *115 their names being made. The citizenship so conferred was made to depend wholly upon the existence of the facts which the statute declared to be a condition precedent to the grant taking effect.

At the same session of the Congress which passed the act of 1866, the Fourteenth Amendment was approved and submitted to the States for adoption. Those who sustained the former urged the adoption of the latter. An examination of the debates in Congress, pending the consideration of that amendment, will show that there was no purpose, on the part of those who framed it or of those who sustained it by their votes, to abandon the policy inaugurated by the act of 1866, of admitting to national citizenship such Indians as were separated from their tribes, and were residents of one of the States or of one of the Territories, outside of any reservation or territory set apart for the exclusive use and occupancy of Indian tribes.

Prior to the adoption of the Fourteenth Amendment numerous statutes were passed with reference to particular bodies of Indians, under which all the individual members of such bodies, upon the dissolution of their tribal relations or upon the division of their lands derived from the government, became or were entitled to become, citizens of the United States by force alone of the statute, without observing any of the forms required by the naturalization laws in the case of a foreigner becoming a citizen of the United States. Such was the statute of March 3, 1839, 5 Stat. 349, relating to the Brothertown Indians, in the then Territory of Wisconsin. Congress consented that the lands reserved for their use might be partitioned among the individuals composing that tribe. The act required the partition to be evidenced by a report and map to be filed with the Secretary of the Interior, by whom it should be transmitted to the President; whereupon, the act proceeded, "the said Brothertown Indians, and each and every of them, shall then be deemed to be, and, from that time forth, are hereby declared to be, citizens of the United States to all intents and purposes, and shall be entitled to all the
116 rights, privileges, and immunities of such citizens," &c. Similar legislation was enacted with *116 reference to the Stockbridge Indians. 5 Stat. 646-7. Legislation of this character has an important bearing upon the present question, for it shows that, prior to the adoption of the Fourteenth Amendment it had often been the policy of Congress to admit persons of the Indian race to citizenship upon their ceasing to have tribal relations, and without the slightest

reference to the fact that they were born in tribal relations. It shows also that the citizenship thus granted was not, in every instance, required to be evidenced by the record of a court. If it be said that the statutes, prior to 1866, providing for the admission of Indians to citizenship, required, in their execution, that a record be made of the names of those who thus acquired citizenship, our answer is, that it was entirely competent for Congress to dispense, as it did in the act of 1866, with any such record being made in a court or in any department of the government. And certainly it must be conceded that, except in cases of persons "naturalized in the United States" (which phrase refers only to those who are embraced by the naturalization laws and not to Indians), the Fourteenth Amendment does not require the citizenship granted by it to be evidenced by the record of any court, or of any department of the government. Such citizenship passes to the person, of whatever race, who is embraced by its provisions, leaving the fact of citizenship to be determined, when it shall become necessary to do so in the course of legal inquiry, in the same way that questions as to one's nativity, domicile, or residence are determined.

If it be also said that, since the adoption of the Fourteenth Amendment, Congress has enacted statutes providing for the citizenship of Indians, our answer is, that those statutes had reference to tribes, the members of which could not, while they continued in tribal relations, acquire the citizenship granted by the Amendment. Those statutes did not deal with individual Indians who had severed their tribal connections and were residents within the States of the Union, under the complete jurisdiction of the United States.

There is nothing in the history of the adoption of the Fourteenth Amendment which, in our
117 opinion, justifies the conclusion *117 that only those Indians are included in its grant of national citizenship who were, at the time of their birth, subject to the complete jurisdiction of the United States. As already stated, according to the doctrines of the court, in this case — if we do not wholly misapprehend the effect of its decision — the plaintiff, if born while his parents were members of an Indian tribe, would not be embraced by the amendment, even had he been, *at the time it was adopted,* a permanent resident of one of the States, subject to taxation, and, in fact, paying property and personal taxes, to the full extent required of the white race in the same State.

When the Fourteenth Amendment was pending in the Senate of the United States, Mr. Doolittle moved to insert after the words "subject to the jurisdiction thereof," the words "excluding Indians not taxed." His avowed object in so amending the measure was to exclude, beyond all question, from the proposed grant of citizenship, tribal Indians who — since they were, in a sense, subject to the jurisdiction of the United States — might be regarded as embraced in the grant. The proposition was opposed by Mr. Trumbull and other friends of the proposed constitutional amendment, upon the ground that the words "Indians not taxed" might be misconstrued, and, also, because those words were unnecessary, in that the phrase "subject to the jurisdiction thereof" embraced only those who were subject to the complete jurisdiction of the United States, which could not be properly said of Indians in tribal relations. But it was distinctly announced by the friends of the measure that they intended to include in the grant of national citizenship Indians who were within the jurisdiction of the States, and subject to their laws, because such Indians would be completely under the jurisdiction of the United States. Said Mr. Trumbull: "It is only those who come completely within our jurisdiction, who are subject to our laws, that we think of making citizens; and there can be no objection to the proposition that such persons should be citizens." Congress. Globe, Pt. 4, 1st. Sess., 39th Cong., pp. 2890 to 2893. Alluding to the phrase "Indians not taxed," he remarked that the
118 language of the proposed constitutional amendment was *118 better than that of the act of 1866 passed at the same session. He observed:

"There is a difficulty about the words `Indians not taxed.' Perhaps one of the reasons why I think so is because of the persistency with which the Senator from Indiana himself insisted that the phrase `Indians not taxed,' the very words which the Senator from Wisconsin wishes to insert here, would exclude everybody that did not pay a tax; that that was the meaning of it; we must take it literally. The Senator from Maryland did not agree to that nor did I, but, if the Senator from Indiana was right, it would receive a construction which, I am sure, the Senator from Wisconsin would not be for, for if these Indians come within our limits and within our jurisdiction and are civilized, he would just as soon make a citizen of a poor Indian as of the

rich Indian." Ibid. 2894.

A careful examination of all that was said by Senators and Representatives, pending the consideration by Congress of the Fourteenth Amendment, justifies us in saying that every one who participated in the debates, whether for or against the amendment, believed that in the form in which it was approved by Congress it granted, and was intended to grant, national citizenship to every person of the Indian race in this country who was unconnected with any tribe, and who resided, in good faith, outside of Indian reservations and within one of the States or Territories of the Union. This fact is, we think, entitled to great weight in determining the meaning and scope of the amendment. *Lithographic Co. v. Sarony,* 111 U.S. 57.

In this connection we refer to an elaborate report made by Mr. Carpenter, to the Senate of the United States, in behalf of its judiciary committee, on the 14th of December, 1870. The report was made in obedience to an instruction to inquire as to the effect of the Fourteenth Amendment upon the treaties which the United States had with various Indian tribes of the country. The report says: "For these reasons your committee do not hesitate to say that the Indian tribes within the limits of the United States, and the individuals, members of such tribes, while they adhere to and form a part of the tribes to which they belong, are not, within the
119 meaning of the *119 Fourteenth Amendment, `subject to the jurisdiction' of the United States; and, therefore, that *such* Indians have not become citizens of the United States by virtue of that amendment; and, if your committee are correct in this conclusion, it follows that the treaties heretofore made between the United States and the Indian tribes are not annulled by that amendment." The report closes with this significant language: "It is pertinent to say, in concluding this report, that treaty relations can properly exist with Indian tribes or nations only, and that, *when the members of any Indian tribe are scattered, they are merged in the mass of our people, and become equally subject to the jurisdiction of the United States.*"

The question before us has been examined by a writer upon constitutional law whose views are entitled to great respect. Judge Cooley, referring to the definition of national citizenship as contained in the Fourteenth Amendment, says:

"By the express terms of the amendment, persons of foreign birth, who have never renounced the allegiance to which they were born, though they may have a residence in this country, more or less permanent, for business, instruction, or pleasure, are not citizens. Neither are the aboriginal inhabitants of the country citizens, so long as they preserve their tribal relations and recognize the headship of their chiefs, notwithstanding that, as against the action of our own people, they are under the protection of the laws, and may be said to owe a qualified allegiance to the government. When living within territory over which the laws, either State or Territorial, are extended, they are protected by, and, at the same time, held amenable to, those laws in all their intercourse with the body politic, and with the individuals composing it; but they are also, as a quasi-foreign people, regarded as being under the direction and tutelage of the general government, and subjected to peculiar regulations as dependent communities. They are `subject to the jurisdiction' of the United States only in a much qualified sense; and it would be obviously inconsistent with the semi-independent character of such a tribe, and with the obedience they are expected to render to their tribal head, that they should
120 be vested with the complete rights, or, on the other *120 hand, subjected to the full responsibilities of American citizens. It would not, for a moment, be contended that such was the effect of this amendment.

"When, however, the tribal relations are dissolved, when the headship of the chief or the authority of the tribe is no longer recognized, and the individual Indian, turning his back upon his former mode of life, makes himself a member of the civilized community, the case is wholly altered. He then no longer acknowledges a divided allegiance; he joins himself to the body politic; he gives evidence of his purpose to adopt the habits and customs of civilized life; and as his case is then within the terms of this amendment, it would seem that his right to protection, in person, property and privilege, must be as complete as the allegiance to the government to which he must then be held; as complete, in short, as that of any other native born inhabitant." 2 Story's Const., Cooley's Edi., § 1933, p. 654.

To the same effect are *Ex parte Kenyon,* 5 Dillon, 390; *Ex parte Reynolds,* Ib. 307; *United*

States v. *Crook*, Ib. 454; *United States* v. *Elm*, Dist. Ct. U.S., Northern District of New York, 23 Int. Rev. Rec. 419.

It seems to us that the Fourteenth Amendment, in so far as it was intended to confer national citizenship upon persons of the Indian race, is robbed of its vital force by a construction which excludes from such citizenship those who, although born in tribal relations, are within the complete jurisdiction of the United States. There were, in some of our States and Territories at the time the amendment was submitted by Congress, many Indians who had finally left their tribes and come within the complete jurisdiction of the United States. They were as fully prepared for citizenship as were or are vast numbers of the white and colored races in the same localities. Is it conceivable that the statesmen who framed, the Congress which submitted, and the people who adopted that amendment, intended to confer citizenship, national and State, upon the entire population in this country of African descent (the larger part of which was shortly before held in slavery), and by the same constitutional provision to
121 exclude from such citizenship Indians *121 who had never been in slavery, and who, by becoming *bona fide* residents of States and Territories within the complete jurisdiction of the United States, had evinced a purpose to abandon their former mode of life and become a part of the People of the United States? If this question be answered in the negative, as we think it must be, then we are justified in withholding our assent to the doctrine which excludes the plaintiff from the body of citizens of the United States, upon the ground that his parents were, when he was born, members of an Indian tribe. For, if he can be excluded upon any such ground, it must necessarily follow that the Fourteenth Amendment did not grant citizenship even to Indians who, although born in tribal relations, were, at its adoption, severed from their tribes, and subject to the complete jurisdiction, as well of the United States as of the State or Territory in which they resided.

Our brethren, it seems to us, construe the Fourteenth Amendment as if it read: "All persons *born subject* to the jurisdiction of, or naturalized in, the United States, are citizens of the United States and of the State in which they reside;" whereas the amendment, as it is, implies in respect of persons born in this country, that they may claim the rights of national citizenship from and after the moment they become subject to the complete jurisdiction of the United States. This would not include the children, born in this country, of a foreign minister, for the reason that, under the fiction of extra-territoriality as recognized by international law, such minister, "though actually in a foreign country, is considered still to remain within the territory of his own State," and, consequently, he continues "subject to the laws of his own country, both with respect to his personal status, and his rights of property; and his children, though born in a foreign country, are considered as natives." Halleck's International Law, ch. 10, § 12. Nor was plaintiff born without the jurisdiction of the United States in the same sense that the subject of a foreign State, born within the territory of that State, may be said to have been
122 born without the jurisdiction of our government. For according to the decision in *Cherokee* *122 *Nation* v. *Georgia*, 5 Pet. 17, the tribe, of which the parents of plaintiff were members, was not "a foreign State, in the sense of the Constitution," but a domestic dependent people, `in a state of pupilage," and "so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered an invasion of our territory, and an act of hostility." They occupied territory, which the court in that case said, composed "a part of the United States," the title to which this nation asserted independent of their will. "In all our intercourse with foreign nations," said Chief Justice Marshall, in the same case, "in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our citizens... . They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their Great Father." And again, in *United States* v. *Rogers*, 4 How. 572, this court, speaking by Chief Justice Taney, said that it was "too firmly and clearly established to admit of dispute that the Indian tribes, residing within the territorial limits of the United States, are subject to their authority." *The Cherokee Tobacco*, 11 Wall. 616.

123 Born, therefore, in the territory under the dominion, and within the jurisdictional limits of the United States, plaintiff has acquired, as was his undoubted right, a residence in one of the States, with her consent, and is subject to taxation and to all other burdens imposed by her

upon residents of every race. If he did not acquire national citizenship on abandoning his tribe and becoming, by residence in one of the States, subject to the complete jurisdiction of the United States, then the Fourteenth Amendment has wholly failed to accomplish, in respect of the Indian race, what, we think, was intended by it; and there is still in this country a despised and rejected class of persons, with no nationality whatever; who, born in our territory, owing no allegiance to any foreign power, and subject, as residents of the States, to all the burdens of government, *123 are yet not members of any political community nor entitled to any of the rights, privileges, or immunities of citizens of the United States.

THE STORY OF THE SUPREME COURT

By ERNEST SUTHERLAND BATES

"We are under a Constitution, but the Constitution is what the judges say it is."

CHARLES EVANS HUGHES

WITH FRONTISPIECE

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Grant; but an equally good technical reason for declining jurisdiction was found by holding that the case concerned purely political matters, instead of personal or property rights. Then a third suit was brought in which a part of the Reconstruction legislation was cleverly turned against itself, namely, an Act of 1867 designed to protect Federal officials in the South but so carelessly drawn that it authorized habeas corpus proceedings in "all cases where any person may be restrained of his or her liberty, in violation of the Constitution or of any treaty or law of the United States." Taking advantage of this Act a Mississippi editor held for trial before a military commission petitioned the federal Circuit Court for a writ of habeas corpus and on denial appealed to the Supreme Court. This time the Court, with Congress apparently unable to object, assumed jurisdiction, and the constitutionality of the Reconstruction Acts was at last about to be tested in the case of *Ex Parte McCardle,* 6 Wallace, 318, with a negative verdict generally expected.

Confronted with an immediate emergency, the Radical Republicans in control of Congress rushed through a bill repealing the appellate jurisdiction of the Supreme Court under the Act of 1867 and prohibiting it from proceeding on any appeals already before it. With all their haste, however, the arguments in the *McCardle Case* had been finished while the bill was still pending, and the Court, had it so chosen, could have rendered its decision before Congress acted. But it did not choose to do so. Instead, it waited until the bill was passed and then postponed further consideration of the matter until the next term. Finally, at the next term; in a unanimous decision delivered by Chief Justice Chase, it said: "This court cannot proceed to pronounce judgment . . . for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer."

The postponement and final decision greatly lowered the prestige of the Court. Its warmest defenders no longer defended it. At the time of the postponement, Gideon Welles in the Cabinet confided to his diary: "The Judges of the Supreme Court have caved in, fallen through, failed in the *Mc-*

Cardle Case," and former Justice Curtis wrote, "Congress, with the acquiescence of the country, has subdued the Supreme Court as well as the President." Writing today of the postponement, Charles Warren says, "While there was some justification for the view that the Court had not been firm in its stand . . . the intimations that its action was influenced by the political situation were clearly unfair, in view of its previous courageous action in sustaining its jurisdiction over the case."* In the absence of written evidence, whether the Court was influenced in withdrawing from the case by the fact that in January, 1868, the House by a vote of one hundred sixteen to thirty-nine had passed a bill favorably reported by its Judiciary Committee providing that two-thirds of the justices must concur to render invalid any act of Congress—a bill dropped in the Senate but liable at any time to be revived—this question must be left to the reader's ideas of human nature in general and of judicial nature in particular as to what was most probable under the circumstances.

In another case, *Texas* v. *White, 7* Wallace, 700, which was decided on the same day as *Ex Parte McCardle,* the Court rendered a guarded opinion on the fundamental question which had divided the executive and legislative whether, as Lincoln and Johnson contended, the Confederate States had never really been outside of the Union but merely thought they were—and so after the war should be treated as an integral part of the Union, or whether, as Thaddeus Stevens and the Radical Republicans maintained, the Confederacy had in fact set itself up as a hostile nation and should be treated as such. The specific issue was whether notes issued by the state of Texas while a part of the Confederacy were still redeemable. The opinion delivered by Justice Chase skillfully boxed the compass on the major point. The case, he said, did not make it necessary to pronounce judgment upon the constitutionality of the "military authority or . . . the paramount authority of Congress"—on which, of course, the majority of the Court had already pronounced judgment, and that an unfavorable

*Warren, *op. cit.*, Vol. II, p. 484.

one, in the *Milligan Case;* he then asserted that the secession ordinance of Texas was a nullity, the state having always remained within the Union in spite of itself, and ended by declaring that this legal nullity had nevertheless changed the relation of Texas to the rest of the Union so that those of her laws which had been passed in support of the rebellion, such as the bond issue under discussion, were absolutely void. The general effect of the decision, and of the Court's careful avoidance of unnecessary conflict with Congress was to enhance further the authority of the latter.

A last attempt to obtain a definite ruling on the constitutionality of the Reconstruction Acts was made in the case of *Ex Parte Yerger,* 8 Wallace, 85, by another editor imprisoned under the military who appealed for a writ of habeas corpus, this time under the original Judiciary Act of 1789. Again the Court assumed jurisdiction, and its action was immediately answered by the introduction of a bill in the Senate explicitly prohibiting the Supreme Court from considering any case which involved the validity of the Reconstruction Acts, followed by another, still more radical, prohibiting the judicial review of any act of Congress. What promised to be a final combat between the Supreme Court and Congress, with the odds on Congress, was averted by a compromise outside of court whereby Yerger on being turned over to the civil authorities withdrew his petition.

More important for an abatement of the conflict between the two branches of the government were the failure of the Radical Republicans in the impeachment trial of President Johnson, the death of their leader, Thaddeus Stevens, and the passing of power in Congress to a more moderate group. With the gradual abandonment of the attempt to enforce the Reconstruction Acts, the interest of the country turned to economic problems. Like the national War of 1812, the second great war between the Supreme Court and Congress was terminated by the disappearance of the cause of conflict, and it ended like the struggle between Marshall and the Jeffersonians without any change in the legal or constitutional position of the Court.

74 U.S. 506 (____)
7 Wall. 506

EX PARTE McCARDLE.

Supreme Court of United States.

509 *509 Mr. Sharkey, for the appellant.

Messrs. L. Trumbull and M.H. Carpenter, contra.

512 *512 The CHIEF JUSTICE delivered the opinion of the court.

The first question necessarily is that of jurisdiction; for, if the act of March, 1868, takes away the jurisdiction defined by the act of February, 1867, it is useless, if not improper, to enter into any discussion of other questions.

513 It is quite true, as was argued by the counsel for the petitioner, that the appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, conferred *513 by the Constitution. But it is conferred "with such exceptions and under such regulations as Congress shall make."

It is unnecessary to consider whether, if Congress had made no exceptions and no regulations, this court might not have exercised general appellate jurisdiction under rules prescribed by itself. For among the earliest acts of the first Congress, at its first session, was the act of September 24th, 1789, to establish the judicial courts of the United States. That act provided for the organization of this court, and prescribed regulations for the exercise of its jurisdiction.

The source of that jurisdiction, and the limitations of it by the Constitution and by statute, have been on several occasions subjects of consideration here. In the case of Durousseau v. The United States,[*] particularly, the whole matter was carefully examined, and the court held, that while "the appellate powers of this court are not given by the judicial act, but are given by the Constitution," they are, nevertheless, "limited and regulated by that act, and by such other acts as have been passed on the subject." The court said, further, that the judicial act was an exercise of the power given by the Constitution to Congress "of making exceptions to the appellate jurisdiction of the Supreme Court." "They have described affirmatively," said the court, "its jurisdiction, and this affirmative description has been understood to imply a negation of the exercise of such appellate power as is not comprehended within it."

The principle that the affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed having been thus established, it was an almost necessary consequence that acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it.

514 The exception to appellate jurisdiction in the case before us, however, is not an inference from the affirmation of other *514 appellate jurisdiction. It is made in terms. The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of habeas corpus is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.

We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle.

Several cases were cited by the counsel for the petitioner in support of the position that jurisdiction of this case is not affected by the repealing act. But none of them, in our judgment, afford any support to it. They are all cases of the exercise of judicial power by the legislature, or of legislative interference with courts in the exercising of continuing jurisdiction.[*]

On the other hand, the general rule, supported by the best elementary writers,[†] is, that "when an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed." And the effect of repealing acts upon suits under acts repealed, has been determined by the adjudications of this court. The subject was fully considered in Norris v. Crocker,[‡] and more recently in Insurance Company v. Ritchie.[§] In both of these cases it was held that no judgment could be rendered in a suit after the repeal of the act under which it was brought and prosecuted.

515 *515 It is quite clear, therefore, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of habeas corpus, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.[*]

The appeal of the petitioner in this case must be

DISMISSED FOR WANT OF JURISDICTION.

[*] 6 Cranch, 312; Wiscart v. Dauchy, 3 Dallas, 321.

[*] Lanier v. Gallatas, 13 Louisiana Annual, 175; De Chastellux v. Fairchild, 15 Pennsylvania State, 18; The State v. Fleming, 7 Humphreys, 152; Lewis v. Webb, 3 Greenleaf, 326.

[†] Dwarris on Statutes, 538.

[‡] 13 Howard, 429.

[§] 5 Wallace, 541

[*] **Ex parte McCardle**, 6 Wallace, 324.

Ex parte MERRYMAN

Circuit Court, D. Maryland.

April Term, 1861.

HABEAS CORPUSPOWER TO SUSPEND IN TIME OF WAR; PRESIDENT; MILITARY AUTHORITY; SUSPENSION BY CONGRESS.

1. On the 25th May 1861, the petitioner, a citizen of Baltimore county, in the state of Maryland, was arrested by a military force, acting under orders of a majorgeneral of the United States army, commanding in the state of Pennsylvania, and committed to the custody of the general commanding Fort McHenry, within the district of Maryland; on the 26th May 1861, a writ of habeas corpus was issued by the chief justice of the United States, sitting at chambers, directed to the commandant of the fort, commanding him to produce the body of the petitioner before the chief justice, in Baltimore city, on the 27th day of May 1861; on the lastmentioned day, the writ was returned served, and the officer to whom it was directed declined to produce the petitioner, giving as his excuse the following reasons: 1. That the petitioner was arrested by the orders of the majorgeneral commanding in Pennsylvania, upon the charge of treason, in being 'publicly associated with and holding a commission as lieutenant in a company having in their possession arms belonging to the United States, and avowing his purpose of armed hostility against the government.' 2. That he (the officer having the petitioner in custody) was duly authorized by the president of the United States, in such cases, to suspend the writ of habeas corpus for the public safety. Held, that the petitioner was entitled to be set at liberty and discharged immediately from confinement, upon the grounds following: 1. That the president, under the constitution of the United States, cannot suspend the privilege of the writ of habeas corpus, nor authorize a military officer to do it. 2. That a military officer has no right to arrest and detain a person not subject to the rules and articles of war, for an offence against the law of the United States, except in aid of the judicial authority, and subject to its control; and if the party be arrested by the military, it is the duty of the officer to deliver him over immediately to the civil authority, to be dealt with according to law. [Approved in Re Kemp, 16 Wis. 367.]

2. Under the constitution of the United States, congress is the only power which can authorize the suspension of the privilege of the writ. [Cited in Ex parte Field, Case No. 4,761; McCall v. McDowell, Id. 8,673.]

Habeas corpus. On the 26th May 1861, the following sworn petition was presented to the chief justice of the United States, on behalf of John Merryman, then in confinement in Fort McHenry:

'To the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States: The petition of John Merryman, of Baltimore county and state of Maryland, respectfully shows, that being at home, in his own domicile, he was, about the hour of two o'clock a. m., on the 25th day of May, A. D. 1861, aroused from his bed by an armed force pretending to act under military orders from some person to your petitioner unknown. That he was by said armed force, deprived of his liberty, by being taken into custody, and removed from his said home to Fort McHenry, near to the city of Baltimore, and in the district aforesaid, and where your petitioner now is in close custody. That he has been so imprisoned without any process or color of law whatsoever, and that none such is pretended by those who are thus detaining him; and that no warrant from any court, magistrate or

other person having legal authority to issue the same exists to justify such arrest; but to the contrary, the same, as above stated, hath been done without color of law and in violation of of constitution and laws of the United States, of which he is a citizen. That since his arrest, he has been informed, that some order, purporting to come from one General Keim, of Pennsylvania, to this petitioner unknown, directing the arrest of the captain of some company in Baltimore county, of which company the petitioner never was and is not captain, was the pretended ground of his arrest, and is the sole ground, as he believes, on which he is now detained. That the person now so detaining him at said fort is BrigadierGeneral George Cadwalader, the military commander of said post, professing to act in the premises under or by color of the authority of the United States. Your petitioner, therefore, prays that the writ of habeas corpus may issue, to be directed to the said George Cadwalader, commanding him to produce your petitioner before you, judge as aforesaid, with the cause, if any, for his arrest and detention, to the end that your petitioner be discharged and restored to liberty, and as in duty, & c. John Merryman. Fort McKenry, 25th May 1861.

'United States of America, District of Maryland, to wit: Before the subscriber, a commissioner appointed by the circuit court of the United States, in and for the Fourth circuit and district of Maryland, to take affidavits, & c., personally appeared the 25th day of May, A. D. 1861, Geo. H. Williams, of the city of Baltimore and district aforesaid, and made oath on the Holy Evangely of Almighty God, that the matters and facts stated in the foregoing petition are true, to the best of his knowledge, information and belief; and that the said petition was signed in his presence by the petitioner, and would have been sworn to by him, said petitioner, but that he was, at the time, and still is, in close custody, and all access to him denied, except to his counsel and his brother inlawthis deponent being one of said counsel. Sworn to before me, the 25th day of May, A. D. 1861. John Hanan, U. S. Commissioner.

'United States of America, District of Maryland, to wit: Before the subscriber, a commissioner appointed by the circuit court of the United States, in and for the Fourth circuit and district of Maryland, to take affidavits, & c., personally appeared this 26th day of May, 1861, George H. Williams, of the city of Baltimore and district aforesaid, and made oath on the Holy Evangely of Almighty God, that on the 26th day of May, he went to Fort McHenry, in the preceding affidavit mentioned, and obtained an interview with Gen. Geo. Cadwalader, then and there in command, and deponent, one of the counsel of said John Merryman, in the foregoing petition named, and at his request, and declaring himself to be such counsel, requested and demanded that he might be permitted to see the written papers, and to be permitted to make copies thereof, under and by which he, the said general, detained the said Merryman in custody, and that to said demand the said Gen. Cadwalader replied, that he would neither permit the deponent, though officially requesting and demanding, as such counsel, to read the said papers, nor to have or make copies thereof. Sworn to this 26th day of May, A. D. 1861, before me. John Hanan, U. S. Commissioner for Maryland.'

Upon this petition the chief justice passed the following order:

'In the matter of the petition of John Merryman, for a writ of habeas corpus: Ordered, this 26th day of May, A. D. 1861, that the writ of habeas corpus issue in this case, as prayed, and that the same be directed to General George Cadwalader, and be issued in the usual form, by Thomas Spicer, clerk of the circuit court of the United States in and for the district of Maryland, and that the said writ of habeas corpus be returnable at eleven o'clock, on Monday, the 27th of May 1861, at the circuit court room, in the Masonic Hall, in the city of Baltimore, before me, chief justice of the supreme court of United States. R. B. Taney.'

In obedience to this order, Mr. Spicer issued the following writ:

'District of Maryland, to wit: The United States of America, to General George Cadwalader, Greeting: You are hereby commanded to be and appear before the Honorable Roger B. Taney, chief justice of the supreme court of the United States, at the United States courtroom, in the Masonic Hall, in the city of Baltimore, on Monday, the 27th day of May 1861, at eleven o'clock in the morning, and that you have with you the body of John Merryman, of Baltimore county, and now in your custody, and that you certify and make known the day and cause of the caption and detention of the said John Merryman, and that you then and there, do, submit to, and receive whatsoever the said chief justice shall determine upon concerning you on this behalf, according to law, and have you then and there this writ. Witness, the Honorable R. B. Taney, chief justice of our supreme court, &c. Thomas Spicer, Clerk. Issued 26th May 1861.'

The marshal made return that he had served the writ on General Cadwalader, on the same day on which it issued; and filed that return on the 27th May 1861, on which day, at eleven o'clock precisely, the chief justice took his seat on the bench. In a few minutes, Colonel Lee, a military officer, appeared with General Cadwalader's return to the writ, which is as follows:

'Headquarters, Department of Annapolis, Fort McHenry, May 26 1861. To the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States, Baltimore, Md.Sir: The undersigned, to whom the annexed writ, of this date, signed by Thomas Spicer, clerk of the supreme court of the United States, is directed, most respectfully states, that the arrest of Mr. John Merryman, in the said writ named, was not made with his knowledge, or by his order or direction, but was made by Col. Samuel Yohe, acting under the orders of Major General William H. Keim, both of said officers being in the military service of the United States, but not within the limits of his command. The prisoner was brought to this post on the 20th inst., by Adjutant James Wittimore and Lieut. Wm. H. Abel, by order of Col. Yohe, and is charged with various acts of treason, and with being publicly associated with and holding a commission as lieutenant in a company having in their possession arms belonging to the United States, and avowing his purpose of armed hostility against the government. He is also informed that it can be clearly established, that the prisoner has made often and unreserved declarations of his association with this organized force, as being in avowed hostility to the government, and in readiness to cooperate with those engaged in the present rebellion against the government of the United States. He has further to inform you, that he is duly authorized by the president of the United States, in such cases, to suspend the writ of habeas corpus, for the public safety. This is a high and delicate trust, and it has been enjoined upon him that it should be executed with judgment and discretion, but he is nevertheless also instructed that in times of civil strife, errors, if any, should be on the side of the safety of the country. He most respectfully submits for your consideration, that those who should cooperate in the present trying and painful position in which our country is placed, should not, by any unnecessary want of confidence in each other, increase our embarrassments. He, therefore, respectfully requests that you will postpone further action upon this case, until he can receive instructions from the president of the United States, when you shall hear further from him. I have the honor to be, with high respect, your obedient servant, George Cadwalader, Brevet MajorGeneral U. S. A. Commanding.'

The chief justice then inquired of the officer whether he had brought with him the body of John Merryman, and on being answered that he had no instructions but to deliver the return, the chief justice said: 'General Cadwalader was commanded to produce the body of Mr. Merryman before me this morning, that the case might be heard, and the petitioner be either remanded to custody, or set at liberty, if held on insufficient grounds; but he has acted in disobedience to the writ, and I therefore direct that an attachment be at once issued against him, returnable before me here, at twelve o'clock tomorrow.' The order was then passed as follows:

'Ordered, that an attachment forthwith issue against General George Cadwalader for a contempt, in refusing to produce the body of John Merryman, according to the command of the writ of

habeas corpus, returnable and returned before me to day, and that said attachment be returned before me at twelve o'clock tomorrow, at the room of the circuit court. R. B. Taney. Monday, May 27 1861.'

The clerk issued the writ of attachment as directed. At twelve o'clock, on the 28th May 1861, the chief justice again took his seat on the bench, and called for the marshal's return to the writ of attachment. It was as follows:

'I hereby certify to the Honorable Roger B. Taney, chief justice of the supreme court of the United States, that by virtue of the within writ of attachment, to me directed, on the 27th day of May 1861, I proceeded, on this 28th day of May 1861, to Fort McHenry, for the purpose of serving the said writ. I sent in my name at the outer gate; the messenger returned with the reply, 'that there was no answer to my card,' and therefore, I could not serve the writ, as I was commanded. I was not permitted to enter the gate. So answers Washington Bonifant, U. S. Marshal for the District of Maryland.'

After it was read, the chief justice said, that the marshal had the power to summon the posse comitatus to aid him in seizing and bringing before the court, the party named in the attachment, who would, when so brought in, be liable to punishment by fine and imprisonment; but where, as in this case, the power refusing obedience was so notoriously superior to any the marshal could command, he held that officer excused from doing anything more than he had done. The chief justice then proceeded as follows:

'I ordered this attachment yesterday, because, upon the face of the return, the detention of the prisoner was unlawful, upon the grounds: 1. That the president, under the constitution of the United States, cannot suspend the privilege of the writ of habeas corpus, nor authorize a military officer to do it. 2. A military officer has no right to arrest and detain a person not subject to the rules and articles of war, for an offence against the laws of the United States, except in aid of the judicial authority, and subject to its control; and if the party be arrested by the military, it is the duty of the officer to deliver him over immediately to the civil authority, to be dealt with according to law. It is, therefore, very clear that John Merryman, the petitioner, is entitled to be set at liberty and discharged immediately from imprisonment. I forbore yesterday to state orally the provisions of the consitution of the United States, which make those principles the fundamental law of the Union, because an oral statement might be misunderstood in some portions of it, and I shall therefore put my opinion in writing, and file it in the office of the clerk of the circuit court, in the course of this week.'

He concluded by saying, that he should cause his opinion, when filed, and all the proceedings, to be laid before the president, in order that he might perform his constitutional duty, to enforce the laws, by securing obedience to the process of the United States.

TANEY, Circuit Justice.

The application in this case for a writ of habeas corpus is made to me under the 14th section of the judiciary act of 1789 [1 Stat. 81], which renders effectual for the citizen the constitutional privilege of the writ of habeas corpus. That act gives to the courts of the United States, as well as to each justice of the supreme court, and to every district judge, power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. The petition was presented to me, at Washington, under the impression that I would order the prisoner to be brought before me there, but as he was confined in Fort McHenry, in the city of Baltimore, which is in my circuit, I resolved to hear it in the latter city, as obedience to the writ, under such circumstances, would not withdraw General Cadwalader, who had him in charge, from the limits of his military command.

The petition presents the following case: The petitioner resides in Maryland, in Baltimore county; while peaceably in his own house, with his family, it was at two o'clock on the morning of the 25th of May 1861, entered by an armed force, professing to act under military orders; he was then compelled to rise from his bed, taken into custody, and conveyed to Fort McHenry, where he is imprisoned by the commanding officer, without warrant from any lawful authority.

The commander of the fort, General George Cadwalader, by whom he is detained in confinement, in his return to the writ, does not deny any of the facts alleged in the petition. He states that the prisoner was arrested by order of General Keim, of Pennsylvania, and conducted as aforesaid to Fort McHenry, by his order, and placed in his (General Cadwalader's) custody, to be there detained by him as a prisoner.

A copy of the warrant or order under which the prisoner was arrested was demanded by his counsel, and refused: and it is not alleged in the return, that any specific act, constituting any offence against the laws of the United States, has been charged against him upon oath, but he appears to have been arrested upon general charges of treason and rebellion, without proof, and without giving the names of the witnesses, or specifying the acts which, in the judgment of the military officer, constituted these crimes. Having the prisoner thus in custody upon these vague and unsupported accusations, he refuses to obey the writ of habeas corpus, upon the ground that he is duly authorized by the president to suspend it.

The case, then, is simply this: a military officer, residing in Pennsylvania, issues an order to arrest a citizen of Maryland, upon vague and indefinite charges, without any proof, so far as appears; under this order, his house is entered in the night, he is seized as a prisoner, and conveyed to Fort McHenry, and there kept in close confinement; and when a habeas corpus is served on the commanding officer, requiring him to produce the prisoner before a justice of the supreme court, in order that he may examine into the legality of the imprisonment, the answer of the officer, is that he is authorized by the president to suspend the writ of habeas corpus at his discretion, and in the exercise of that discretion, suspends it in this case, and on that ground refuses obedience to the writ.

As the case comes before me, therefore, I understand that the president not only claims the right to suspend the writ of habeas corpus himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him. No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the president claimed this power, and had exercised it in the manner stated in the return. And I certainly listened to it with some surprise, for I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands, that the privilege of the writ could not be suspended, except by act of congress.

When the conspiracy of which Aaron Burr was the head, became so formidable, and was so extensively ramified, as to justify, in Mr. Jefferson's opinion, the suspension of the writ, he claimed, on his part, no power to suspend it, but communicated his opinion to congress, with all the proofs in his possession, in order that congress might exercise its discretion upon the subject, and determine whether the public safety required it. And in the debate which took place upon the subject, no one suggested that Mr. Jefferson might exercise the power himself, if, in his opinion, the public safety demanded it.

Having, therefore, regarded the question as too plain and too well settled to be open to dispute, if the commanding officer had stated that, upon his own responsibility, and in the exercise of his own discretion, he refused obedience to the writ, I should have contented myself with referring to the

clause in the constitution, and to the construction it received from every jurist and statesman of that day, when the case of Burr was before them. But being thus officially notified that the privilege of the writ has been suspended, under the orders, and by the authority of the president, and believing, as I do, that the president has exercised a power which he does not possess under the constitution, a proper respect for the high office he fills, requires me to state plainly and fully the grounds of my opinion, in order to show that I have not ventured to question the legality of his act, without a careful and deliberate examination of the whole subject.

The clause of the constitution, which authorizes the suspension of the privilege of the writ of habeas corpus, is in the 9th section of the first article. This article is devoted to the legislative department of the United States, and has not the slightest reference to the executive department. It begins by providing 'that all legislative powers therein granted, shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.' And after prescribing the manner in which these two branches of the legislative department shall be chosen, it proceeds to enumerate specifically the legislative powers which it thereby grants [and legislative powers which it expressly prohibits]; 1 and at the conclusion of this specification, a clause is inserted giving congress 'the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.'

The power of legislation granted by this latter clause is, by its words, carefully confined to the specific objects before enumerated. But as this limitation was unavoidably somewhat indefinite, it was deemed necessary to guard more effectually certain great cardinal principles, essential to the liberty of the citizen, and to the rights and equality of the states, by denying to congress, in express terms, any power of legislation over them. It was apprehended, it seems, that such legislation might be attempted, under the pretext that it was necessary and proper to carry into execution the powers granted; and it was determined, that there should be no room to doubt, where rights of such vital importance were concerned; and accordingly, this clause is immediately followed by an enumeration of certain subjects, to which the powers of legislation shall not extend. The great importance which the framers of the constitution attached to the privilege of the writ of habeas corpus, to protect the liberty of the citizen, is proved by the fact, that its suspension, except in cases of invasion or rebellion, is first in the list of prohibited powers; and even in these cases the power is denied, and its exercise prohibited, unless the public safety shall require it.

It is true, that in the cases mentioned, congress is, of necessity, the judge of whether the public safety does or does not require it; and their judgment is conclusive. But the introduction of these words is a standing admonition to the legislative body of the danger of suspending it, and of the extreme caution they should exercise, before they give the government of the United States such power over the libery of a citizen.

It is the second article of the constitution that provides for the organization of the executive department, enumerates the powers conferred on it, and prescribes its duties. And if the high power over the liberty of the citizen now claimed, was intended to be conferred on the president, it would undoubtedly be found in plain words in this article; but there is not a word in it that can furnish the slightest ground to justify the exercise of the power.

The article begins by declaring that the executive power shall be vested in a president of the United States of America, to hold his office during the term of four years; and then proceeds to prescribe the mode of election, and to specify, in precise and plain words, the powers delegated to him, and the duties imposed upon him. The short term for which he is elected, and the narrow limits to which his power is confined, show the jealousy and apprehension of future danger which the framers of the constitution felt in relation to that department of the government, and how

carefully they withheld from it many of the powers belonging to the executive branch of the English government which were considered as dangerous to the liberty of the subject; and conferred (and that in clear and specific terms) those powers only which were deemed essential to secure the successful operation of the government.

He is elected, as I have already said, for the brief term of four years, and is made personally responsible, by impeachment, for malfeasance in office; he is, from necessity, and the nature of his duties, the commanderinchief of the army and navy, and of the militia, when called into actual service; but no appropriation for the support of the army can be made by congress for a longer term than two years, so that it is in the power of the succeeding house of representatives to withhold the appropriation for its support, and thus disband it, if, in their judgment, the president used, or designed to use it for improper purposes. And although the militia, when in actual service, is under his command, yet the appointment of the officers is reserved to the states, as a security against the use of the military power for purposes dangerous to the liberties of the people, or the rights of the states.

So too, his powers in relation to the civil duties and authority necessarily conferred on him are carefully restricted, as well as those belonging to his military character. He cannot appoint the ordinary officers of government, nor make a treaty with a foreign nation or Indian tribe, without the advice and consent of the senate, and cannot appoint even inferior officers, unless he is authorized by an act of congress to do so. He is not empowered to arrest any one charged with an offence agaisnt the United States, and whom he may, from the evidence before him, believe to be guilty; nor can he authorize any officer, civil or military, to exercise this power, for the fifth article of the amendments to the constitution expressly provides that no person 'shall be deprived of life, liberty or property, without due process of law'that is, judicial process.

Even if the privilege of the writ of habeas corpus were suspended by act of congress, and a party not subject to the rules and articles of war were afterwards arrested and imprisoned by regular judicial process, he could not be detained in prison, or brought to trial before a military tribunal, for the article in the amendments to the constitution immediately following the one above referred to (that is, the sixth article) provides, that 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.'

The only power, therefore, which the president possesses, where the 'life, liberty or property' of a private citizen is concerned, is the power and duty prescribed in the third section of the second article, which requires 'that he shall take care that the laws shall be faithfully executed.' He is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution, as they are expounded and adjudged by the coordinate branch of the government to which that duty is assigned by the constitution. It is thus made his duty to come in aid of the judicial authority, if it shall be resisted by a force too strong to be overcome without the assistance of the executive arm; but in exercising this power he acts in subordination to judicial authority, assisting it to execute its process and enforce its judgments. $With such provisions in the constitution, expressed in language too clear to be misunderstood by any one, I can see no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus, or the arrest of a citizen, except in aid of the judicial power. He certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of habeas corpus, and the judicial power also, by arresting and imprisoning a person without

due process of law.

Nor can any argument be drawn from the nature of sovereignty, or the necessity of government, for selfdefence in times of tumult and dnager. The government of the United States is one of delegated and limited powers; it derives it existence and authority altogether from the constitution, and neither of its branches, executive, legislative or judicial, can exercise any of the powers of government beyond those specified and granted; for the tenth article of the amendments to the constitution, in express terms, provides 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.'

Indeed, the security against imprisonment by executive authority, provided for in the fifth article of the amendments to the constitution, which I have before quoted, is nothing more than a copy of a like provision in the English constitution, which had been firmly established before the declaration of independence. Blackstone states it in the following words: 'To make imprisonment lawful, it must be either by process of law from the courts of judicature, or by warrant from some legal officer having authority to commit to prison.' 1 Bl. Comm. 137.

The people of the United Colonies, who had themselves lived under its protection, while they were British subjects, were well aware of the necessity of this safeguard for their personal liberty. And no one can believe that, in framing a government intended to guard still more efficiently the rights and liberties of the citizen, against executive encroachment and oppression, they would have conferred on the president a power which the history of England had proved to be dangerous and oppressive in the hands of the crown; and which the people of England had compelled it to surrender, after a long and obstinate struggle on the part of the English executive to usurp and retain it.

The right of the subject to the benefit of the writ of habeas corpus, it must be recollected, was one of the great points in controversy, during the long struggle in England between arbitrary government and free institutions, and must therefore have strongly attracted the attention of the statesmen engaged in framing a new and, as they supposed, a freer government than the one which they had thrown off by the revolution. From the earliest history of the common law, if a person were imprisoned, no matter by what authority, he had a right to the writ of habeas corpus, to bring his case before the king's bench; if no specific offence were charged against him in the warrant of commitment, he was entitled to be forthwith discharged; and if an offence were charged which was bailable in its character, the court was bound to set him at liberty on bail. The most exciting contests between the crown and the people of England, from the time of Magna Charta, were in relation to the privilege of this writ, and they continued until the passage of the statute of 31 Car. II., commonly known as the great habeas corpus act.

This statute put an end to the struggle, and finally and firmly secured the liberty of the subject against the usurpation and oppression of the executive branch of the government. It nevertheless conferred no new right upon the subject, but only secured a right already existing; for, although the right could not justly be denied, there was often no effectual remedy against its violation. Until the statute of 13 Wm. III., the judges held their offices at the pleasure of the king, and the influence which he exercised over timid, timeserving and partisan judges, often induced them, upon some pretext or other, to refuse to discharge the party, although entitled by law to his discharge, or delayed their decision, from time to time, so as to prolong the imprisonment of persons who were obnoxious to the king for their political opinions, or had incurred his resentment in any other way.

The great and inestimable value of the habeas corpus act of the 31 Car. II. is, that it contains

provisions which compel courts and judges, and all parties concerned, to perform their duties promptly, in the manner specified in the statute.

A passage in Blackstone's Commentaries, showing the ancient state of the law on this subject, and the abuses which were practised through the power and influence of the crown, and a short extract from Hallam's Constitutional History, stating the circumstances which gave rise to the passage of this statute, explain briefly, but fully, all that is material to this subject.

Blackstone says: 'To assert an absolute exemption from imprisonment in all cases is inconsistent with every idea of law and political society, and in the end would destroy all civil liberty by rendering its protection impossible. But the glory of the English law consists in clearly defining the times, the causes and the extent, when, wherefore and to what degree, the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing upon every commitment the reason for which it is made, that the court, upon a habeas corpus, may examine into its validity, and according to the circumstances of the case, may discharge, admit to bail or remand the prisoner. And yet early in the reign of Charles I. the court of kings bench, relying on some arbitrary precedents (and those perhaps misunderstood) determined that they would not, upon a habeas corpus, either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king or by the lords of the privy council. This drew on a parliamentary inquiry, and produced the 'Petition of Right' (3 Car. I.) which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. But when, in the following year, Mr. Selden and others were committed by the lords of the council, in pursuance of his majesty's special command, under a general charge of 'notable contempts, and stirring up sedition against the king and government,' the judges delayed for two terms (including also the long vacation) to deliver an opinion how far such a charge was bailable; and when at length they agreed that it was, they however annexed a condition of finding sureties for their good behavior, which still protracted their imprisonment, the chief justice, Sir Nicholas Hyde, at the same time, declaring that 'if they were again remanded for that cause, perhaps the court would not afterwards grant a habeas corpus, being already made acquainted with the cause of the imprisonment.' But this was heard with indignation and astonishment by every lawyer present, according to Mr. Selden's own account of the matter, whose resentment was not cooled at the distance of four and twenty years.' 3 Bl. Comm. 133, 134.

It is worthy of remark, that the offences charged against the prisoner in this case, and relied on as a justification for his arrest and imprisonment, in their nature and character, and in the loose and vague manner in which they are stated, bear a striking resemblance to those assigned in the warrant for the arrest of Mr. Selden. And yet, even at that day, the warrant was regarded as such a flagrant violation of the rights of the subject that the delay of the timeserving judges to set him at liberty, upon the habeas corpus issued in his behalf, excited the universal indignation of the bar.

The extract from Hallam's Constitutional History is equally impressive and equally in point: 'It is a very common mistake, and that not only among foreigners, but many from whom some knowledge of our constitutional laws might be expected, to suppose that this statute of Car. II. enlarged in a great degree our liberties, and forms a sort of epoch in their history. But though a very beneficial enactment, and eminently remedial in many cases of illegal imprisonment, it introduced no new principle, nor conferred any right upon the subject. From the earliest records of the English law, no freeman could be detained in prison, except upon a criminal charge or conviction, or for a civil debt. In the former case it was always in his power to demand of the court of king's bench a writ of habeas corpus ad subjiciendum, directed to the person detaining him in custody, by which he was enjoined to bring up the body of the prisoner, with the warrant of commitment, that the court might judge of its sufficiency, and remand the party, admit him to bail, or discharge him, according to the nature of the charge. This writ issued of right, and could not be refused by the court. It was not to

bestow an immunity from arbitrary imprisonment, which is abundantly provided for in Magna Charta (if indeed it is not more ancient), that the statute of Car. II. was enacted, but to cut off the abuses by which the government's lust of power, and the servile subtlety of the crown lawyers, had impaired so fundamental a privilege.' 3 Hall. Const. Hist. 19.

While the value set upon this writ in England has been so great, that the removal of the abuses which embarrassed its employment has been looked upon as almost a new grant of liberty to the subject, it is not to be wondered at, that the continuance of the writ thus made effective should have been the object of the most jealous care. Accordingly, no power in England short of that of parliament can suspend or authorize the suspension of the writ of habeas corpus. I quote again from Blackstone (1 Bl. Comm. 136): 'But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient. It is the parliament only or legislative power that, whenever it sees proper, can authorize the crown by suspending the habeas corpus for a short and limited time, to imprison suspected persons without giving any reason for so doing.' If the president of the United States may suspend the writ, then the constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen, than the people of England have thought it safe to entrust to the crown; a power which the queen of England cannot exercise at this day, and which could not have been lawfully exercised by the sovereign even in the reign of Charles the First.

But I am not left to form my judgment upon this great question, from analogies between the English government and our own, or the commentaries of English jurists, or the decisions of English courts, although upon this subject they are entitled to the highest respect, and are justly regarded and received as authoritative by our courts of justice. To guide me to a right conclusion, I have the Commentaries on the Constitution of the United States of the late Mr. Justice Story, not only one of the most eminent jurists of the age, but for a long time one of the brightest ornaments of the supreme court of the United States; and also the clear and authoritative decision of that court itself, given more than half a century since, and conclusively establishing the principles I have above stated.

Mr. Justice Story, speaking, in his Commentaries, of the habeas corpus clause in the constitution, says: 'It is obvious that cases of a peculiar emergency may arise, which may justify, nay, even require, the temporary suspension of any right to the writ. But as it has frequently happened in foreign countries, and even in England, that the writ has, upon various pretexts and occasions, been suspended, whereby persons apprehended upon suspicion have suffered a long imprisonment, sometimes from design, and sometimes because they were forgotten, the right to suspend it is expressly confined to cases of rebellion or invasion, where the public safety may require it. A very just and wholesome restraint, which cuts down at a blow a fruitful means of oppression, capable of being abused, in bad times, to the worst of purposes. Hitherto, no suspension of the writ has ever been authorized by congress, since the establishment of the constitution. It would seem, as the power is given to congress to suspend the writ of habeas corpus, in cases of rebellion or invasion, that the right to judge whether the exigency had arisen must exclusively belong to that body.' 3 Story, Comm. Const. s 1336.

And Chief Justice Marshall, in delivering the opinion of the supreme court in the case of Ex parte Bollman and Swartwout, uses this decisive language, in 4 Cranch [8 U. S.] 95: 'It may be worthy of remark, that this act (speaking of the one under which I am proceeding) was passed by the first congress of the United States, sitting under a constitution which had declared 'that the privilege of the writ of habeas corpus should not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.' Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means, by which this

great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give to all the courts the power of awarding writs of habeas corpus.' And again on page 101: 'If at any time, the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide; until the legislative will be expressed, this court can only see its duty, and must obey the laws.' I can add nothing to these clear and emphatic words of my great predecessor.

But the documents before me show, that the military authority in this case has gone far beyond the mere suspension of the privilege of the writ of habeas corpus. It has, by force of arms, thrust aside the judicial authorities and officers to whom the constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers. For, at the time these proceedings were had against John Merryman, the district judge of Maryland, the commissioner appointed under the act of congress, the district attorney and the marshal, all resided in the city of Baltimore, a few miles only from the home of the prisoner. Up to that time, there had never been the slightest resistance or obstruction to the process of any court or judicial officer of the United States, in Maryland, except by the military authority. And if a military officer, or any other person, had reason to believe that the prisoner had committed any offence against the laws of the United States, it was his duty to give information of the fact and the evidence to support it, to the district attorney; it would then have become the duty of that officer to bring the matter before the district judge or commissioner, and if there was sufficient legal evidence to justify his arrest, the judge or commissioner would have issued his warrant to the marshal to arrest him; and upon the hearing of the case, would have held him to bail, or committed him for trial, according to the character of the offence, as it appeared in the testimony, or would have discharged him immediately, if there was not sufficient evidence to support the accusation. There was no danger of any obstruction or resistance to the action of the civil authorities, and therefore no reason whatever for the interposition of the military.

Yet, under these circumstances, a military officer, stationed in Pennsylvania, without giving any information to the district attorney, and without any application to the judicial authorities, assumes to himself the judicial power in the district of Maryland; undertakes to decide what constitutes the crime of treason or rebellion; what evidence (if indeed he required any) is sufficient to support the accusation and justify the commitment; and commits the party, without a hearing, even before himself, to close custody, in a strongly garrisoned fort, to be there held, it would seem, during the pleasure of those who committed him.

The constitution provides, as I have before said, that 'no person shall be deprived of life, liberty or property, without due process of law.' It declares that 'the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' It provides that the party accused shall be entitled to a speedy trial in a court of justice.

These great and fundamental laws, which congress itself could not suspend, have been disregarded and suspended, like the writ of habeas corpus, by a military order, supported by force of arms. Such is the case now before me, and I can only say that if the authority which the constitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found. 2

In such a case, my duty was too plain to be mistaken. I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him; I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the circuit court of the United States for the district of Maryland, and direct the clerk to transmit a copy, under seal, to the president of the United States. It will then remain for that high officer, in fulfilment of his constitutional obligation to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced.

---- Begin EndNotes ----

1 From 9 Am. Law Reg. 524.

2 The constitution of the United States is founded upon the principles of government set forth and maintained in the Declaration of Independence. In that memorable instrument the people of the several colonies declared, that one of the causes which 'impelled' them to 'dissolve the political bands' which connected them with the British nation, and justified them in withdrawing their allegiance from the British sovereign, was that 'he (the king) had affected to render the military independent of, and superior to, the civil power.'

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75 U.S. 85 (____)
8 Wall. 85

EX PARTE YERGER.

Supreme Court of United States.

89 *89 Messrs. P. Phillips and Carlisle, in support of the motion.

Mr. Hoar, Attorney-General of the United States.

94 *94 The CHIEF JUSTICE delivered the opinion of the court.

The argument, by the direction of the court, was confined to the single point of the jurisdiction of the court to issue the writ prayed for. We have carefully considered the reasonings which have been addressed to us, and I am now to state the conclusions to which we have come.

The general question of jurisdiction in this case resolves itself necessarily into two other questions:

1. Has the court jurisdiction, in a case like the present, to inquire into the cause of detention,
95 alleged to be unlawful, and to give relief, if the detention be found to be in fact *95 unlawful, by the writ of habeas corpus, under the Judiciary Act of 1789?

2. If, under that act, the court possessed this jurisdiction, has it been taken away by the second section of the act of March, 27, 1868,[*] repealing so much of the act of February 5, 1867,[†] as authorizes appeals from Circuit Courts to the Supreme Court?

Neither of these questions is new here. The first has, on several occasions, received very full consideration, and very deliberate judgment.

A cause, so important as that which now invokes the action of this court, seems however to justify a reconsideration of the grounds upon which its jurisdiction has been heretofore maintained.

The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom.

In England, after a long struggle, it was firmly guaranteed by the famous Habeas Corpus Act of May 27, 1679,[‡] "for the better securing of the liberty of the subject," which, as Blackstone says, "is frequently considered as another Magna Charta."[§]

It was brought to America by the colonists, and claimed as among the immemorial rights descended to them from their ancestors.

Naturally, therefore, when the confederated colonies became united States, and the formation of a common government engaged their deliberations in convention, this great writ found prominent sanction in the Constitution. That sanction 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."

96 The terms of this provision necessarily imply judicial action. In England, all the higher courts were open to applicants *96 for the writ, and it is hardly supposable that, under the new government, founded on more liberal ideas and principles, any court would be, intentionally, closed to them.

We find, accordingly, that the first Congress under the Constitution, after defining, by various sections of the act of September 24, 1789, the jurisdiction of the District Courts, the Circuit Courts, and the Supreme Court in other cases, proceeded, in the 14th section, to enact, "that all the before-mentioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs, not specially provided by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."[*] In the same section, it was further provided "that either of the Justices of the Supreme Court, as well as Judges of the District Courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment; provided that writs of habeas corpus shall in no case extend to prisoners in jail, unless they are in custody, under, or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

That this court is one of the courts to which the power to issue writs of habeas corpus is expressly given by the terms of this section has never been questioned. It would have been, indeed, a remarkable anomaly if this court, ordained by the Constitution for the exercise, in the United States, of the most important powers in civil cases of all the highest courts of England, had been denied, under a constitution which absolutely prohibits the suspension of the writ, except under extraordinary exigencies, that power in cases of alleged unlawful restraint, which the Habeas Corpus Act of Charles II expressly declares those courts to possess.

97 But the power vested in this court is, in an important particular, unlike that possessed by the English courts. The jurisdiction of this court is conferred by the Constitution, *97 and is appellate; whereas, that of the English courts, though declared and defined by statutes, is derived from the common law, and is original.

The judicial power of the United States extends to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made under their authority, and to large classes of cases determined by the character of the parties, or the nature of the controversy.

That part of this judicial power vested in this court is defined by the Constitution in these words:

"In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

If the question were a new one, it would, perhaps, deserve inquiry whether Congress might not, under the power to make exceptions from this appellate jurisdiction, extend the original jurisdiction to other cases than those expressly enumerated in the Constitution; and especially, in view of the constitutional guaranty of the writ of habeas corpus, to cases arising upon petition for that writ.

But, in the case of Marbury v. Madison,[*] it was determined, upon full consideration, that the power to issue writs of mandamus, given to this court by the 13th section of the Judiciary Act, is, under the Constitution, an appellate jurisdiction, to be exercised only in the revision of judicial decisions. And this judgment has ever since been accepted as fixing the construction of this part of the Constitution.

It was pronounced in 1803. In 1807 the same construction was given to the provision of the 14th section relating to the writ of habeas corpus, in the case of Bollman and Swartwout.[†]

98 The power to issue the writ had been previously exercised *98 in Hamilton's case[*] (1795),

and in Burford's case[†] (1806), in neither of which cases does the distinction between appellate and original jurisdiction appear to have been made.

In the case of Bollman and Swartwout, however, the point was brought distinctly before the court; the nature of the jurisdiction was carefully examined, and it was declared to be appellate. The question then determined has not since been drawn into controversy.

The doctrine of the Constitution and of the cases thus far may be summed up in these propositions:

(1.) The original jurisdiction of this court cannot be extended by Congress to any other cases than those expressly defined by the Constitution.

(2.) The appellate jurisdiction of this court, conferred by the Constitution, extends to all other cases within the judicial power of the United States.

(3.) This appellate jurisdiction is subject to such exceptions, and must be exercised under such regulations as Congress, in the exercise of its discretion, has made or may see fit to make.

(4.) Congress not only has not excepted writs of habeas corpus and mandamus from this appellate jurisdiction, but has expressly provided for the exercise of this jurisdiction by means of these writs.

We come, then, to consider the first great question made in the case now before us.

We shall assume, upon the authority of the decisions referred to, what we should hold were the question now for the first time presented to us, that in a proper case this court, under the act of 1789, and under all the subsequent acts, giving jurisdiction in cases of habeas corpus, may, in the exercise of its appellate power, revise the decisions of inferior courts of the United States, and relieve from unlawful imprisonment authorized by them, except in cases within some limitations of the jurisdiction by Congress.

99 It remains to inquire whether the case before us is a *99 proper one for such interposition. Is it within any such limitation? In other words, can this court inquire into the lawfulness of detention, and relieve from it if found unlawful, when the detention complained of is not by civil authority under a commitment made by an inferior court, but by military officers, for trial before a military tribunal, after an examination into the cause of detention by the inferior court, resulting in an order remanding the prisoner to custody?

It was insisted in argument that, "to bring a case within the appellate jurisdiction of this court in the sense requisite to enable it to award the writ of habeas corpus under the Judiciary Act, it is necessary that the commitment should appear to have been by a tribunal whose decisions are subject to revision by this court."

This proposition seems to assert, not only that the decision to be revised upon habeas corpus must have been made by a court of the United States, subject to the ordinary appellate jurisdiction of this court, but that having been so made, it must have resulted in an order of commitment to civil authority subject to the control of the court making it.

The first branch of this proposition has certainly some support in Metzger's case,[*] in which it was held that an order of commitment made by a district judge at chambers cannot be revised here by habeas corpus. This case, as was observed by Mr. Justice Nelson in Kaine's case,[†] stands alone; and it may admit of question whether it can be entirely reconciled with the proposition, which we regard as established upon principle and authority, that the appellate jurisdiction by habeas corpus extends to all cases of commitment by the judicial authority of the United States, not within any exception made by Congress.

But it is unnecessary to enter upon this inquiry here. The action which we are asked to revise was that of a tribunal whose decisions are subject to revision by this court in ordinary modes.

100 *100 We need consider, therefore, only the second branch of the proposition, namely, that the

action of the inferior court must have resulted in a commitment for trial in a civil court; and the inference drawn from it, that no relief can be had here, by habeas corpus, from imprisonment under military authority, to which the petitioner may have been remanded by such a court.

This proposition certainly is not supported by authority.

In Kaine's case all the judges, except one, asserted, directly or indirectly, the jurisdiction of this court to give relief in a case where the detention was by order of a United States commissioner. The lawfulness of the detention had been examined by the Circuit Court for the Southern District of New York upon a writ of habeas corpus, and that court had dismissed the writ and remanded the prisoner to custody. In this court relief was denied on the merits, but the jurisdiction was questioned by one judge only. And it is difficult to find any substantial ground upon which jurisdiction in that case can be affirmed, and in this denied.

In Wells's case,[*] the petitioner was confined in the penitentiary, under a sentence of death, commuted by the President into a sentence of imprisonment for life. He obtained a writ of habeas corpus from the Circuit Court of the District of Columbia, was brought before that court, and was remanded to custody. He then sued out a writ of habeas corpus from this court, and his case was fully considered here. No objection was taken to the jurisdiction, though there, as here, it was evident that the actual imprisonment, at the time of the petition for the writ, was not under the direction of the court by whose order the prisoner was remanded, but by a different and distinct authority.

In this case of Wells, Mr. Justice Curtis again dissented, and, on the point of jurisdiction, Mr. Justice Campbell concurred with him. The other judges, though all, except one, were of opinion that the relief asked must be denied, agreed in maintaining the jurisdiction of the court.
101 Judge Curtis, *101 who regarded the question as left undetermined in Kaine's case, admitted that the jurisdiction was asserted in this, and stated the ground of judgment affirming jurisdiction to be that, "as the Circuit Court had had the prisoner before it, and has remanded him, this court, by a writ of habeas corpus, may examine that decision and see whether it be erroneous or not."

Since this judgment was pronounced, the jurisdiction, in cases similar to that now before the court, has not hitherto been questioned.

We have carefully considered the argument against it, made in this case, and are satisfied that the doctrine heretofore maintained is sound.

The great and leading intent of the Constitution and the law must be kept constantly in view upon the examination of every question of construction.

That intent, in respect to the writ of habeas corpus, is manifest. It is that every citizen may be protected by judicial action from unlawful imprisonment. To this end the act of 1789 provided that every court of the United States should have power to issue the writ. The jurisdiction thus given in law to the Circuit and District Courts is original; that given by the Constitution and the law to this court is appellate. Given in general terms, it must necessarily extend to all cases to which the judicial power of the United States extends, other than those expressly excepted from it.

As limited by the act of 1789, it did not extend to cases of imprisonment after conviction, under sentences of competent tribunals; nor to prisoners in jail, unless in custody under or by color of the authority of the United States, or committed for trial before some court of the United States, or required to be brought into court to testify. But this limitation has been gradually narrowed, and the benefits of the writ have been extended, first in 1833,[*] to prisoners confined under any authority, whether State or National, for any act done or omitted
102 in pursuance of a law of the United *102 States, or of any order, process, or decree of any judge or court of the United States; then in 1842[*] to prisoners being subjects or citizens of foreign States, in custody under National or State authority for acts done or omitted by or under color of foreign authority, and alleged to be valid under the law of nations; and finally, in 1867,[†] to all cases where any person may be restrained of liberty in violation of the

Constitution, or of any treaty or law of the United States.

This brief statement shows how the general spirit and genius of our institutions has tended to the widening and enlarging of the habeas corpus jurisdiction of the courts and judges of the United States; and this tendency, except in one recent instance, has been constant and uniform; and it is in the light of it that we must determine the true meaning of the Constitution and the law in respect to the appellate jurisdiction of this court. We are not at liberty to except from it any cases not plainly excepted by law; and we think it sufficiently appears from what has been said that no exception to this jurisdiction embraces such a case as that now before the court. On the contrary, the case is one of those expressly declared not to be excepted from the general grant of jurisdiction. For it is a case of imprisonment alleged to be unlawful, and to be under color of authority of the United States.

It seems to be a necessary consequence that if the appellate jurisdiction of habeas corpus extends to any case, it extends to this. It is unimportant in what custody the prisoner may be, if it is a custody to which he has been remanded by the order of an inferior court of the United States. It is proper to add, that we are not aware of anything in any act of Congress, except the act of 1868, which indicates any intention to withhold appellate jurisdiction in habeas corpus cases from this court, or to abridge the jurisdiction derived from the Constitution and defined by the act of 1789. We agree that it is given subject to exception and regulation by
103 Congress; but it is too plain for argument that the denial *103 to this court of appellate jurisdiction in this class of cases must greatly weaken the efficacy of the writ, deprive the citizen in many cases of its benefits, and seriously hinder the establishment of that uniformity in deciding upon questions of personal rights which can only be attained through appellate jurisdiction, exercised upon the decisions of courts of original jurisdiction. In the particular class of cases, of which that before the court is an example, when the custody to which the prisoner is remanded is that of some authority other than that of the remanding court, it is evident that the imprisoned citizen, however unlawful his imprisonment may be in fact, is wholly without remedy unless it be found in the appellate jurisdiction of this court.

These considerations forbid any construction giving to doubtful words the effect of withholding or abridging this jurisdiction. They would strongly persuade against the denial of the jurisdiction even were the reasons for affirming it less cogent than they are.

We are obliged to hold, therefore, that in all cases where a Circuit Court of the United States has, in the exercise of its original jurisdiction, caused a prisoner to be brought before it, and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken, this court, in the exercise of its appellate jurisdiction, may, by the writ of habeas corpus, aided by the writ of certiorari, revise the decision of the Circuit Court, and if it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded.

This conclusion brings us to the inquiry whether the 2d section of the act of March 27th, 1868, takes away or affects the appellate jurisdiction of this court under the Constitution and the acts of Congress prior to 1867.

In McCardle's case,[*] we expressed the opinion that it does not, and we have now re-examined the grounds of that opinion.

The circumstances under which the act of 1868 was passed were peculiar.

104 *104 On the 5th of February, 1867, Congress passed the act to which reference has already been made, extending the original jurisdiction by habeas corpus of the District and Circuit Courts, and of the several judges of these courts, to all cases of restraint of liberty in violation of the Constitution, treaties, or laws of the United States. This act authorized appeals to this court from judgments of the Circuit Court, but did not repeal any previous act conferring jurisdiction by habeas corpus, unless by implication.

Under this act, one McCardle, alleging unlawful restraint by military force, petitioned the Circuit Court for the Southern District of Mississippi for the writ of habeas corpus. The writ was issued, and a return was made; and, upon hearing, the court decided that the restraint was

lawful, and remanded him to custody. McCardle prayed an appeal, under the act, to this court, which was allowed and perfected. A motion to dismiss the appeal was made here and denied. The case was then argued at the bar, and the argument having been concluded on the 9th of March, 1869, was taken under advisement by the court. While the cause was thus held, and before the court had time to consider the decision proper to be made, the repealing act under consideration was introduced into Congress. It was carried through both houses, sent to the President, returned with his objections, repassed by the constitutional majority in each house, and became a law on the 27th of March, within eighteen days after the conclusion of the argument.

The effect of the act was to oust the court of its jurisdiction of the particular case then before it on appeal, and it is not to be doubted that such was the effect intended. Nor will it be questioned that legislation of this character is unusual and hardly to be justified except upon some imperious public exigency.

It was, doubtless, within the constitutional discretion of Congress to determine whether such an exigency existed; but it is not to be presumed that an act, passed under such circumstances, was intended to have any further effect than that plainly apparent from its terms.

105 *105 It is quite clear that the words of the act reach, not only all appeals pending, but all future appeals to this court under the act of 1867; but they appear to be limited to appeals taken under that act.

The words of the repealing section are, "that so much of the act approved February 5th, 1867, as authorizes an appeal from the judgment of the Circuit Court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been, or may be hereafter taken, be, and the same is hereby repealed."

These words are not of doubtful interpretation. They repeal only so much of the act of 1867 as authorized appeals, or the exercise of appellate jurisdiction by this court. They affected only appeals and appellate jurisdiction authorized by that act. They do not purport to touch the appellate jurisdiction conferred by the Constitution, or to except from it any cases not excepted by the act of 1789. They reach no act except the act of 1867.

It has been suggested, however, that the act of 1789, so far as it provided for the issuing of writs of habeas corpus by this court, was already repealed by the act of 1867. We have already observed that there are no repealing words in the act of 1867. If it repealed the act of 1789, it did so by implication, and any implication which would give to it this effect upon the act of 1789, would give it the same effect upon the acts of 1833 and 1842. If one was repealed, all were repealed.

Repeals by implication are not favored. They are seldom admitted except on the ground of repugnancy; and never, we think, when the former act can stand together with the new act. It is true that exercise of appellate jurisdiction, under the act of 1789, was less convenient than under the act of 1867, but the provision of a new and more convenient mode of its exercise does not necessarily take away the old; and that this effect was not intended is indicated by the fact that the authority conferred by the new act is expressly declared to be "in addition" to the authority conferred by the former acts. Addition is not substitution.

106 *106 The appeal given by the act of 1867 extended, indeed, to cases within the former acts; and the act, by its grant of additional authority, so enlarged the jurisdiction by habeas corpus that it seems, as was observed in the McCardle case, "impossible to widen" it. But this effect does not take from the act its character of an additional grant of jurisdiction, and make it operate as a repeal of jurisdiction theretofore allowed.

Our conclusion is, that none of the acts prior to 1867, authorizing this court to exercise appellate jurisdiction by means of the writ of habeas corpus, were repealed by the act of that year, and that the repealing section of the act of 1868 is limited in terms, and must be limited in effect to the appellate jurisdiction authorized by the act of 1867.

We could come to no other conclusion without holding that the whole appellate jurisdiction of this court, in cases of habeas corpus, conferred by the Constitution, recognized by law, and exercised from the foundation of the government hitherto, has been taken away, without the expression of such intent, and by mere implication, through the operation of the acts of 1867 and 1868.

The suggestion made at the bar, that the provision of the act of 1789, relating to the jurisdiction of this court by habeas corpus, if repealed by the effect of the act of 1867, was revived by the repeal of the repealing act, has not escaped our consideration. We are inclined to think that such would be the effect of the act of 1868, but having come to the conclusion that the act of 1789 was not repealed by the act of 1867, it is not necessary to express an opinion on that point.

The argument having been confined, by direction of the court, to the question of jurisdiction, this opinion is limited to that question. The jurisdiction of the court to issue the writ prayed for is affirmed.

[*] 15 Stat. at Large, 44.

[†] 14 Id. 385.

[‡] 3 British Stat. at Large, 397; 3 Hallam's Constitutional History, 19.

[§] 3 Commentary, 135.

[*] 1 Stat. at Large, 81.

[*] 1 Cranch, 137.

[†] 4 Id. 100.

[*] 3 Dallas, 17.

[†] 3 Cranch, 448.

[*] 5 Howard, 176.

[†] 14 Ib. 103.

[*] 18 Howard, 308.

[*] 4 Stat. at Large, 634.

[*] 5 Stat. at Large, 539.

[†] 14 Id. 385.

[*] 7 Wallace, 508.

The Federalist Papers

|| Federalist No. 39 ||

The Conformity of the Plan to Republican Principles
For the Independent Journal.

Author: **James Madison**

To the People of the State of New York:

THE last paper having concluded the observations which were meant to introduce a candid survey of the plan of government reported by the convention, we now proceed to the execution of that part of our undertaking.

The first question that offers itself is, whether the general form and aspect of the government be strictly republican. It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government. If the plan of the convention, therefore, be found to depart from the republican character, its advocates must abandon it as no longer defensible.

What, then, are the distinctive characters of the republican form? Were an answer to this question to be sought, not by recurring to principles, but in the application of the term by political writers, to the constitution of different States, no satisfactory one would ever be found. Holland, in which no particle of the supreme authority is derived from the people, has passed almost universally under the denomination of a republic. The same title has been bestowed on Venice, where absolute power over the great body of the people is exercised, in the most absolute manner, by a small body of hereditary nobles. Poland, which is a mixture of aristocracy and of monarchy in their worst forms, has been dignified with the same appellation. The government of England, which has one republican branch only, combined with an hereditary aristocracy and monarchy, has, with equal impropriety, been frequently placed on the list of republics. These examples, which are nearly as dissimilar to each other as to a genuine republic, show the extreme inaccuracy with which the term has been used in political disquisitions.

If we resort for a criterion to the different principles on which different forms of government are established, we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is ESSENTIAL to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic. It is SUFFICIENT for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified; otherwise every government in the United States, as well as every other popular government that has been or can be well organized or well executed, would be degraded from the republican character. According to the constitution of every State in the Union, some or other of the officers of government are appointed indirectly only by the people. According to most of them, the chief magistrate himself is so appointed. And according to one, this mode of appointment is extended to one of the co-ordinate branches of the legislature. According to all the constitutions, also, the tenure of the highest offices is extended to a definite period, and in many instances, both within the legislative and executive departments, to a period of years. According to the provisions of most of the constitutions, again, as well as according to the most respectable and received opinions on the subject, the members of the judiciary department are to retain their offices by the firm tenure of good behavior.

On comparing the Constitution planned by the convention with the standard here fixed, we perceive at once that it is, in the most rigid sense, conformable to it. The House of Representatives, like that of one branch at least of all the State legislatures, is elected immediately by the great body of the people. The Senate, like the present Congress, and the Senate of Maryland, derives its appointment indirectly from the people. The President is indirectly derived from the choice of the people, according to the example in most of the States. Even the judges, with all other officers of the Union, will, as in the several States, be the choice, though a remote choice, of the people themselves, the duration of the appointments is equally conformable to the republican standard, and to the model of State constitutions The House of Representatives is periodically elective, as in all the States; and for the period of two years, as in the State of South Carolina. The Senate is elective, for the period of six years; which is but one year more than the period of the Senate of Maryland, and but two more than that of the Senates of New York and Virginia. The President is to continue in office for the period of four years; as in New York and Delaware, the chief magistrate is elected for three years, and in South Carolina for two years. In the other States the election is annual. In several of the States, however, no constitutional provision is made for the impeachment of the chief magistrate. And in Delaware and Virginia he is not impeachable till out of office. The President of the United States is impeachable at any time during his continuance in office. The tenure by which the judges are to hold their places, is, as it unquestionably ought to be, that of good behavior. The tenure of the ministerial offices generally, will be a subject of legal regulation, conformably to the reason of the case and the example of the State constitutions.

Could any further proof be required of the republican complexion of this system, the most decisive one might be found in its absolute prohibition of titles of nobility, both under the federal and the State governments; and in its express guaranty of the republican form to each of the latter.

"But it was not sufficient," say the adversaries of the proposed Constitution, "for the convention to adhere to the republican form. They ought, with equal care, to have preserved the FEDERAL form, which regards the Union as a CONFEDERACY of sovereign states; instead of which, they have framed a NATIONAL government, which regards the Union as a CONSOLIDATION of the States." And it is asked by what authority this bold and radical innovation was undertaken? The handle which has been made of this objection requires that it should be examined with some precision.

Without inquiring into the accuracy of the distinction on which the objection is founded, it will be necessary to a just estimate of its force, first, to ascertain the real character of the government in question; secondly, to inquire how far the convention were authorized to propose such a government; and thirdly, how far the duty they owed to their country could supply any defect of regular authority.

First. In order to ascertain the real character of the government, it may be considered in relation to the foundation on which it is to be established; to the sources from which its ordinary powers are to be drawn; to the operation of those powers; to the extent of them; and to the authority by which future changes in the government are to be introduced.

On examining the first relation, it appears, on one hand, that the Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but, on the other, that this assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State, the authority of the people themselves. The act, therefore, establishing the Constitution, will not be a NATIONAL, but a FEDERAL act.

That it will be a federal and not a national act, as these terms are understood by the objectors; the act of the people, as forming so many independent States, not as forming one aggregate nation, is obvious from this single consideration, that it is to result neither from the decision of a MAJORITY of the people of the Union, nor from that of a MAJORITY of the States. It must result from the UNANIMOUS assent of the several States that are parties to it, differing no otherwise from their ordinary assent than in its being expressed, not by the legislative authority, but by that of the people themselves. Were the people regarded in this transaction as forming one nation, the will of the majority of the whole people of the United States would bind the minority, in the same manner as the majority in each State must bind the minority; and the will of the majority must be determined either by a comparison of the individual votes, or by considering the will of the majority of the States as evidence of the will of a majority of the people of the United States. Neither of these rules have been adopted. Each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new Constitution will, if established, be a FEDERAL, and not a NATIONAL constitution.

The next relation is, to the sources from which the ordinary powers of government are to be derived. The House of Representatives will derive its powers from the people of America; and the people will be represented in the same proportion, and on the same principle, as they are in the legislature of a particular State. So far the government is NATIONAL, not FEDERAL. The Senate, on the other hand, will derive its powers from the States, as political and coequal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress. So far the government is FEDERAL, not NATIONAL. The executive power will be derived from a very compound source. The immediate election of the President is to be made by the States in their political characters. The votes allotted to them are in a compound ratio, which considers them partly as distinct and coequal societies, partly as unequal members of the same society. The eventual election, again, is to be made by that branch of the legislature which consists of the national representatives; but in this particular act they are to be thrown into the form of individual delegations, from so many distinct and coequal bodies politic. From this aspect of the government it appears to be of a mixed character, presenting at least as many FEDERAL as NATIONAL features.

The difference between a federal and national government, as it relates to the OPERATION OF THE GOVERNMENT, is supposed to consist in this, that in the former the powers operate on the political bodies composing the Confederacy, in their political capacities; in the latter, on the individual citizens composing the nation, in their

individual capacities. On trying the Constitution by this criterion, it falls under the NATIONAL, not the FEDERAL character; though perhaps not so completely as has been understood. In several cases, and particularly in the trial of controversies to which States may be parties, they must be viewed and proceeded against in their collective and political capacities only. So far the national countenance of the government on this side seems to be disfigured by a few federal features. But this blemish is perhaps unavoidable in any plan; and the operation of the government on the people, in their individual capacities, in its ordinary and most essential proceedings, may, on the whole, designate it, in this relation, a NATIONAL government.

But if the government be national with regard to the OPERATION of its powers, it changes its aspect again when we contemplate it in relation to the EXTENT of its powers. The idea of a national government involves in it, not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government. Among a people consolidated into one nation, this supremacy is completely vested in the national legislature. Among communities united for particular purposes, it is vested partly in the general and partly in the municipal legislatures. In the former case, all local authorities are subordinate to the supreme; and may be controlled, directed, or abolished by it at pleasure. In the latter, the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere. In this relation, then, the proposed government cannot be deemed a NATIONAL one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects. It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact; and that it ought to be established under the general rather than under the local governments, or, to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated.

If we try the Constitution by its last relation to the authority by which amendments are to be made, we find it neither wholly NATIONAL nor wholly FEDERAL. Were it wholly national, the supreme and ultimate authority would reside in the MAJORITY of the people of the Union; and this authority would be competent at all times, like that of a majority of every national society, to alter or abolish its established government. Were it wholly federal, on the other hand, the concurrence of each State in the Union would be essential to every alteration that would be binding on all. The mode provided by the plan of the convention is not founded on either of these principles. In requiring more than a majority, and principles. In requiring more than a majority, and particularly in computing the proportion by STATES, not by CITIZENS, it departs from the NATIONAL and advances towards the FEDERAL character; in rendering the concurrence of less than the whole number of States sufficient, it loses again the FEDERAL and partakes of the NATIONAL character.

The proposed Constitution, therefore, is, in strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally, in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national.

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The Federalist Papers

|| Federalist No. 78 ||

The Judiciary Department
From McLEAN'S Edition, New York.

Author: **Alexander Hamilton**

To the People of the State of New York:

WE PROCEED now to an examination of the judiciary department of the proposed government.

In unfolding the defects of the existing Confederation, the utility and necessity of a federal judicature have been clearly pointed out. It is the less necessary to recapitulate the considerations there urged, as the propriety of the institution in the abstract is not disputed; the only questions which have been raised being relative to the manner of constituting it, and to its extent. To these points, therefore, our observations shall be confined.

The manner of constituting it seems to embrace these several objects: 1st. The mode of appointing the judges. 2d. The tenure by which they are to hold their places. 3d. The partition of the judiciary authority between different courts, and their relations to each other.

First. As to the mode of appointing the judges; this is the same with that of appointing the officers of the Union in general, and has been so fully discussed in the two last numbers, that nothing can be said here which would not be useless repetition.

Second. As to the tenure by which the judges are to hold their places; this chiefly concerns their duration in office; the provisions for their support; the precautions for their responsibility.

According to the plan of the convention, all judges who may be appointed by the United States are to hold their offices DURING GOOD BEHAVIOR; which is conformable to the most approved of the State constitutions and among the rest, to that of this State. Its propriety having been drawn into question by the adversaries of that plan, is no light symptom of the rage for objection, which disorders their imaginations and judgments. The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power [1] ; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." [2] And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their WILL to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

This exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is, that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an EQUAL authority, that which was the last indication of its will should have the preference.

But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed Constitution will never concur with its enemies, [3] in questioning that fundamental principle of republican government, which admits the right of the people to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness, yet it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act. But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.

But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments, than but few may be aware of. The benefits of the integrity and moderation of the judiciary have already been felt in more States than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts: as no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day. And every man must now feel, that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress.

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

There is yet a further and a weightier reason for the permanency of the judicial offices, which is deducible from the nature of the qualifications they require. It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is, that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us, that the government can have no great option between fit character; and that a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity. In the present circumstances of this country, and in those in which it is likely to be for a long time to come, the disadvantages on this score would be greater than they may at first sight appear; but it must be confessed, that they are far inferior to those which present themselves under the other aspects of the subject.

Upon the whole, there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established GOOD BEHAVIOR as the tenure of their judicial offices, in point of duration; and that so far from being blamable on this account, their plan would have been inexcusably defective, if it had wanted this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of the institution.

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1. The celebrated Montesquieu, speaking of them, says: "Of the three powers above mentioned, the judiciary is next to nothing." "Spirit of Laws." vol. i., page 186.

2. Idem, page 181.

3. Vide "Protest of the Minority of the Convention of Pennsylvania," Martin's Speech, etc.

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HEADQUARTERS SECOND MILITARY DISTRICT,

CHARLESTON, S. C., June 30, 1868.

GENERAL ORDERS,
NO. 120.

In conformity with the law of the United States passed June 25, 1868, entitled "An Act to admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida to representation in Congress," all officers of the States of North Carolina and South Carolina, duly elected and qualified under the Constitutions thereof, and not prohibited from holding office in said States by the third section of the proposed amendment to the Constitution of the United States, known as Article Fourteen, will, upon the ratification of the said amendment by the Legislature, be inaugurated without delay; taking the oath of office prescribed by the Constitutions of the States in which they have been elected, and otherwise qualifying, in conformity with the laws of said States.

1. So much of the provisions of General Orders No. 79, of May 2, and No. 83, of May 12, 1868, from these Headquarters, as designates the time for the officers elected under the new Constitution to enter upon their duties, and requires them to take the oath prescribed by the law of July 2, 1862, being superseded by the law above cited, is hereby revoked.

2. The third section of the proposed amendment to the Constitution, known as Article Fourteen, is republished for the information and government of those whom it may concern:

ARTICLE XIV.

* * * * *

"SECTION 3. No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability."

* * * * *

Should the disabilities of any of the officers elect not have been removed, or if they should from any other cause be unable to qualify, the fact will be immediately reported to the Governor of the State, and the present incumbents, if they are charged with any active administrative duties, or with the care of public records, or with the custody of public money or public property, will, in conformity with the law, hold over until their successors be duly qualified.

3. To facilitate the organization of the new State governments, the following appointments are made:

To be Governor of North Carolina, W. W. Holden, Governor elect, *vice* Jonathan Worth, removed.

To be Lieutenant-Governor of North Carolina, Tod R. Caldwell, Lieutenant-Governor elect, to fill an original vacancy.

To take effect July 1, 1868, on the meeting of the General Assembly of the State of North Carolina.

2. To be Governor of South Carolina, Robert K. Scott, Governor elect, *vice* James L. Orr, removed.

To be Lieutenant-Governor, Lemuel Boozer, Lieutenant-Governor elect, to fill a vacancy.

To take effect July 6, 1868, on the meeting of the General Assembly of the State of South Carolina.

4. The County Courts of North Carolina and the District Courts of South Carolina having been abolished, the records of all such courts will be transferred to the custody of the Clerks of the Courts of the respective Counties, and all unexecuted processes or other unfinished business of the said Courts will be returned, in the former State to the Superior Court, and in the latter to the Court of Common Pleas and General Sessions, at the first ensuing session held in such County; and in like manner the records, papers and public property in the custody of the clerks of said County and District Courts, as well as in the hands of Clerks and Masters in Equity in North Carolina, shall be turned over to the incoming Clerks of said Superior Courts and Courts of Common Pleas.

5. Unless or until otherwise directed by the General Assembly of North Carolina, the duty of approving the bonds of public officers of Counties will be devolved upon the County Commissioners elected under the new Constitution.

6. For the purpose of organization, the County Commissioners elect of each County in the State of North Carolina shall, on the day provided by the Constitution for them to enter upon their duties, or as soon thereafter as practicable, assemble together at the

court house in each County, and elect one of their number chairman, who shall thereupon request the chairman of the retiring County Court to administer the oath of office to the said Commissioners; and the said chairman of the retiring County Court is hereby empowered and required immediately to administer to the said Commissioners, severally, the oath prescribed by said Constitution; which oath having been by them then and there taken and subscribed, said Board of County Commissioners shall be deemed duly qualified and inducted into office.

The County Commissioners elect in South Carolina will organize in like manner, the retiring Ordinary in each County administering the oath.

7. Until the General Assembly of the State of South Carolina shall expressly prescribe by law the duties of the Sheriffs, Coroners and Clerks of Courts chosen or authorized to be chosen at the election held in said State on the 2d and 3d of June, 1868, the officers so elected shall, after qualification, perform the duties prescribed for said officers by law under the existing provisional government of the State.

8. Until otherwise provided by law, the Judges of Probate elected in South Carolina shall perform the duties heretofore performed by Ordinaries; and in respect to business appertaining to minors, and the allotment of dower, and in cases of idiocy and lunacy, and persons *non compotes mentis*, shall conduct their proceedings as far as possible in conformity with the rules and regulations governing the practice in like cases in the Courts of the provisional government now authorized by law to take jurisdiction of such business: and records and public property in the hands of Ordinaries will be transferred to the Probate Judges.

9. In like manner, until otherwise provided by law, the powers and duties of County Commissioners in South Carolina, shall include the powers and duties heretofore pertaining to Commissioners of the Poor, Commissioners of Roads, Bridges, Ferries and Cuts, Commissioners of Public Buildings, and Commissioners to Approve the Bonds of Public Officers, and in discharge thereof, said County Commissioners will be governed as far as practicable by the laws and usuages regulating the functions of the offices, the powers and duties of which are hereby conferred upon them.

10. It shall be the duty of each of the Boards of County Commissioners in South Carolina, immediately after their organization, to appoint a Treasurer to act until otherwise provided by law, who shall be required, before entering upon his duties, to enter into bond to the Board, with sureties to be approved by the Board, and in amount to be fixed by the Board, conditioned for the faithful performance of his

duties, which bond shall be filed with the Clerk of the Court for the County; and such Treasurer shall safely keep and disburse all funds belonging to the Board; and for his services shall be allowed a commission, to be fixed by the Board, on all sums received and paid away, but no commission or other fee shall be allowed on the transfer of funds to the Treasurer from his predecessor, nor from the Treasurer to his successor, nor shall the commission allowed to the Treasurer exceed the rate of two per cent. on moneys received, and two per cent. on moneys paid away.

11. The Circuit Judges, who shall be chosen by the General Assembly, shall, until otherwise provided by law, be authorized to exercise in suits in equity hereafter commenced all the powers heretofore pertaining to Chancellors, subject to rules of procedure to be fixed by Justices of the Supreme Court; and until the adoption of such rules, the existing rules of chancery practice shall be followed.

BY COMMAND OF BVT. MAJOR-GENERAL ED. R. S. CANBY:

LOUIS V. CAZIARC,
Aide-de-Camp,
Actg. Asst. Adjt. Genl.

OFFICIAL:

73 U.S. 50 (____)
6 Wall. 50

STATE OF GEORGIA
v.
STANTON.

Supreme Court of United States.

53 *53 Mr. Stanbery, A.G., at the last term moved to dismiss the bill for want of jurisdiction.

71 *71 The bill having been dismissed at the last term, Mr. Justice NELSON now delivered the opinion of the court.

A motion has been made by the counsel for the defendants to dismiss the bill for want of jurisdiction, for which a precedent is found in the case of The State of Rhode Island v. The State of Massachusetts.[*] It is claimed that the court has no jurisdiction either over the subject-matter set forth in the bill or over the parties defendants. And, in support of the first ground, it is urged that the matters involved, and presented for adjudication, are political and not judicial, and, therefore, not the subject of judicial cognizance.

This distinction results from the organization of the government into the three great departments, executive, legislative, and judicial, and from the assignment and limitation of the powers of each by the Constitution.

The judicial power is vested in one supreme court, and in such inferior courts as Congress may ordain and establish: the political power of the government in the other two departments.

The distinction between judicial and political power is so generally acknowledged in the jurisprudence both of England and of this country, that we need do no more than refer to some of the authorities on the subject. They are all in one direction.[†]

73 *72 It has been supposed that the case of The State of Rhode Island v. The State of Massachusetts[*] is an exception, and affords an authority for hearing and adjudicating upon political questions in the usual course of judicial proceedings on a bill in equity. But, it will be seen on a close examination of the case, that this is a mistake. It involved a question of boundary between the two States. Mr. Justice Baldwin, who delivered the opinion of the court, states the objection, and proceeds to answer it. He observes,[†] "It is said that this is a political, not civil controversy, between the parties; and, so not within the Constitution, or thirteenth section of the Judiciary Act. As it is viewed by the court, on the bill alone, had it been demurred to, a controversy as to the locality of a point three miles south of the southernmost point of Charles River, is the only question that can arise under the charter. Taking the case on the bill and plea, the question is, whether the stake set up on Wrentham Plain by Woodward and Saffrey, in 1842, is the true point from which to run an east and west line as the compact boundary between the States. In the first aspect of the case it depends on a fact; in the second, on the law of equity, whether the agreement is void or valid; neither of which present a political controversy, but one of an ordinary judicial nature of frequent occurrence in suits between individuals." In another part of the opinion, speaking of the submission by sovereigns or states, of a controversy between them, he observes, "From the

time of such submission the question ceases to be a political one, to be decided by the sic volo, sic jubeo, of political power. It comes to the court to be decided by its judgment, legal discretion, and solemn consideration of the rules of law, appropriate to its nature as a judicial question, depending on the exercise of judicial powers, as it is bound to act by known and settled principles of national or municipal jurisprudence, as the case requires." *73 And he might have added, what, indeed, is probably implied in the opinion, that the question thus submitted by the sovereign, or state, to a judicial determination, must be one appropriate for the exercise of judicial power; such as a question of boundary, or as in the case of Penn v. Lord Baltimore, a contract between the parties in respect to their boundary. Lord Hardwicke places his right in that case to entertain jurisdiction upon this ground.

The objections to the jurisdiction of the court in the case of Rhode Island against Massachusetts were, that the subject-matter of the bill involved sovereignty and jurisdiction, which were not matters of property, but of political rights over the territory in question. They are forcibly stated by the Chief Justice, who dissented from the opinion.[*] The very elaborate examination of the case by Mr. Justice Baldwin, was devoted to an answer and refutation of these objections. He endeavored to show, and, we think did show, that the question was one of boundary, which, of itself, was not a political question, but one of property, appropriate for judicial cognizance; and, that sovereignty and jurisdiction were but incidental, and dependent upon the main issue in the case. The right of property was undoubtedly involved; as in this country, where feudal tenures are abolished, in cases of escheat, the State takes the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction.

In the case of The State of Florida v. **Georgia**,[†] the United States were allowed to intervene, being the proprietors of a large part of the land situated within the disputed boundary, ceded by Spain as a part of Florida. The State of Florida was also deeply interested as a proprietor.

The case, bearing most directly on the one before us, is The Cherokee Nation v. The State of **Georgia**.[‡] A bill was filed in that case and an injunction prayed for, to prevent the execution of certain acts of the legislature of **Georgia** within the territory of the Cherokee Nation of
74 Indians, they claiming *74 a right to file it in this court, in the exercise of its original jurisdiction, as a foreign nation. The acts of the legislature, if permitted to be carried into execution, would have subverted the tribal government of the Indians; and subjected them to the jurisdiction of the State. The injunction was denied, on the ground that the Cherokee Nation could not be regarded as a foreign nation within the Judiciary Act; and, that, therefore, they had no standing in court. But, Chief Justice Marshall, who delivered the opinion of the majority, very strongly intimated, that the bill was untenable on another ground, namely, that it involved simply a political question. He observed, "That the part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possessions, may be more doubtful. The mere question of right might, perhaps, be decided by this court in a proper case with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislature of **Georgia**, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned. It savors too much of the exercise of political power, to be within the province of the judicial department." Several opinions were delivered in the case; a very elaborate one, by Mr. Justice Thompson, in which Judge Story concurred. They maintained that the Cherokee Nation was a foreign nation within the Judiciary Act, and, competent to bring the suit; but, agreed with the Chief Justice, that all the matters set up in the bill involved political questions, with the exception of the right and title of the Indians to the possession of the land which they occupied. Mr. Justice Thompson, referring to this branch of the case, observed: "For the purpose of guarding against any erroneous conclusions, it is proper I should state, that I do not claim for this court, the exercise of jurisdiction upon any matter properly falling under the denomination of political power. Relief to the full extent prayed for by the bill may be beyond the reach of this court. Much of the matters therein contained by way of complaint, would seem to depend for relief
75 upon *75 the exercise of political power; and, as such, appropriately devolving upon the executive, and not the judicial department of the government. This court can grant relief so far, only, as the rights of persons or property are drawn in question, and have been infringed." And, in another part of the opinion, he returns, again, to this question, and, is still more

emphatic in disclaiming jurisdiction. He observes: "I certainly do not claim, as belonging to the judiciary, the exercise of political power. That belongs to another branch of the government. The protection and enforcement of many rights secured by treaties, most certainly do not belong to the judiciary. It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief. This court can have no right to pronounce an abstract opinion upon the constitutionality of a State law. Such law must be brought into actual, or threatened operation upon rights properly falling under judicial cognizance, or a remedy is not to be had here." We have said Mr. Justice Story concurred in this opinion; and Mr. Justice Johnson, who also delivered one, recognized the same distinctions.[*]

By the second section of the third article of the Constitution "the judicial power extends to all cases, in law and equity, arising under the Constitution, the laws of the United States," &c., and as applicable to the case in hand, "to controversies between a State and citizens of another State," — which controversies, under the Judiciary Act, may be brought, in the first instance, before this court in the exercise of its original jurisdiction, and we agree, that the bill filed, presents a case, which, if it be the subject of judicial cognizance, would, in form, come under a familiar head of equity jurisdiction, that is, jurisdiction to grant an injunction to restrain a party from a wrong or injury to the rights of another, where the danger, actual or threatened,
76 is irreparable, or the remedy at law inadequate. But, according to the course of *76 proceeding under this head in equity, in order to entitle the party to the remedy, a case must be presented appropriate for the exercise of judicial power; the rights in danger, as we have seen, must be rights of persons or property, not merely political rights, which do not belong to the jurisdiction of a court, either in law or equity.

The remaining question on this branch of our inquiry is, whether, in view of the principles above stated, and which we have endeavored to explain, a case is made out in the bill of which this court can take judicial cognizance. In looking into it, it will be seen that we are called upon to restrain the defendants, who represent the executive authority of the government, from carrying into execution certain acts of Congress, inasmuch as such execution would annul, and totally abolish the existing State government of **Georgia**, and establish another and different one in its place; in other words, would overthrow and destroy the corporate existence of the State, by depriving it of all the means and instrumentalities whereby its existence might, and, otherwise would, be maintained.

This is the substance of the complaint, and of the relief prayed for. The bill, it is true, sets out in detail the different and substantial changes in the structure and organization of the existing government, as contemplated in these acts of Congress; which, it is charged, if carried into effect by the defendants, will work this destruction. But, they are grievances, because they necessarily and inevitably tend to the overthrow of the State as an organized political body. They are stated, in detail, as laying a foundation for the interposition of the court to prevent the specific execution of them; and the resulting threatened mischief. So in respect to the prayers of the bill. The first is, that the defendants may be enjoined against doing or permitting any act or thing, within or concerning the State, which is or may be directed, or required of them, by or under the two acts of Congress complained of; and the remaining four prayers are of the same character, except more specific as to the particular acts threatened to be committed.

77 *77 That these matters, both as stated in the body of the bill, and, in the prayers for relief, call for the judgment of the court upon political questions, and, upon rights, not of persons or property, but of a political character, will hardly be denied. For the rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court.

It is true, the bill, in setting forth the political rights of the State, and of its people to be protected, among other matters, avers, that **Georgia** owns certain real estate and buildings therein, State capitol, and executive mansion, and other real and personal property; and that

putting the acts of Congress into execution, and destroying the State, would deprive it of the possession and enjoyment of its property. But, it is apparent, that this reference to property and statement concerning it, are only by way of showing one of the grievances resulting from the threatened destruction of the State, and in aggravation of it, not as a specific ground of relief. This matter of property is neither stated as an independent ground, nor is it noticed at all in the prayers for relief. Indeed the case, as made in the bill, would have stopped far short of the relief sought by the State, and its main purpose and design given up, by restraining its remedial effect, simply to the protection of the title and possession of its property. Such relief would have called for a very different bill from the one before us.

Having arrived at the conclusion that this court, for the reasons above stated, possesses no jurisdiction over the subject-matter presented in the bill for relief, it is unimportant to examine the question as it respects jurisdiction over the parties defendants.

78 The CHIEF JUSTICE: Without being able to yield my assent to the grounds stated in the opinion just read for the *78 dismissal of the complainant's bill, I concur fully in the conclusion that the case made by the bill, is one of which this court has no jurisdiction.

BILL DISMISSED FOR WANT OF JURISDICTION.

[*] 12 Peters, 669.

[†] Nabob of Carnatic v. The East India Co., 1 Vesey, Jr., 375-393, S.C., 2 Id. 56-60; Penn v. Lord Baltimore, 1 Vesey, 446-7; New York v. Connecticut, 4 Dallas, 4-6; The Cherokee Nation v. **Georgia**, 5 Peters, 1, 20, 29, 30, 51, 75; The State of Rhode Island v. The State of Massachusetts, 12 Ib. 657, 733, 734, 737, 738.

[*] 12 Peters, 657.

[†] Page 736.

[*] 12 Peters, 752, 754.

[†] 17 Howard, 478.

[‡] 5 Peters, 1.

[*] 5 Peters, 29-30.

415 U.S. 528 (1974)

HAGANS ET AL.
v.
LAVINE, COMMISSIONER, NEW YORK DEPARTMENT OF SOCIAL SERVICES, ET AL.

No. 72-6476.

Supreme Court of United States.

Argued December 11, 1973.
Decided March 25, 1974.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

529 *529 *Carl Jay Nathanson* argued the cause for petitioners, With him on the briefs were *Steven J. Cole* and *Henry A. Freedman.*

Michael Colodner, Assistant Attorney General of New York, argued the cause for respondent
530 **Lavine**. With him on the brief were *Louis J. Lefkowitz,* Attorney General, *530 and *Samuel A. Hirshowitz,* First Assistant Attorney General.

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioners, recipients of public assistance under the cooperative federal-state Aid to Families With Dependent Children (AFDC) program,[1] brought this action in the District Court for themselves and their infant children and as representatives of other similarly situated AFDC
531 recipients. Their suit challenged a provision of *531 the New York Code of Rules and Regulations permitting the State to recoup prior unscheduled payments for rent from subsequent grants under the AFDC program.[2] They alleged that the recoupment regulation violated the Equal Protection Clause of the Fourteenth Amendment and contravened the pertinent provisions of the Social Security Act governing AFDC and the regulations promulgated thereunder by the administering federal agency, the Department of Health,
532 Education, and Welfare (HEW).[3] The action sought injunctive and declaratory *532 relief pursuant to 42 U. S. C. § 1983 and 28 U. S. C. § 2201, and jurisdiction was invoked under 28 U. S. C. §§ 1343 (3) and (4). The District Court found that the equal protection claim was substantial and provided a basis for pendent jurisdiction to adjudicate the so-called "statutory" claim—the alleged conflict between state and federal law. After hearing, the trial court declared the recoupment regulation contrary to the Social Security Act and HEW regulations
533 and enjoined its implementation *533 or enforcement. Following a remand,[4] the Court of Appeals reversed, holding that because petitioners had failed to present a substantial constitutional claim, the District Court lacked jurisdiction to entertain either the equal protection or the statutory claim. 471 F. 2d 347 (CA2 1973). The jurisdictional question being an important one, we granted certiorari. 412 **U. S.** 938 (1973). For reasons set forth below, we hold that the District Court had jurisdiction under 28 U. S. C. § 1343 (3) to consider petitioners' attack on the recoupment regulation.[5]

534 *534

Petitioners brought this action under 42 U. S. C. § 1983, which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or
> 535 usage, of any State *535 or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

By its terms, § 1983 embraces petitioners' claims that the challenged regulation enforced by respondent state and county welfare officials deprives them of a right "secured by the Constitution and laws," *viz.,* the equal protection of the laws. But the federal cause of action created by the section does not by itself confer jurisdiction upon the federal district courts to adjudicate these claims. Accordingly, petitioners relied principally upon 28 U. S. C. § 1343 (3):

> 536 "The district courts shall have original jurisdiction *536 of any civil action authorized by law to be commenced by any person:
>
> .....
>
> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . ."

Concededly, § 1343 authorizes a civil action to "redress the deprivation, under color of any State . . . regulation. . . of any right . . . secured by the Constitution of the United States." Section 1343 (3) therefore conferred jurisdiction upon the District Court to entertain the constitutional claim if it was of sufficient substance to support federal jurisdiction. If it was, it is also clear that the District Court could hear as a matter of pendent jurisdiction the claim of conflict between federal and state law, without determining that the latter claim in its own right was encompassed within § 1343. *Rosado* v. *Wyman,* 397 **U. S.** 397, 402-405 (1970); see also *N. Y. Dept. of Social Services* v. *Dublino,* 413 **U. S.** 405, 412 n. 11 (1973).

The Court of Appeals ruled that petitioners had not tendered a substantial constitutional claim and ordered dismissal of the entire action for want of subject matter jurisdiction. The principle applied by the Court of Appeals—that a "substantial" question was necessary to support jurisdiction—was unexceptionable under prior cases. Over the years this Court has repeatedly held that the federal courts are without power to entertain claims otherwise within their jurisdiction if they are "so attenuated and unsubstantial as to be absolutely devoid of merit,"
537 *Newburyport Water Co.* v. *Newburyport,* 193 *537 **U. S.** 561, 579 (1904); "wholly insubstantial," *Bailey* v. *Patterson,* 369 **U. S.** 31, 33 (1962); "obviously frivolous," *Hannis Distilling Co.* v. *Baltimore,* 216 **U. S.** 285, 288 (1910); "plainly unsubstantial," *Levering & Garrigues Co.* v. *Morrin,* 289 **U. S.** 103, 105 (1933); or "no longer open to discussion," *McGilvra* v. *Ross,* 215 **U. S.** 70, 80 (1909). One of the principal decisions on the subject, *Ex parte Poresky,* 290 **U. S.** 30, 31-32 (1933), held, first, that "[i]n the absence of diversity of citizenship, it is essential to jurisdiction that a substantial federal question should be presented"; second, that a three-judge court was not necessary to pass upon this initial question of jurisdiction; and third, that "[t]he question may be plainly unsubstantial, either because it is `obviously without merit' or because `its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' *Levering & Garrigues Co.* v. *Morrin, supra; Hannis Distilling Co.* v. *Baltimore,* 216 **U. S.** 285, 288; *McGilvra* v. *Ross,* 215 **U. S.** 70, 80."

Only recently this Court again reviewed this general question where it arose in the context of

convening a three-judge court under 28 U. S. C. § 2281:

> "`Constitutional insubstantiality' for this purpose has been equated with such concepts as `essentially fictitious,' *Bailey* v. *Patterson,* 369 **U. S.**, at 33; `wholly insubstantial,' *ibid.;* `obviously frivolous,' *Hannis Distilling Co.* v. *Baltimore,* 216 **U. S.** 285, 288 (1910); and `obviously without merit,' *Ex parte Poresky,* 290 **U. S.** 30, 32 (1933). The limiting words `wholly' and `obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality
> 538 of constitutional claims, those words import that claims are constitutionally *538 insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U. S. C. § 2281. A claim is insubstantial only if `"its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." ' *Ex parte Poresky, supra,* at 32, quoting from *Hannis Distilling Co.* v. *Baltimore, supra,* at 288; see also *Levering & Garrigues Co.* v. *Morrin,* 289 **U. S.** 103, 105-106 (1933); *McGilvra* v. *Ross,* 215 **U. S.** 70, 80 (1909)." *Goosby* v. *Osser,* 409 **U. S.** 512, 518 (1973).

The substantiality doctrine as a statement of jurisdictional principles affecting the power of a federal court to adjudicate constitutional claims has been questioned, *Bell* v. *Hood,* 327 **U. S.** 678, 683 (1946), and characterized as "more ancient than analytically sound," *Rosado* v. *Wyman, supra,* at 404. But it remains the federal rule and needs no re-examination here, for we are convinced that within accepted doctrine petitioners' complaint alleged a constitutional claim sufficient to confer jurisdiction on the District Court to pass on the controversy.

Jurisdiction is essentially the authority conferred by Congress to decide a given type of case one way or the other. *The Fair* v. *Kohler Die Co.,* 228 **U. S.** 22, 25 (1913). Here, §§ 1343 (3) and 1983 unquestionably authorized federal courts to entertain suits to redress the deprivation, under color of state law, of constitutional rights. It is also plain that the complaint formally alleged such a deprivation. The District Court's jurisdiction, a matter for threshold
539 determination, turned *539 on whether the question was too insubstantial for consideration.

In *Dandridge* v. *Williams,* 397 **U. S.** 471 (1970), AFDC recipients challenged the Maryland maximum grant regulation on equal protection grounds. We held that the issue should be resolved by inquiring whether the classification had a rational basis. Finding that it did, we sustained the regulation. But *Dandridge* evinced no intention to suspend the operation of the Equal Protection Clause in the field of social welfare law. State laws and regulations must still "be rationally based and free from invidious discrimination." *Id.,* at 487. See *Jefferson* v. *Hackney,* 406 **U. S.** 535, 546 (1972); *Carter* v. *Stanton,* 405 **U. S.** 669, 671 (1972); cf. *San Antonio School District* v. *Rodriguez,* 411 **U. S.** 1 (1973).

Judged by this standard, we cannot say that the equal protection issue tendered by the complaint was either frivolous or so insubstantial as to be beyond the jurisdiction of the District Court. We are unaware of any cases in this Court specifically dealing with this or any similar regulation and settling the matter one way or the other.[6] Nor is it immediately obvious to **us**
540 from the *540 face of the complaint that recouping emergency rent payments from future
541 welfare disbursements, which petitioners argue deprived needy children because of parental *541 default, was so patently rational as to require no meaningful consideration.

The Court of Appeals rightly felt obliged to measure petitioners' complaint that the challenged regulation violated the Equal Protection Clause "by discriminating irrationally and invidiously between different classes of recipients"[7] against the standard prescribed by *Dandridge.* The Court of Appeals then reasoned that without the recoupment regulation, those who were subject to it would be preferred over those who had paid their full rent out of their normal monthly grant. The court further reasoned that the regulation provided an incentive for welfare recipients to properly manage their grants and not become delinquent in their rent.[8] It
542 concluded that *542 the regulation was rationally based and that no substantial constitutional

question within the jurisdiction of the District Court had been presented.

This reasoning with respect to the rationality of the regulation and its propriety under the Equal Protection Clause may ultimately prove correct, but it is not immediately obvious from the decided cases or so "very plain"[9] under the Equal Protection Clause. We think the admonition of *Bell* v. *Hood,* 327 **U. S.** 678 (1946), should be followed here:

> "Jurisdiction . . . is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction." *Id.,* at 682 (citations omitted).[10]

As was the case in *Bell* v. *Hood,* we cannot "say that the cause of action alleged is so
543 patently without merit *543 as to justify, even under the qualifications noted, the court's dismissal for want of jurisdiction." *Id.,* at 683. Nor can we say that petitioners' claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits." *Oneida Indian Nation* v. *County of Oneida,* 414 **U. S.** 661, 666-667 (1974). (Citations omitted.)

II

Given a constitutional question over which the District Court had jurisdiction, it also had jurisdiction over the "statutory" claim. See *supra,* at 536. The latter was to be decided first and the former not reached if the statutory claim was dispositive. *California Human Resources Dept.* v. *Java,* 402 **U. S.** 121, 124 (1971); *Dandridge* v. *Williams,* 397 **U. S.**, at 475-476; *Rosado* v. *Wyman,* 397 **U. S.**, at 402; *King* v. *Smith,* 392 **U. S.** 309 (1968). The constitutional claim could be adjudicated only by a three-judge court, but the statutory claim was within the jurisdiction of a single district judge. *Swift & Co.* v. *Wickham,* 382 **U. S.** 111 (1965); *Rosado* v. *Wyman, supra,* at 403. Thus, the District Judge, sitting alone, moved directly to the statutory claim. His decision was appealed to the Court of Appeals, although had a three-judge court been convened, an injunction issued, and the statutory ground alone decided, the appeal would be only to this Court under 28 U. S. C. § 1253.

The procedure followed by the District Court—initial determination of substantiality and then adjudication of the "statutory" claim without convening a three-judge court—may appear at odds with some of our prior decisions. See, *e. g.,* *Engineers* v. *Chicago, R. I. & P. R. Co.,*
544 382 **U. S.** 423 (1966); *Florida Lime & Avocado Growers* *544 v. *Jacobsen,* 362 **U. S.** 73 (1960). But, we think it accurately reflects the recent evolution of three-judge-court jurisprudence. "this Court's concern for efficient operation of the lower federal courts," and "the constrictive view of the three-judge [court] jurisdiction which this Court has traditionally taken." *Swift & Co.* v. *Wickham, supra,* at 128, 129 (citations omitted). In *Rosado* v. *Wyman, supra,* at 403, we suggested that

> "[e]ven had the constitutional claim not been declared moot, the most appropriate course may well have been to remand to the single district judge for findings and the determination of the statutory claim rather than encumber the district court, at a time when district court calendars are overburdened, by consuming the time of three federal judges in a matter that was not required to be determined by a three-judge court. See *Swift & Co.* v. *Wickham,* 382 **U. S.** 111 (1965)."

It is true that the constitutional claim would warrant convening a three-judge court and that if a single judge rejects the statutory claim, a three-judge court must be called to consider the constitutional issue. Nevertheless, the coincidence of a constitutional and statutory claim should not automatically require a single-judge district court to defer to a three-judge panel, which, in view of what we have said in *Rosado v. Wyman, supra*, could then merely pass the statutory claim back to the single judge. See *Kelly v. Illinois Bell Telephone Co.*, 325 F. 2d 148, 151 (CA7 1963); *Chicago, Duluth & Georgian Bay Transit Co. v. Nims*, 252 F. 2d 317, 319-320 (CA6 1958); *Doe v. **Lavine***, 347 F. Supp. 357, 359-360 (SDNY 1972); cf. *Bryant v. Carleson*, 444 F. 2d 353, 358-359 (CA9 1971). "In fact, it would be grossly inefficient to send a three-judge court a claim which will only be sent immediately back. This inefficiency is
545 especially *545 apparent if the single judge's decision resolves the case, for there is then no need to convene the three-judge court." *Norton v. Richardson*, 352 F. Supp. 596, 599 (Md. 1972) (citations omitted). Section 2281 does not forbid this practice, and we are not inclined to read that statute "in isolation with mutilating literalness . . . ." *Florida Lime & Avocado Growers v. Jacobsen, supra*, at 94 (Frankfurter, J., dissenting).

III

Taking a jaundiced view of the constitutional claim, the dissenters would have the District Court dismiss the Supremacy Clause ("statutory") issue, convene a three-judge court, and reject the constitutional claim, all of this, apparently, as an exercise of the discretion which the District Court, under *Mine Workers v. Gibbs*, 383 **U. S.** 715 (1966), is claimed to have over the pendent federal claim. But *Gibbs* was oriented to state law claims pendent to federal claims conferring jurisdiction on the District Court. Pendent jurisdiction over state claims was described as a doctrine of discretion not to be routinely exercised without considering the advantages of judicial economy, convenience, and fairness to litigants. For, "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *Id.*, at 726 (footnote omitted).[11]

In light of the dissent's treatment of *Gibbs*, several observations are appropriate. First, it is evident from *Gibbs* that pendent state law claims are not always, or even almost always, to
546 be dismissed and not adjudicated. *546 On the contrary, given advantages of economy and convenience and no unfairness to litigants, *Gibbs* contemplates adjudication of these claims.

Second, it would reasonably follow that other considerations may warrant adjudication rather than dismissal of pendent state claims. In *Siler v. Louisville & Nashville R. Co.*, 213 **U. S.** 175 (1909) the Court held that the state issues should be decided first and because these claims were dispositive, federal questions need not be reached:

> "Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons. In this case we think it much better to decide it with regard to the question of a local nature, involving the construction of the state statute and the authority therein given to the commission to make the order in question, rather than to unnecessarily decide the various constitutional questions appearing in the record." *Id.*, at 193.

Siler is not an oddity. The Court has characteristically dealt first with possibly dispositive state law claims pendent to federal constitutional claims. See, *e. g.*, *Louisville & Nashville R. Co. v. Garrett*, 231 **U. S.** 298, 303-304, 310 (1913); *Ohio Tax Cases*, 232 **U. S.** 576, 586-587 (1914); *Greene v. Louisville & Interurban R. Co.*, 244 **U. S.** 499, 508-509 (1917); *Louisville & Nashville R. Co. v. Greene*, 244 **U. S.** 522, 527 (1917); *Davis v. Wallace*, 257 **U. S.** 478, 482, 485 (1922); *Chicago G. W. R. Co. v. Kendall*, 266 **U. S.** 94, 97-98 (1924); *Cincinnati v. Vester*, 281 **U. S.** 439, 448-449 (1930); *Hillsborough v. Cromwell*, 326 **U. S.** 620, 629 (1946). The doctrine is not ironclad, see *Sterling v. Constantin*, 287 **U. S.** 378, 393-394, 396 (1932),
547 but it is recurringly applied,[12] *547 and, at the very least, it presumes the advisability of deciding first the pendent, nonconstitutional issue.

Gibbs did not cite *Siler* or like cases, nor did it purport to change the ordinary rule that a federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available. The dissent uncritically relies on *Siler* but ignores the preference stated in that case for deciding nonconstitutional claims even though they are pendent and, standing alone, are beyond the jurisdiction of the federal court.[13]

548 *548 Third, the rationale of *Gibbs* centers upon considerations of comity and the desirability of having a reliable and final determination of the state claim by state courts having more familiarity with the controlling principles and the authority to render a final judgment. These considerations favoring state adjudication are wholly irrelevant where the pendent claim is *federal* but is itself beyond the jurisdiction of the District Court for failure to satisfy the amount in controversy. In such cases, the federal court's rendition of federal law will be at least as sure-footed and lasting as any judgment from the state courts.[14]

549 *549 The most relevant cases for our purposes, of course, are those decisions such as *King* v. *Smith,* 392 **U. S.** 309 (1968), *Rosado* v. *Wyman,* 397 **U. S.** 397 (1970), and *Dandridge* v. *Williams,* 397 **U. S.** 471 (1970), where the jurisdictional claim arises under the Federal Constitution and the pendent claim, although denominated "statutory," is in reality a constitutional claim arising under the Supremacy Clause. In these cases the Court has characteristically dealt with the "statutory" claim first "because if the appellees' position on this question is correct, there is no occasion to reach the constitutional issues. *Ashwander* v. *TVA,* 297 **U. S.** 288, 346-347 (Brandeis, J., concurring); *Rosenberg* v. *Fleuti,* 374 **U. S.** 449." *Dandridge* v. *Williams, supra,* at 475-476.

550 In none of these cases did the Court think that with jurisdiction fairly established, a federal court, *550 under *Gibbs,* must nevertheless decide the constitutional issue and avoid the statutory claim if, upon weighing the two claims, the statutory claim is strong and the constitutional claim weak. On the contrary, Mr. Justice Harlan, writing for the Court in *Rosado* v. *Wyman,* and with the principles of *Gibbs* well in mind, noted that the pendent statutory question was essentially one of federal policy and that the argument for the exercise of pendent jurisdiction was "`particularly strong.'" 397 **U. S.**, at 404. And *Gibbs* itself observed the "special reason for the exercise of pendent jurisdiction" where the Supremacy Clause is implicated: "the federal courts are particularly appropriate bodies for the application of pre-emption principles." 383 **U. S.**, at 729.

The judgment of the Court of Appeals is reversed and the case remanded to that court for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

I join the dissenting opinion of MR. JUSTICE REHNQUIST because I believe he expresses the correct view of the appropriate result when a claim over which a district court has no independent jurisdiction is appended to a constitutional claim that has no hope of success on the merits. A wise exercise of discretion lies at the heart of the doctrine of pendent jurisdiction. *E. g., Rosado* v. *Wyman,* 397 **U. S.** 397, 403 (1970); *Mine Workers* v. *Gibbs,* 383 **U. S.** 715, 726-727 (1966). Compelling a district court to decide an ancillary claim where the premise for its jurisdiction is a meritless constitutional claim does not impress me as an efficacious performance of a discretionary responsibility.

551 *551 I write briefly to emphasize my view that the majority has misread the import of the *Gibbs* opinion, *supra,* particularly in the manner in which it links *Gibbs* to *Siler* v. *Louisville & Nashville R. Co.,* 213 **U. S.** 175 (1909), and like cases. *Gibbs* involved a state claim that arose out of the same transaction as the federal law claim that conferred federal jurisdiction. The majority apparently reads *Gibbs* and *Siler* together as mandating decision of the state law claim without regard to the frailty of the federal claim on which federal jurisdiction rests. See *ante,* at 547, 549-550. In other words, the majority opinion appears to be saying that a federal constitutional claim as marginal as the one at issue here is capable of supporting

pendent federal jurisdiction over a *state* claim and, indeed, that the state claim is to be decided to the exclusion of the federal issue. As I view it, that is a particularly erroneous interpretation of the pendent jurisdiction doctrine. That reading would broaden federal question jurisdiction to encompass matters of state law whenever an imaginative litigant can think up a federal claim, no matter how insubstantial, that is related to the transaction giving rise to the state claim.

This extension of *Gibbs* is quite unnecessary, since we are not confronted with a case where the pendent claim is a matter of state law. The Court's dictum could nevertheless prompt other courts to follow it. In view of this potential mischief, I repeat a quotation from *Gibbs* relied on by my Brother REHNQUIST which indicates how far the Court has departed from the rationale of that 1966 precedent:

> "[R]ecognition of a federal court's wide latitude to decide ancillary questions of state law does not imply that it must tolerate a litigant's effort to impose upon it
552 what is in effect only a state law case. *552 Once it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed." 383 **U. S.**, at 727.

The correct reading of *Gibbs*, as a matter of common sense and in light of deeply rooted notions of federalism, is that the federal claim must have more than a glimmer of merit and must continue to do so at least until substantial judicial resources have been committed to the lawsuit. If either of those conditions is not met, a district court has no business deciding issues of state law. District courts are not expositors of state law when jurisdiction is not based on diversity of citizenship.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE POWELL join, dissenting.

The Court's decision in this case resolves a legal question and is necessarily and properly cast in legal terms. According to the Court, a federal district court, having acquired jurisdiction over a "not wholly insubstantial" federal claim, has power to decide other related claims which lack an independent jurisdictional basis. Applying this analysis to the present case, the Court finds the equal protection claim pleaded by petitioners sufficient to satisfy this somewhat hazy definition of "substantiality" and appears to approve the District Court's exercise of pendent jurisdiction over a claim alleging conflict between state and federal welfare regulations. But since we have been admonished that we may not shut our eyes as judges to what we know as men, the practical as well as the legal consequences of this decision should be squarely faced.

In the wake of *King* v. *Smith*, 392 **U. S.** 309 (1968), and *Rosado* v. *Wyman*, 397 **U. S.** 397 (1970), the lower federal courts have been confronted by a massive influx of cases
553 challenging state welfare regulations. The principal *553 claim of plaintiffs in the typical case is that the state regulation conflicts with governing federal regulations and is invalid under the Supremacy Clause of the United States Constitution. This allegation presents a federal claim sufficient to satisfy the first jurisdictional requirement of 28 U. S. C. § 1331,[1] the so-called "federal question" jurisdictional statute, but many plaintiffs find the statute's second requirement, that the matter in controversy exceed the sum of $10,000, impossible to meet. Normally, therefore, these cases would be left, as Congress surely understood when it imposed this jurisdictional limitation, to state courts likewise charged with enforcing the United States Constitution.

To avoid this natural disposition, however, plaintiffs in these cases have turned to 28 U. S. C. § 1343, a more narrowly drawn federal jurisdictional statute requiring no minimum jurisdictional amount. The provision of 28 U. S. C. § 1343 relevant to this case reads:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> .....

> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . ."

554 *554 This Court, however, has never held, and does not hold now, that the Supremacy Clause of the Constitution itself provides a basis for jurisdiction under this section. The Court escapes the need for such a decision by granting the federal courts power to hear the Supremacy Clause claim under a theory of pendent jurisdiction. Finding that plaintiffs here have pleaded an equal protection claim sufficiently substantial to satisfy the requirements of 28 U. S. C. § 1343, the Court seems to suggest that consideration of the Supremacy Clause claim may follow as a matter of course. Since I do not believe that the equal protection claim was sufficient to establish jurisdiction under § 1343, or that the doctrine of pendent jurisdiction was appropriately invoked in this case, I dissent.

I

The history of pendent jurisdiction in this Court is long and complex. Its roots go back to *Osborn* v. *Bank of the United States,* 9 Wheat. 738 (1824), where the Court said that the jurisdiction of the federal courts extended not only to federal issues themselves but also to nonfederal issues essential to the settlement of the federal claim. No subsequent decision has cast any doubt upon the wisdom of Mr. Chief Justice Marshall's exposition in that case, since a different result would have forced substantial federal cases into state courts for adjudication
555 simply because they involved nonfederal issues as well as federal ones.[2] The doctrine was *555 expanded in *Siler* v. *Louisville & Nashville R. Co.,* 213 **U. S.** 175 (1909), where the Court upheld the power of a district court, having founded its jurisdiction upon federal constitutional claims, to bypass the constitutional questions and to decide an issue of local law. The Court said that the lower court "had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only."[3] But the Court at the same time cautioned: "Of course, the Federal question must not be merely colorable or fraudulently set up for the mere purpose of endeavoring to give the court jurisdiction."[4]

556 *556 The Court returned to the question of pendent jurisdiction in *Hurn* v. *Oursler,* 289 **U. S.** 238 (1933), and *Levering & Garrigues Co.* v. *Morrin,* 289 **U. S.** 103 (1933). The Court in both cases agreed that a substantial federal question was necessary to confer initial jurisdiction on the district court,[5] a test that must be met whether or not pendent jurisdiction is involved, and then in *Hurn* further attempted to define the necessary relationship between the pendent claim and the claim conferring jurisdiction. According to the Court, a lower federal court could
557 exercise pendent jurisdiction over a separate *557 *ground* alleged in support of a single cause of action, but not over a separate cause of action itself.[6]

The Court's most recent extensive treatment of the subject occurred in *Mine Workers* v. *Gibbs,* 383 **U. S.** 715 (1966). Because *Hurn* had spoken in terms of "causes of action," a term which was superseded by the adoption of the Federal Rules of Civil Procedure, *Gibbs* redefined the necessary relation of the federal and nonfederal claims in more understandable terms. Restating the substantiality test in pretty much the language of the earlier cases, the Court then continued:

> "The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole." *Id.,* at 725 (footnote omitted) (emphasis in original).

This language served to clarify jurisdictional questions which had proved troublesome after
558 *Hurn v. Oursler.* But, importantly, the decision then went on to emphasize *558 that power to hear claims lacking an independent jurisdictional basis should not be exercised indiscriminately. The Court reiterated that "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right," *id.,* at 726, and urged that the district courts exercise caution not to abuse that discretion. For example, the Court suggested that

> "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *Ibid.* (footnote omitted).

Furthermore, the Court stressed that the relative importance of the claims should be considered:

> "Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals." *Id.,* at 726-727.

Although the Court's language in *Gibbs* necessarily discussed the relationship between federal and state claims, much of the opinion's rationale is applicable when pendent jurisdiction is
559 sought over federal claims lacking an independent jurisdictional basis.[7] Of course, a *559 decision to deny pendent jurisdiction on the ground that state courts should consider questions of state law naturally involves issues relevant to the question of abstention, a consideration not especially applicable when the pendent claim primarily involves questions of federal law. But the presence of federal questions should not induce federal courts to expand their proper jurisdiction. As previously noted, Congress, by requiring a minimum dollar amount for federal question jurisdiction, made a legislative decision to leave certain claims to state courts. Considerations of convenience and judicial economy may justify hearing those claims when genuine federal business, as contrasted to weak claims intended merely to secure jurisdiction, is before the federal court, but these considerations should be subordinated to considerations of federalism when the claims without independent jurisdiction constitute "the real body" of the case. In this situation the lower courts should remember that federalism embodies

> "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger* v. *Harris,* 401 **U. S.** 37, 44 (1971).

The majority rejects this analysis, seemingly finding that state courts' greater familiarity with state law is the only reason for declining pendent jurisdiction under *Gibbs.* But Congress left to state courts not only those claims involving state law but also those claims involving federal law which it felt did not merit the time of federal courts. This Court now says that federal
560 courts should hear those cases anyway since they can *560 render "at least as sure-footed" an interpretation of federal law and are "`particularly appropriate bodies'" to do so. This opinion, while it undoubtedly reflects the view of this Court, does not reflect with equal accuracy the purpose of Congress.

In *Rosado* v. *Wyman,* 397 **U. S.** 397 (1970), heavily relied upon by the Court to support its position, there was no intimation that the constitutional claim was a weak one pleaded for the purpose of securing federal jurisdiction over a stronger claim. Rather the constitutional claim proved moot. This Court plainly stated:

> "Unlike insubstantiality, which is apparent at the outset, mootness, frequently a matter beyond the control of the parties, may not occur until after substantial time and energy have been expended looking toward the resolution of a dispute that plaintiffs were entitled to bring in a federal court." *Id.,* at 404.

Thus *Rosado* does not in any way settle the issue before the Court today. Its holding offers no

aid in resolving the real and practical issues that the Court confronts in this case.

The *Gibbs* decision must be understood in its separate parts. First, the Court held that jurisdiction could not attach unless the claim for which jurisdiction was asserted met the requirement of substantiality and unless the pendent claim was sufficiently related to the jurisdictional claim to constitute a single case under the Constitution. Second, the Court admonished that this jurisdiction, even if found to exist, should be exercised judiciously. The relatively permissive standards applied to the issue of whether the Court *could* consider a pendent claim were not to guide the ultimate decision of whether the Court *should* consider
561 the pendent claim. Only where "considerations of judicial economy, convenience *561 and fairness to litigants" were served and where the pendent claim did not predominate in scope or worth over the judicial claim, was the doctrine of pendent jurisdiction to be applied. 383 **U. S.**, at 726. While I am convinced that the District Court lacked jurisdiction over an equal protection claim as thin as this one, even if I am wrong on that point it seems clear to me that its decision to exercise pendent jurisdiction over the Supremacy Clause claim was not based on the discretionary considerations outlined in *Gibbs, supra*.

II

The District Court simply found the equal protection claim in this case to be "substantial" and proceeded without further discussion to the statutory claim. The Court of Appeals, reversing the determination of the District Court, found the claim to be insubstantial and therefore had no need to go further. This Court merely disagrees on the question of substantiality, reinstating the District Court's jurisdiction. Unfortunately, this process of analysis seems to me to be wrong both in its treatment of the jurisdictional question and in its failure to treat the discretionary aspects of pendent jurisdiction.

Whatever legal terminology is applied to the equal protection claim of the plaintiffs in this case, the one clear fact is that the claim is not very good. In brief, petitioners, who are recipients of public assistance under the Aid to Families with Dependent Children program, all received funds from New York, over and above their usual monthly grants, to prevent eviction from their places of lodging for nonpayment of rent. The State, pursuant to a provision of the New York Code of Rules and Regulations challenged in the District Court, sought to recover these
562 unusual expenditures by making deductions over the next succeeding months from petitioners' *562 normal monthly grants. In their complaint petitioners contended that the New York recoupment procedure deprived them of equal protection of the laws.[8]

One searches in vain, either in petitioners' brief or in the opinions of the District Court or this Court, for any reason why this claim meets even a minimal test of substantiality. It would seem extraordinary if, having paid petitioners more than their normal monthly entitlement in order to meet an emergency situation, the State had not sought to recoup the payments over a period of time. The District Court, finding the claim substantial, cited *Bradford* v. *Juras,* 331 F. Supp. 167 (Ore. 1971), a decision by a three-judge district court which found jurisdiction on a similar constitutional claim and then decided the case on statutory grounds. In *Bradford,* however, the Court simply stated that it had jurisdiction under 28 U. S. C. § 1343 (3) without further discussion.[9]

The opinion of this Court sheds no more light than did the opinion of the District Court. The Court simply states:

> "This reasoning with respect to the rationality of the regulation and its propriety under the Equal Protection Clause may ultimately prove correct, but it is not
> 563 immediately obvious from the decided cases *563 or so `very plain' under the Equal Protection Clause." *Ante,* at 542.

But cases such as *Dandridge* v. *Williams,* 397 **U. S.** 471 (1970), have largely discredited attacks on legislative decisions about the apportionment of limited state welfare funds. At least where the Court has not found a penalty based on race or considerations such as interstate travel, the legislative judgment is upheld whenever a "conceivable rational basis"

exists. Although *Dandridge* did not "suspend the operation of the Equal Protection Clause" in this area, it assuredly makes this particular claim a marginal one.[10]

I therefore cannot agree that the equal protection claim pleaded here was sufficient to confer jurisdiction on the District Court. Even assuming that the lower court may refer only to the pleadings in making its determination on the question of jurisdiction, the analysis need not be made, as the majority seems to imply, in a legal vacuum. To say that previous decisions have not foreclosed a question unless a prior case "specifically deal[s]" with the same regulation neglects the second branch of the test enunciated in *Levering & Garrigues Co.* v. *Morrin,* 289
564 **U. S.** 103 (1933), and repeated in later cases, that a *564 claim is insubstantial because "obviously without merit." *Id.,* at 105. Under today's rationale it appears sufficient for jurisdiction that a plaintiff is able to plead his claim with a straight face. But a district court should be able to dismiss for want of jurisdiction any claim that plainly carries no hope of success on the merits. This lack of promise in turn could be evident from recent decisions of this Court rejecting claims with a similar thesis or laying down rules which would clearly require dismissal on the merits.

Assuming, however, that the District Court here did have jurisdiction, it seems clear to me that under *Gibbs* the equal protection claim should not support the Supremacy Clause claim also asserted by petitioners. The test for exercising discretion must be a practical one, involving the type of judgments that a reasonable lawyer, evaluating the respective strengths and weaknesses of his case, might undertake. In this case it is highly improbable that a lawyer familiar with this Court's cases would place much faith in the success of his equal protection claim. In fact, examination of the complaint itself shows that substantially more attention was paid to the Supremacy Clause claim than to the claims under the Fourteenth Amendment. At the very least, the District Court, before it chose to exercise pendent jurisdiction, should have made an identifiable determination that the Equal Protection Clause was not simply asserted for the purpose of giving the Court jurisdiction over the heart of the plaintiffs' case. To my mind this seems to be a classic case of the statutory tail wagging the constitutional dog.

III

Thus, even if the Court of Appeals may have erroneously resolved the question of jurisdiction, the result it reached was correct in terms of the wise exercise of jurisdiction. Whether the
565 equal protection claim pleaded in *565 this case meets the threshold of substantiality for jurisdiction in the federal courts, the claim surely should not convince a district court that its main purpose was anything other than to secure jurisdiction for the more promising Supremacy Clause claim. Presented with this situation, the District Court should have declined to exercise pendent jurisdiction over the Supremacy Clause claim and referred the equal protection claim to a three-judge court.[11] Since its failure to do so seems to me an abuse of discretion under *Gibbs,* I dissent.

[1] AFDC is one of several major categorical public assistance programs established by the Social Security Act of 1935, and as we described in *King* v. *Smith,* 392 **U. S.** 309, 316-317 (1968), it is founded on a scheme of cooperative federalism:

"It is financed largely by the Federal Government, on a matching fund basis, and is administered by the States. States are not required to participate in the program, but those which desire to take advantage of the substantial federal funds available for distribution to needy children are required to submit an AFDC plan for the approval of the Secretary of Health, Education, and Welfare (HEW). 49 Stat. 627, 42 U. S. C. §§ 601, 602, 603, and 604. See [**U. S.** Advisory Commission Report on Intergovernmental Relations, Statutory and Administrative Controls Associated with Federal Grants for Public Assistance 21-23 (1964)]. The plan must conform with several requirements of the Social Security Act and with rules and regulations promulgated by HEW. 49 Stat. 627, as amended, 42 U. S. C. § 602 (1964 ed., Supp. II). See also HEW, Handbook of Public Assistance Administration, pt. IV, §§ 2200, 2300. . . ."

See also *Rosado* v. *Wyman,* 397 **U. S.** 397, 407-409 (1970).

Under the Social Security Act, HEW withholds federal funds for implementation of a state AFDC plan until compliance with the Act and the Department's regulations. HEW may also terminate partially or entirely federal payments if "in the administration of the [state] plan there is a failure to comply substantially with any provision required by section 602 (a) of [the Act] to be included in the plan." 42 U. S. C. § 604. See *King* v. *Smith, supra,* at 317 n. 12; *Rosado* v. *Wyman, supra,* at 420-422.

[2] The challenged regulation provides, in pertinent part:

"(g) *Payment for services and supplies already received.* Assistance grants shall be made to meet only current needs. Under the following specified circumstances payment for services or supplies already received is deemed a current need:

.....

"(7) For a recipient of public assistance who is being evicted for nonpayment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent such eviction or rehouse the family; and such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months. When there is a rent advance for more than one month, or more than one rent advance in a 12 month period, subsequent grants for rent shall be provided as restricted payments in accordance with Part 381 of this Title." 18 N. Y. C. R. R. § 352.7 (g) (7).

As AFDC recipients, petitioners receive monthly grants calculated to provide 90% of their family needs for shelter, fuel, and other basic necessities. For one reason or another, each petitioner was unable to pay her rent, and faced with imminent eviction, she received emergency rent payments from the Nassau County Department of Social Services. Because the State characterized these payments as "advances," the amount of these disbursements was deducted or recouped from petitioners' subsequent monthly familial assistance grants pursuant to § 352.7 (g) (7).

[3] Petitioners alleged that the New York State recoupment regulation was contrary to the following provisions of the federal statute and regulations because it assumed, contrary to fact, that those funds, extended to a recipient to satisfy a current emergency rent need, remain available as income for the family's need during the mandated six-month recoupment period.

Title 42 U. S. C. §§ 602 (a) (7) and (a) (10) state in pertinent part:

"(a) A State plan for aid and services to needy families with children must . . . (7) except as may be otherwise provided in clause (8), provide that the [administering] State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income . . . .

.....

"(10) provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals . . . ."

45 CFR § 233.20 (a) (3) (ii) (c):

"(a) *Requirements for State Plans.* A State Plan for OAA, AFDC, AB, APTD or AABD must, as specified below:

.....

"(3) . . . .

(ii) Provide that, in establishing financial eligibility and the amount of the assistance payment: . . . (c) only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered . . . ."

[4] On appeal from the District Court's entry of the injunction, the Court of Appeals without extended discussion found jurisdiction for the § 1983 action under 28 U. S. C. § 1343 (3). Without passing on the merits of the District Court's findings and conclusions, the Court of Appeals, with one judge dissenting, ordered a remand to that court to determine whether the recoupment of prior advance rent payments from current grants is a "reduction in grant" that would trigger the New York fair-hearing procedures under 18 N. Y. C. R. R. § 351.26. 462 F. 2d 928 (CA2 1972).

On remand, the District Court allowed additional parties who had received fair hearings to intervene and file a complaint. At the invitation of the court, HEW filed an *amicus curiae* brief which concluded that "the New York regulation does contravene federal requirements because it assumes for particular months the existence of income and resources which by definition are not currently available for such months." Brief for Petitioners Appendix 2. The District Court once again held the recoupment regulation invalid as violative of the Social Security Act and HEW regulations and enjoined its enforcement and implementation.

[5] In view of our disposition of this case, we do not reach the question whether, wholly aside from the pendent-jurisdiction rationale relied upon by the District Court, other valid grounds existed for sustaining its jurisdiction to entertain and decide the claim of conflict between federal and state law. It has been suggested, for example, that the conflict question is itself a constitutional matter within the meaning of § 1343 (3). *Connecticut Union of Welfare Employees* v. *White,* 55 F. R. D. 481, 486 (Conn. 1972). For purposes of interpreting and applying 28 U. S. C. § 2281, the three-judge-court provision, a claim of conflict between federal and state law has been denominated a claim not requiring a three-judge court. *Swift & Co.* v. *Wickham,* 382 **U. S.** 111 (1965). But *Swift* itself recognized that a suit to have a state statute declared void and to secure the benefits of the federal statute with which the state law is allegedly in conflict cannot succeed without ultimate resort to the Federal Constitution—"to be sure, any determination that a state statute is void for obstructing a federal statute does rest on the Supremacy Clause of the Federal Constitution." *Id.,* at 125. Moreover, when we have previously determined that state AFDC laws do not conform to the Social Security Act or HEW regulations, they have been invalidated under the Supremacy Clause. See *Townsend* v. *Swank,* 404 **U. S.** 282, 286 (1971). It is therefore urged that the "secured by the Constitution" language of § 1343 (3) should not be construed to exclude Supremacy Clause issues. That question we leave for another day.

Petitioners contend that § 1983 authorizes suits to vindicate rights under the "laws" of the United States as well as under the Constitution and that a suit brought under § 1983 to vindicate a statutory right under the Social Security Act, is a suit under an Act of Congress "providing for the protection of civil rights, including the right to vote" within the meaning of § 1343 (4). They further argue that in any event, § 1343 (3) in particular, and § 1343 in general, should be construed to invest the district courts with jurisdiction to hear any suit authorized by § 1983. These issues we also do not reach. See *Rosado* v. *Wyman,* 397 **U. S.**, at 405 n. 7; see also Herzer, Federal Jurisdiction Over Statutorily-Based Welfare Claims, 6 Harv, Civ. Rights-Civ. Lib. L. Rev. 1, 16-18 (1970); Note, Federal Jurisdiction Over Challenges to State Welfare Programs, 72 Col. L. Rev. 1404, 1405-1435 (1972); Note, Federal Judicial Review of State Welfare Practices, 67 Col. L. Rev. 84, 109-115 (1967).

Several past decisions of this Court concerning challenges by federal categorical assistance recipients to state welfare regulations have either assumed that jurisdiction existed under § 1343 or so stated without analysis. See, *e. g., Carleson* v. *Remillard,* 406 **U. S.** 598 (1972); *Carter* v. *Stanton,* 405 **U. S.** 669, 671 (1972); *Townsend* v. *Swank,* 404 **U. S.**, at 284 n. 2; *California Human Resources Dept.* v. *Java,* 402 **U. S.** 121 (1971); *Dandridge* v. *Williams,* 397 **U. S.** 471 (1970); *Goldberg* v. *Kelly,* 397 **U. S.** 254 (1970); *King* v. *Smith,* 392 **U. S.**, at 312 n. 3; *Damico* v. *California,* 389 **U. S.** 416 (1967). In none of these cases was the jurisdictional issue squarely raised as a contention in the petitions for certiorari, jurisdictional statements, or

briefs field in this Court. See *Edelman* v. *Jordan, post,* at 670-671. Moreover, when questions of jurisdiction have been passed on in prior decisions *sub silentio,* this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before **us**. *United States* v. *More,* 3 Cranch 159, 172 (1805); *King Mfg. Co.* v. *Augusta,* 277 **U. S.** 100, 134-135, n. 21 (1928) (Brandeis, J., dissenting). We therefore approach the question of the District Court's jurisdiction to entertain this suit as an open one calling for a canvass of the relevant jurisdictional considerations. *Florida Lime & Avocado Growers* v. *Jacobsen,* 362 **U. S.** 73, 88 (1960) (Frankfurter, J., dissenting).

[6] Those district courts that have ruled on similarly drafted state recoupment provisions have found that they were not rationally related to the declared purposes of the AFDC program and were therefore invalid under the Social Security Act and HEW regulations. In *Cooper* v. *Laupheimer,* 316 F. Supp. 264 (ED Pa. 1970), the District Court, after finding the equal protection claim substantial, invalidated a Pennsylvania regulation that recouped over a two-month period alleged overpayments from a family's assistance grants. The court found the regulation inconsistent with the Social Security Act for several reasons, including, *inter alia,* the punishment of the dependent child by depriving him of a substantial amount of his AFDC assistance because his mother either mistakenly or fraudulently obtained an extra payment months ago. "[T]he state cannot justify its [arbitrary] method of restitution by asserting that proper management of funds would produce such a [cash] reserve. The state cannot permit a child to starve or be deprived of aid that he needs because of the mother's budgetary mismanagement. The Social Security Act specifies remedies for such a situation . . . ." *Id.,* at 269.

In *Bradford* v. *Juras,* 331 F. Supp. 167 (Ore. 1971), the District Court found that it had subject-matter jurisdiction over the constitutional and statutory challenge to an Oregon regulation authorizing recoupment of overpayments from current assistance grants. Measuring the regulation against the goals of the AFDC program, the court invalidated it as inconsistent with federal law.

"The primary concern of Congress in establishing the AFDC program was the welfare and protection of the needy dependent child. 42 U. S. C. § 601; King v. Smith, 392 **U. S.** 309, 313 . . . (1968). This concern is thwarted when recoupment from current grants takes money from the child to penalize the misconduct of its parent.

.....

". . . The child-oriented policy of the AFDC program requires that children with equal needs be treated equally. The fact that a parent-recipient has acted wrongfully in the past by withholding information does not justify reducing the subsistence level of her children below that of other needy children." 331 F. Supp., at 170.

In *Holloway* v. *Parham,* 340 F. Supp. 336 (ND Ga. 1972). an equal protection and due process challenge to a Georgia statute mandating recoupment from future grants for past unlawful payments was deemed substantial enough to warrant the convening of a three-judge court. Addressing the pendent claim of inconsistency with the Social Security Act and HEW regulations, the court ruled that the law was valid because it required a prerecoupment determination that all or part of the overpayments are currently available to the parent and the children.

Although it did not explore the question in depth, the first Court of Appeals panel in this case that passed upon the injunction found jurisdiction in the District Court pursuant to 28 U. S. C. § 1343 (3) on the authority of the Court's decision in *Carter* v. *Stanton,* 405 **U. S.** 669 (1972). There we noted in a suit challenging a state welfare regulation that "if the [federal district] court's characterization of the [Fourteenth Amendment] question presented as insubstantial was based on the face of the complaint, as it seems to have been, it was error." *Id.,* at 671. The dissent did not question the majority's jurisdictional determination. 462 F. 2d, at 930-931, 932.

[7] App. 5.

[8] "The regulation in question, 18 NYCRR § 352.7 (g) (7), has a rational basis. Since the state has a limited amount of funds available to allocate to welfare recipients, the recoupment regulation is reasonably designed to ensure that there are sufficient funds available to all recipients on the level set by the state legislature. By receiving the advance payment plaintiffs have gotten more than the normal grant. Without the recoupment regulation, the plaintiffs would be in a preferred position over all the other welfare recipients who have paid their full rent out of the normal grant. The purposes of equal protection are served by treating all alike without granting special favor to those who have misappropriated their rent allowance. If there were no recoupment provision, there would be a disincentive for welfare recipients to manage their grants so as to have funds available to pay their rent each month. The recoupment provision encourages proper money management, an entirely acceptable, if incidental, purpose of the welfare legislation.

"No doubt there are other ways in which the state could accomplish the ends served by the use of the recoupment regulation. However it is not for **us** to evaluate the wisdom of the state's choice of means. If these means are rationally related to a proper end, as they are in this case, we have no power to go further." 471 F. 2d 347, 349-350.

[9] *Hart* v. *Keith Exchange,* 262 **U. S.** 271, 274 (1923).

[10] Once a federal court has ascertained that a plaintiff's jurisdiction-conferring claims are not "insubstantial on their face," *Engineers* v. *Chicago, R. I. & P. R. Co.,* 382 **U. S.** 423, 428 (1966), "no further consideration of the merits of the claim[s] is relevant to a determination of the court's jurisdiction of the subject matter." *Baker* v. *Carr,* 369 **U. S.** 186, 199 (1962).

[11] The Court also cited with approval Chief Judge Magruder's concurrence in *Strachman* v. *Palmer,* 177 F. 2d 427, 431 (CA1 1949), advising that "'[f]ederal courts should not be overeager to hold on to the determination of issues that might be more appropriately left to settlement in state court litigation.'" 383 **U. S.**, at 726 n. 15.

[12] Numerous decisions of this Court have stated the general proposition endorsed in *Siler*—that a federal court properly vested with jurisdiction may pass on the state or local law question without deciding the federal constitutional issues—and have then proceeded to dispose of the case solely on the nonfederal ground. See, *e. g., Hillsborough* v. *Cromwell,* 326 **U. S.** 620, 629-630 (1946); *Waggoner Estate* v. *Wichita County,* 273 **U. S.** 113, 116-119 (1927); *Chicago G. W. R. Co.* v. *Kendall,* 266 **U. S.** 94 (1924); *United Gas Co.* v. *Railroad Comm'n,* 278 **U. S.** 300, 308 (1929); *Risty* v. *Chicago, R. I. & P. R. Co.,* 270 **U. S.** 378, 387 (1926). These and other cases illustrate in practice the wisdom of the federal policy of avoiding constitutional adjudication where not absolutely essential to disposition of a case. Other decisions have addressed both the federal and state claims in a random fashion, see, *e. g., Atlantic Coast Line R. Co.* v. *Daughton,* 262 **U. S.** 413, 421-426 (1923); *Southern R. Co.* v. *Watts,* 260 **U. S.** 519, 525-531 (1923); but they have generally denied relief on both the federal and nonfederal grounds asserted, the nonfederal claim not being dispositive. *Daughton* and *Watts* were both written by Mr. Justice Brandeis, who in his celebrated concurring opinion in *Ashwander* v. *TVA,* 297 **U. S.** 288, 347 (1936), relied upon *Siler* in summarizing the general rule that "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."

[13] The dissent also relies upon *Hurn* v. *Oursler,* 289 **U. S.** 238 (1933), but *Hurn* expressly took account of one aspect of the rule stated in *Siler:* once a federal court acquires jurisdiction of a case by virtue of the federal questions involved, it may omit to decide the federal issues and decide the case on local or state questions alone. With unmistakable clarity, the Court reaffirmed *Siler:*

"The *Siler* and like cases announce the rule broadly, without qualification; and we perceive no sufficient reason for the exception suggested. It is stated in these decisions as a rule of general application, and we hold it to be such . . . ." *Id.,* at 245.

The dissent properly notes *Hurn*'s warning that *Siler* does not "permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action . . . ." *Ibid.* However, the *Siler* rule certainly allows the trial court to adjudicate "a case where two distinct *grounds* in support of a single cause of action are alleged, only one of which presents a federal question . . . ." *Id.,* at 246 (emphasis added). We can thus see that here, as in *Hurn,* "[t]he [complaint] alleges the violation of a single right [here the right to nondiscriminatory treatment as to receipt of public assistance]. And it is this violation which constitutes the cause of action. Indeed, the claims of [violation of equal protection and the Social Security Act] so precisely rest upon identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances. The primary relief sought is an injunction to put an end to an essentially single wrong, however differently characterized, not to enjoin distinct wrongs constituting the basis for independent causes of action." *Id.,* at 246.

See also *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.,* 305 **U. S.** 315, 324-325 (1938).

[14] In a closely analogous context, this Court has recognized the special capability of federal courts to adjudicate pendent federal claims. In *Romero* v. *International Terminal Operating Co.,* 358 **U. S.** 354 (1959), an injured Spanish seaman filed suit in federal court claiming damages under the Jones Act and under the general maritime law of the United States for unseaworthiness of the ship, maintenance and cure, and negligence. Jurisdiction was invoked under the Jones Act (46 U. S. C. § 688) and under general federal-question (28 U. S. C. § 1331) and diversity (28 U. S. C. § 1332) jurisdiction. After expressing its view that petitioner alleged a Jones Act claim substantial enough to confer jurisdiction under that statute, the Court held that his general maritime law claims were not cognizable under 28 U. S. C. § 1331. By no means, however, was this the end of the inquiry.

"[T]he District Court may have jurisdiction of [petitioner's general maritime law claims] `pendent' to its jurisdiction under the Jones Act. Of course the considerations which call for the exercise of pendent jurisdiction of a state claim related to a pending federal cause of action within the appropriate scope of the doctrine of *Hurn* v. *Oursler,* 289 **U. S.** 238, are not the same when, as here, *what is involved are related claims based on the federal maritime law.* We perceive no barrier to the exercise of `pendent jurisdiction' in the very limited circumstances before **us**." 358 **U. S.**, at 380-381 (emphasis added).

[1] The relevant provision of 28 U. S. C. § 1331 reads as follows:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

The jurisdictional amount was raised from $3,000 to $10,000 in 1958.

[2] "Under this construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the constitution, but to those parts of cases only which present the particular question involving the construction of the constitution or the law. We say it never can be extended to the whole case, because, if the circumstance that other points are involved in it, shall disable Congress from authorizing the Courts of the Union to take jurisdiction of the original cause, it equally disables Congress from authorizing those Courts to take jurisdiction of the whole cause, on an appeal, and thus will be restricted to a single question in that cause; and words obviously intended to secure to those who claim rights under the constitution, laws, or treaties of the United States, a trial in the federal Courts, will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal, into which he is forced against his will." *Osborn* v. *Bank of the United States,* 9 Wheat. 738, 822-823 (1824).

[3] 213 **U. S.**, at 191.

[4] *Id.,* at 191-192. In *Siler* the Court specifically noted that the constitutional claim was not fraudulently pleaded to confer jurisdiction over the pendent claim.

The Court today, by its heavy emphasis on deciding state issues in preference to constitutional ones, *ante,* at 546-547, seems to imply that this doctrine should be controlling even when a constitutional claim *is* pleaded "for the mere purpose of endeavoring to give the court jurisdiction." I cannot agree. The numerous cases cited in the Court's opinion stand for the long-recognized and sensible policy that cases should be decided on nonconstitutional grounds where possible; but they do not stand for the proposition that claims which would be otherwise dismissed under the principles discussed in *Mine Workers* v. *Gibbs,* 383 **U. S.** 715 (1966), should be heard simply to avoid the constitutional claim which conferred jurisdiction in the first place. See n. 11, *infra.* In such cases the competing and equally important policy of safeguarding the limited jurisdiction of the federal courts is entitled to more weight than the Court appears to give it.

[5] The Court in *Levering, supra,* stated:

"Whether an objection that a bill or a complaint fails to state a case under a federal statute raises a question of jurisdiction or of merits is to be determined by the application of a well settled rule. If the bill or the complaint sets forth a substantial claim, a case is presented within the federal jurisdiction, however the court, upon consideration, may decide as to the legal sufficiency of the facts alleged to support the claim. But jurisdiction, as distinguished from merits, is wanting where the claim set forth in the pleading is plainly unsubstantial. The cases have stated the rule in a variety of ways, but all to that effect. . . . And the federal question averred may be plainly unsubstantial either because obviously without merit, or `because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'" 289 **U. S.**, at 105-106.

[6] *Hurn* v. *Oursler,* 289 **U. S.** 238, 245-246 (1933):

"But the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal cause of action. The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal

ground be not established, may nevertheless retain and dispose of the case upon the non-federal *ground;* in the latter it may not do so upon the non-federal *cause of action.*" (Emphasis in original.)

[7] The Court in *Mine Workers* v. *Gibbs,* 383 **U. S.**, at 727, also stated:

"[R]ecognition of a federal court's wide latitude to decide ancillary questions of state law does not imply that it must tolerate a litigant's effort to impose upon it what is in effect only a state law case. Once it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed."

I also see no reason why federal courts should be required to "tolerate" efforts to impose upon them federal cases which Congress has chosen to leave to the state courts.

[8] The portion of the petitioners' complaint setting forth their equal protection claim states in full:

"Said regulation irrationally and invidiously discriminates against plaintiff victims of eviction. No basis exists in law or fact, consistent with the purposes of the Social Security Act, for reducing the level of payments to plaintiffs who are then forced to live far below the subsistence levels provided to all other persons. Said regulation applies a wholly different standard in determining the grant levels of plaintiffs than the income resource and exemptions from levy standard, applicable to all other persons in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution."

[9] 331 F. Supp., at 168.

[10] The Court in *Dandridge* stated:

"Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before **us**. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration, *Goldberg* v. *Kelly,* [397 **U. S.** 254 (1970)]. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients. Cf. *Steward Mach. Co.* v. *Davis,* 301 **U. S.** 548, 584-585; *Helvering* v. *Davis,* 301 **U. S.** 619, 644." 397 **U. S.**, at 487.

[11] Petitioners originally sought to convene a three-judge court to consider their constitutional claims but later withdrew that request. Pursuant to a stipulation between the parties, the case was then tried before a single judge on the issue of the claimed statutory conflict only. *Goosby* v. *Osser,* 409 **U. S.** 512 (1973), specifies that a three-judge court must be convened to hear constitutional questions within its jurisdiction if they are "substantial." It is true, of course, that federal courts commonly avoid deciding constitutional questions when alternative grounds for decision are available. See, *e. g., Ashwander* v. *TVA,* 297 **U. S.** 288, 346-347 (1936) (Brandeis J., concurring). But application of that principle to cases in which the constitutional claim is pleaded primarily to confer jurisdiction over a pendent claim would lead to circular reasoning. Under that theory a claim for which Congress provided no jurisdiction and which a single judge determined to be improperly brought into federal court would become a *preferred* ground for decision simply because the court wished to avoid the claim over which Congress granted jurisdiction in the first place. To turn to the pendent claim when pendent jurisdiction is properly assumed under *Gibbs* may be appropriate, but the presence of a constitutional claim which might therefore be avoided should not itself be an *independent* basis for hearing the pendent claim.

In rare cases, of course, a three-judge court may disagree with the single judge's view that a constitutional claim lacks merit and resolve the constitutional issue in the plaintiff's favor. At that point, the plaintiff will have his relief, and the case need go no further. Concededly, a constitutional decision will have been rendered when a statutory decision might have been possible, but that cost, in the few cases where it is likely to arise, seems less expensive than the cost of allowing federal jurisdiction to be unnecessarily expanded.

POLITICAL DISCUSSIONS

LEGISLATIVE, DIPLOMATIC, AND POPULAR

1856–1886

BY

JAMES G. BLAINE.

NORWICH, CONN.
THE HENRY BILL PUBLISHING COMPANY
1887

in this Constitutional Amendment, attempt to force them upon Southern white men as equals at the ballot-box; but we do intend that they shall be admitted to citizenship, that they shall have the protection of the laws, that they shall not, any more than the rebels shall, be deprived of life, of liberty, of property, *without due process of law*, and that "they shall not be denied the equal protection of the law." And in making this extension of citizenship, we are not confining the breadth and scope of our efforts to the negro. It is for the white man as well. We intend to make citizenship National. Heretofore, a man has been a citizen of the United States because he was a citizen of some one of the States: now, we propose to reverse that, and make him a citizen of any State where he chooses to reside, by defining in advance his National citizenship — and our Amendment declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside." This Amendment will prove a great beneficence to this generation, and to all who shall succeed us in the rights of American citizenship; and we ask the people of the revolted States to consent to this condition as an antecedent step to their readmission to Congress with Senators and Representatives.

But that is not all we ask. The white people of the South have heretofore had, as we in the North have thought, an unfair advantage, in counting their property in the basis of representation against the flesh and blood of the North. They have always insisted that slaves were property, — as much as horses or mules or lands, — and they have been ready to fly into a passion and to commit violence against any one who disputed that proposition; and yet when our Federal Government was formed they insisted that three-fifths of all the persons that constituted this property should be included in the basis of representation in Congress. They have thus had an unfair advantage in every Congress that has assembled from the inauguration of George Washington to the outbreak of the Rebellion. The negroes are now free men, and instead of three-fifths entering into the basis of representation, the South will have the benefit of the whole mass, the entire five-fifths; and yet the Southern white men do not propose to allow a single one of these millions

TWENTY YEARS OF CONGRESS:

FROM

LINCOLN TO GARFIELD.

WITH A REVIEW OF

THE EVENTS WHICH LED TO THE POLITICAL REVOLUTION OF 1860.

BY

JAMES G. BLAINE.

VOLUME II.

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was the one especially founded upon justice, abstract as well as practical.

Conventions were held successively in all the States, the elections being conducted in good order, while every man entitled to vote was fully secured in his suffrage. The conventions were duly assembled, constitutions formed, submitted in due time, and approved by popular vote. State governments were promptly organized under these organic laws, Legislatures were elected, and the Fourteenth Amendment ratified in each of the States with as hearty a unanimity as in the preceding winter it had been rejected by the same communities. The proceedings were approximately uniform in all the States, and the constitutions, with such minor differences and adaptations as circumstances required, were in all essential points the same. All were ordained in the spirit of liberty, all prohibited the existence of any form of slavery, and all heartily recognized the supreme sovereignty of the National Government as having been indisputably established by the overthrow of the Rebellion which was undertaken to confirm the adverse theory of State-rights.

These proceedings in the South were in full progress when the second or long session of the Fortieth Congress began, on the first Monday of December, 1867. While President Johnson had not interposed any obstructions to the working of the Reconstruction Act which had not been effectively cured by the two supplementary Acts, he had neither concealed nor abated his utter hostility to the policy of Congress, — a form of hostility that grew in rancor in proportion as he had been thwarted and rendered powerless by the enactment of the laws over his veto. When Congress came together he seemed to have gathered all his strength for a final assault upon its Reconstruction work and for a final vindication of his own policy. His message was laden with every form of attack which ingenuity could devise to throw discredit upon Congress, and if possible to affright the people by the dismal consequences destined in his judgment to follow the flagrant violation of the Constitution which he saw in the Reconstruction policy. He appealed to the people on the ground of patriotism, public safety, and personal interest. He pictured anew the advantage and the grandeur of having the old Union fully restored; he warned the people of the danger of sowing the seeds of another rebellion by allowing continued maltreatment of the Southern people; and he appealed to the commercial and financial interests of the country by pointing out how every form of property was

In the arguments which the President had found such frequent occasion to submit, he quietly ignored the facts of secession, the crime of rebellion, the ruthless sundering of Constitutional bonds which these States had attempted. He took no note of the immense losses both of life and property which they had inflicted upon the Nation, and gave no consideration to the suffering which they had causelessly brought upon the people. If the President's logic should be accepted as indicating the true measure of Constitutional obligation imposed on the different members of the Union, then any State might rebel at any time, seize and destroy the National property, levy war, form alliances with hostile nations, and thus subject the Republic to great peril and great outlay, her citizens to murder and to pillage. If the rebellious State be finally subdued, the National Government must not attach the slightest condition to her re-admission to the Union; must not impose discipline or even administer reproof. The fact that the rebellion fails is the full warrant for its guilty authors to be at once repossessed of all the rights and all the privileges which in the frenzy of anger and disobedience they had thrown away. Such was in effect the argument of the President throughout the Reconstruction contest; such was the demand of the leaders of the Rebellion; such was the concession which the Democratic party constantly urged in Congress, through the press, and in all the channels through which its great power was exerted.

The position of Republicans was steadily the opposite of that described. They held that the States which had rushed into a rebellion so wicked, so causeless, and so destructive, should not be allowed to resume their places of authority in the Union except under such conditions as would guard, so far as human foresight could avail, against the outbreak of another insurrection. They should return to the Union on precisely the same terms as those on which the loyal States held their places; they should have the same privileges and be subjected to the same conditions. As slavery had been the chief inciting cause of disunion, slavery should die. As the vicious theory of State-rights had been constantly at enmity with the true spirit of Nationality, the Organic Law of the Republic should be so amended that no standing-room for the heresy would be left. As the basis of representation in the Constitution had always given the slave States an advantage, those States, now that slavery was abolished, should not be permitted to oppress the negro population and use them merely for an enlarged Congressional power to the white men who had precipitated the

one-half of the total population (and in many instances the proportion was even larger), the vote of one white man offset the vote of two in a Northern district where suffrage was impartial. This ratio of influence went into the Electoral College, and gave to the white men of South Carolina, Mississippi and Louisiana double the power of that enjoyed by white men in New York, Illinois and California. The loss of Representatives to the Northern States, or more properly speaking the gain to the Southern States on existing numbers, would be nearly one-eighth of the entire House, and fully one-quarter of those likely to occupy seats on the Democratic side of the chamber. In the Electoral College, the loss to the North and the gain to the South would be in nearly the same ratio. In the rapid increase of the negro race the offensive discrimination against the North would be continually enlarging in its proportions. The corrective provision in the Fourteenth Amendment was designed to prevent this grave injustice both to the negro and to the white man — but every Democrat in Congress and in the State Legislatures voted against it through all the stages of its enactment and its ratification, and thereby expressed a willingness to give an unfair advantage to the Southern white man, and to establish an unfair discrimination against the Northern white man.

Important and essential as are the provisions of the Fourteenth Amendment just cited, indispensable as they have proved in the system of Southern Reconstruction, they are relatively of small consequence when compared with that great provision which is for all time: — that provision which establishes American citizenship upon a permanent foundation, which gives to the humblest man in the Republic ample protection against any abridgment of his privileges and immunities by State law, which secures to him and his descendants the equal protection of the law in all that relates to his life, his liberty, and his property. The first section of the Constitutional amendment which includes these invaluable provisions is in fact a new charter of liberty to the citizens of the United States; is the utter destruction of the pestilent heresy of State-rights, which constantly menaced the prosperity and even the existence of the Republic; and is the formal bestowment of Nationality upon the wise Federal system which was the outgrowth of our successful Revolution against Great Britain.

Before the adoption of this Amendment citizenship of the United States was inferred from citizenship of some one of the States, for

there was nothing in the Constitution defining or even implying National citizenship as distinct from its origination in or derivation from a State. It was declared in Article IV, Section 2, of the Federal Constitution, that "Citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States;" but nothing was better known than that this provision was a dead letter from its very origin. A colored man who was a citizen of a Northern State was certain to be placed under the surveillance of the police if he ventured south of the Potomac or the Ohio, destined probably to be sold into slavery under State law, or permitted as a special favor to return at once to his home. A foreign-born citizen, with his certificate of naturalization in his possession, had prior to the war no guarantee or protection against any form of discrimination or indignity, or even persecution, to which State law might subject him, as has been painfully demonstrated at least twice in our history. But this rank injustice and this hurtful inequality were removed by the Fourteenth Amendment. Its opening section settled all conflicts and contradictions on this question by a comprehensive declaration which defined National citizenship and gave to it precedence of the citizenship of a State. "*All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside.*" These pregnant words distinctly reversed the origin and character of American citizenship. Instead of a man being a citizen of the United States because he was a citizen of one of the States, he was now made a citizen of any State in which he might choose to reside, because he was antecedently a citizen of the United States.

The consequences that flowed from this radical change in the basis of citizenship were numerous and weighty. Nor were those consequences left subject to construction or speculation. They were incorporated in the same section of the Amendment. The abuses which were formerly heaped on the citizens of one State by the legislative and judicial authority of another State were rendered thenceforth impossible. The language of the Fourteenth Amendment is authoritative and mandatory: "*No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.*" Under the force of these weighty inhibitions, the citizen of foreign birth cannot be per-

829 F.Supp. 1226 (1993)

Leroy JONES; Ani Ebong; Rowland Nwankwo; Girma Molalegne; Quick Pick Cabs, Inc.; and Reverend Oscar S. Tillman, Plaintiffs,

v.

Robert TEMMER; Christine Alvarez; and Vincent Majowski, acting in their official capacities as members of the Colorado Public Utilities Commission, Defendants.

Civ. A. No. 93-B-235.

United States District Court, D. Colorado.

August 11, 1993.

1228 *1227 *1228 Paula Connelly, Gorsuch, Kirgis, Campbell, Walker and Grover, Denver, CO, William H. Mellor III, Institute for Justice, Washington, DC, for plaintiffs.

Mana L. Jennings-Fader, Jeffrey A. Froeschle, Asst. Attys. Gen., Regulatory Law Section, Denver, CO, for defendants.

MEMORANDUM OPINION AND ORDER

BABCOCK, District Judge.

Plaintiffs Leroy **Jones**, Ani Ebong, Rowland Nwankwo, Girma Molalegne, and Quick Pick Cabs, Inc. (Quick Pick), have brought this action for injunctive and declaratory relief against Robert **Temmer**, Christine Alvarez, and Vincent Majowski (collectively, defendants or commissioners) claiming violation of rights protected by the Fourteenth Amendment to the Constitution. Specifically, in Count I plaintiffs allege violations of the privileges and immunities clause and deprivation of substantive due process. In Count II plaintiffs allege violations of the equal protection clause of the Fourteenth Amendment. Finally, in Count III plaintiff Tillman
1229 asserts a separate Fourteenth *1229 Amendment equal protection claim. Plaintiffs seek a judgment declaring that the system of Colorado state laws and regulations governing Denver taxicab business, as applied, effectively prohibits entry into the business, violates their substantive due process rights and is thus unconstitutional. In addition, plaintiffs seek to enjoin defendants from enforcing Colorado's state regulatory process and policies in a manner that unreasonably interferes with their right and opportunity to provide taxi service within the Denver metropolitan area.

Plaintiffs bring this action pursuant to the Fourteenth Amendment of the Constitution, 42 U.S.C. § 1983, and 28 U.S.C. § 2201. Jurisdiction is claimed pursuant to 28 U.S.C. §§ 1331 and 1343.

Defendants move to dismiss the amended complaint or, in the alternative, for summary judgment with respect to all counts of the amended complaint. They file this motion pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), 12(b)(7), and 56(b).

As the basis for this motion defendants state: 1) plaintiffs Quick Pick Cabs, Inc., Leroy **Jones**,

Ani Ebong, and Rowland Nwankwo, and Girma Molalegne lack standing to bring a portion of the first claim for relief; 2) plaintiff Tillman lacks standing to bring the third claim for relief; 3) the applicable principles of abstention enunciated in *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), and in *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), require abstention in this case; 4) plaintiffs have failed to join necessary parties under Fed.R.Civ.P. 19; 5) plaintiffs have failed to state a cause of action upon which relief can be granted under any count in the amended complaint; and 6) summary judgment is appropriate in this case as there are no genuine issues of material fact and defendants are entitled to judgment as a matter of law.

For the reasons set forth below I conclude that: 1) Quick Pick Cabs, Inc., and Ani Ebong lack standing to bring a claim under the privileges and immunities clause; 2) Tillman lacks standing to bring the third claim for relief; 3) I decline to abstain in this case; 4) taxicab companies operating in Denver are not necessary parties under Rule 19(a); 5) plaintiffs' first and second claims will be dismissed for failure to state a cause of action under the privileges and immunities clause, substantive due process and equal protection; and 6) plaintiff Tillman's third claim will be dismissed for lack of standing and alternatively, for failure to state a claim. Because Rule 12 applies to resolve defendants' motions, I need not address their Rule 56 arguments.

I.

Under Colorado Revised Statutes § 40-10-102, taxicabs are deemed motor vehicle carriers, and as such are regulated as public utilities by the Public Utilities Commission (PUC). § 40-10-102, 17 C.R.S. (1984). The PUC is a regulatory agency created pursuant to Article XXV of the Colorado Constitution. It regulates taxicabs pursuant to Articles 1 through 7, inclusive, Article 10 of Title 40 of the Colorado Revised Statutes, and pursuant to the rules and regulations found at 4 Code of Colorado Regulations 723, promulgated pursuant to statutory authority.

The regulatory scheme in Colorado for common carriers of passengers, including taxicabs, is regulated monopoly. This state policy is found in § 40-5-101, 17 C.R.S. (1984). The policy "was designed to prevent duplication of facilities and competition between utilities, and to authorize new utilities in a field only when existing ones are found to be inadequate." *Public Serv. Co. v. Public Utilities Comm'n of State of Colo.*, 765 P.2d 1015, 1021 (Colo.1988).

Anyone seeking to operate a taxicab business in Colorado must obtain a "certificate of public convenience and necessity" (CPCN) from the PUC. Under the current regulatory scheme, an applicant for a CPCN has the burden of demonstrating (1) that existing service in an area is substantially inadequate, and (2) that existing companies cannot provide adequate service. Once a CPCN is obtained no other utility may provide service in that territory unless it is established that the certified utility is unable or unwilling to provide adequate service. This
1230 exclusive right to serve an area is a *1230 property right which cannot be affected except by due process of law. *Public Serv. Co.*, 765 P.2d at 1021. Until changed by the state General Assembly, the doctrine of regulated monopoly governs and restricts the PUC in exercising its discretion in the area of granting CPCNs to taxicabs. *See Rocky Mountain Airways, Inc. v. Public Utilities Comm'n*, 181 Colo. 170, 509 P.2d 804, 807 (1973).

Plaintiffs **Jones**, Ebong, Nwankwo, and Molalegne formed Quick Pick, a Colorado corporation, and in July, 1992, Quick Pick filed an application with the PUC seeking a CPCN to operate a taxicab service in the Denver metro area. The existing Denver taxicab companies, along with 10 other companies operating elsewhere in Colorado, intervened to protest the application. At present, three companies, Yellow Cab, Zone Cab, and Metro Taxi, hold CPCNs and are authorized to provide taxicab service in the Denver metropolitan area. On November 23-24, 1992, the PUC conducted a hearing before an administrative law judge on Quick Pick Cabs' application. At the end of the hearing, the application was dismissed without prejudice.

II.

A. Abstention

As a preliminary matter, defendants move to dismiss the amended complaint based on the doctrine of abstention. The doctrine of abstention represents "an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it." *Smith v. Paulk,* 705 F.2d 1279, 1282 (10th Cir.1983) (quoting *Colorado River Water Conservation Dist. v. U.S.,* 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976)). The decision to abstain is largely committed to the discretion of the district court. *Ramos v. Lamm,* 639 F.2d 559, 564 n. 4 (10th Cir.1980), *cert. denied,* 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981).

Defendants argue that abstention is appropriate here because this case falls squarely within the principles enunciated in *Colorado River Conservation Dist. v. U.S.,* 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) and *Burford v. Sun Oil Co,* 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). The principle distilled from these cases is that where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River Water Conservation Dist. v. U.S.,* 424 U.S. 800, 814, 96 S.Ct. 1236, 1245, 47 L.Ed.2d 483 (1976). Defendants argue that the applicable ground for abstention in this case is that the case presents difficult questions of state law bearing on policy problems of substantial public import with importance that transcends the result in this case. They assert that if this court were to modify either the basic nature of Colorado's regulatory policy or any part of the overall regulatory scheme, the modification would have ramifications and repercussions that would ripple throughout the remainder of the comprehensive and complex regulatory scheme established by the Colorado legislature and administered by the commission.

In *Burford v. Sun Oil,* a Federal District Court sitting in equity was confronted with a Fourteenth Amendment challenge to the reasonableness of the Texas Railroad Commission's grant of an oil drilling permit. The constitutional challenge was of minimal federal importance, involving solely the question whether the commission had properly applied Texas' complex oil and gas conservation regulations. 319 U.S. at 331 and n. 28, 63 S.Ct. at 1106 and n. 28. Abstention was appropriate in that case because the state courts had acquired a specialized knowledge of the regulations and industry. *Id.* at 327, 63 S.Ct. at 1104.

Here, plaintiffs seek relief for alleged violations of their constitutionally based civil rights under
1231 42 U.S.C. § 1983. The obligation to exercise jurisdiction is particularly *1231 weighty when relief is sought pursuant to 42 U.S.C. § 1983. *San Francisco County Democratic Cent. Comm. v. Eu,* 826 F.2d 814, 825 n. 19 (9th Cir.1987). This case does not involve a federal claim entangled in a complex state regulatory scheme. Although my inquiry in this case could result in an injunction against the enforcement of the state regulatory scheme as applies to these plaintiffs, abstention is not required merely because resolution of a federal question may result in the overturning of a state policy. *Zablocki v. Redhail,* 434 U.S. 374, 380 n. 5, 98 S.Ct. 673, 678 n. 5, 54 L.Ed.2d 618 (1978). I decline to abstain from hearing plaintiffs' claims in this case.

B. Failure to Join Parties Under Rule 19

Defendants argue that taxicab companies operating in Colorado generally, and in the Denver area specifically, are necessary parties under Rule 19 and must be joined as defendants in this action, and if they cannot be joined, the action must be dismissed pursuant to Rule 12(b)(7).

To show that the taxicab companies are indispensable parties, defendants must establish that the companies fall within Rule 19(a)'s definition of necessary parties. Once a party has been

found "necessary," Rule 19(b) provides factors to be considered to determine whether the suit should be dismissed if joinder of the party destroys jurisdiction. *See* Fed.R.Civ.P. 19(b). A party is "necessary" under Rule 19(a) if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed.R.Civ.P. 19(a).

There are at present 38 persons or entities in Colorado holding CPCNs to operate as taxicab companies. Defendants argue that current holders of CPCNs are necessary parties under both 19(a)(2)(i) and 19(a)(2)(ii). Defendants contend that the question of the constitutionality of the regulatory scheme governing taxicabs as applied to these plaintiffs raises the state law issue of protection of the property rights of the present taxicab CPCN holders. Defendants argue that the current holders of CPCNs are so situated that the disposition of this case in their absence may, as a practical matter, impair or impede their ability to protect that interest. *See* Fed.R.Civ.P. 19(a)(2)(i). Alternatively, defendants assert that because disposition of this case in the absence of these taxicabs companies may leave one or more of the present parties subject to a substantial risk of incurring inconsistent obligations, the CPCN holders must be joined as defendants. Fed.R.Civ.P. 19(a)(2)(ii). I find no merit in defendants arguments. Since I conclude that 19(a) does not apply, 19(b) cannot be applied to dismiss the action.

C. Standards for Dismissal

Under Rule 12(b)(6), a district court may dismiss a complaint for failure to state a claim upon which relief can be granted if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957). In reviewing the sufficiency of the complaint, all well-pled facts, as opposed to conclusory allegations, must be taken as true. *Weiszmann v. Kirkland & Ellis,* 732 F.Supp. 1540, 1543 (D.Colo. 1990). All reasonable inferences must be liberally construed in the plaintiff's favor. *Id.*

D. Standing

Before the plaintiffs filed their amended complaint, the commission filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(1) asserting that this court lacks subject matter jurisdiction because plaintiffs lack standing to bring a portion of the first claim for relief and the entirety of the third claim for relief. Defendants renew this motion now.

1232 *1232 The focus of an inquiry into standing "is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise...." *Warth v. Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). The constitutional limitations of standing are derived from Article III, which limits judicial power to cases and controversies.

To overcome the Article III limitation on standing, often referred to as the "injury in fact" requirement, a plaintiff must at a minimum show an actual or threatened injury caused by the defendant and that a favorable judicial decision is likely to redress the injury. *Valley Forge Christian College v. Americans United for Separation of Church and State Inc.,* 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982). There are, in addition, prudential principles applying to standing that limit the class of persons who may invoke a courts' powers. *Id.* at 474, 102 S.Ct. at 759-60. In *Valley Forge Christian College,* the court listed the three

"prudential principles": (1) the plaintiff must assert his own rights and may not rely on the constitutional rights of third parties; (2) the court must not adjudicate "generalized grievances" that are more appropriately addressed by the executive or legislative branches of government; and (3) the plaintiff must come within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. *Id.* at 474-75, 102 S.Ct. at 759-60.

Defendants first argue that plaintiff Quick Pick has no standing to bring the first cause of action. According to paragraph 8 of the complaint, plaintiff Quick Pick is a corporation. The Tenth Circuit has held that a corporation has no standing to maintain a claim under the privileges and immunities clause of the Fourteenth Amendment. *Smith v. Paulk,* 705 F.2d 1279, 1283 (10th Cir.1983). The privileges and immunities claim with respect to Quick Pick Cabs, Inc. will be dismissed for lack of standing.

Second, defendants argue that plaintiff Ebong has no standing to maintain a claim under the privileges and immunities clause because he is not a citizen of the United States. *See Banerjee v. Roberts,* 641 F.Supp. 1093, 1103 (D.Conn.1985). By its terms, § 1 of the Fourteenth Amendment protects only "persons born or naturalized in the United States." By his own admission, plaintiff Ebong is neither; he is a "permanent resident of the United States." (Complaint ¶ 5.) Thus, the privileges and immunities claim with respect to plaintiff Ebong will be dismissed for lack of standing.

Defendants further argue that all plaintiffs lack standing to bring the privileges and immunities portion of the first claim for relief because that clause protects nonresidents of Colorado from discrimination based on their nonresident status, and here, each plaintiff is a resident of Colorado. Plaintiffs respond that defendants have confused the privileges and immunities clause of the Fourteenth Amendment with the privileges and immunities clause under Article IV, section 2 of the Constitution.

The privileges and immunities clause of the Fourteenth Amendment protects very few rights because it neither incorporates any of the Bill of Rights nor protects all rights of individual citizens. *See Slaughter-House Cases,* 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1873). Instead, this provision protects only those rights peculiar to being a citizen of the federal government; it does not protect those rights which relate to state citizenship. *Id.* Accordingly, it is not necessary that plaintiffs have non-resident status in order to bring a claim under the privileges and immunities clause of the Fourteenth Amendment. As discussed below in section E(a), however, plaintiffs have failed to state a claim under the privileges and immunities clause of the Fourteenth Amendment.

Finally, defendants argue that plaintiff Tillman has no standing to bring the third claim for relief. In the third claim, Tillman alleges that: he is a member of the general public in Denver; he uses taxicabs in Denver; Colorado's regulatory scheme for taxicabs artificially limits the availability
1233 of taxicabs in Denver; and, as a result, he and *1233 other individuals in the neighborhood in which he lives and resides are denied "opportunities equal to those of other Denver residents to enjoy taxicab services." (Complaint at 14.) On these allegations, Tillman brings his claim of deprivation of his rights to equal protection under the Fourteenth Amendment.

Defendants argue that Tillman cannot prove a fairly traceable causal relationship between Colorado's regulatory scheme and his alleged injury. They also contend that Tillman has not shown, and cannot prove without engaging in gross speculation, that he will have any greater access to taxicab service in Denver if this court grants his request for declaratory and injunctive relief. Defendants further argue that Tillman asserts no special harm personal to him, but rather complains only about the general unavailability of taxicabs in some neighborhoods of Denver and complains that this has incidentally affected him.

As to defendants allegation that Tillman has alleged only a generalized grievance, Tillman need only allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. *Warth,* 422 U.S. at 501, 95 S.Ct. at 2206. I find that Tillman has satisfied this requirement. I conclude, however, that defendants other arguments have merit.

Accepting his allegations as true, and construing the complaint in his favor, Tillman has failed

to allege facts from which I can reasonably infer that, absent the defendants' restrictive regulatory scheme, there is a substantial probability that he would have access to taxicabs equal to that of other Denver residents. *See* *Warth v. Seldin,* 422 U.S. at 505-07, 95 S.Ct. at 2208-10. In addition, I am unable to infer that if I grant the relief requested, there is a substantial probability that the perceived inequity will be removed. *See id.* I conclude, therefore, that Tillman lacks standing to bring the third claim for relief.

E. First Claim for Relief

The Supreme Court has established two necessary elements for recovery of damages under a 42 U.S.C. § 1983 civil rights claim. A plaintiff must prove that the defendant has deprived him of a right secured by the United States Constitution and, second, that the defendant deprived plaintiff of this right under color of state law. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 150, 90 S.Ct. 1598, 1604, 26 L.Ed.2d 142 (1970). Here, defendants do not dispute that all actions were taken under color of state law; the only issue is whether plaintiffs suffered a constitutional deprivation. Plaintiffs allege violations of their Fourteenth Amendment rights. I will address, seriatim, plaintiffs claims relating to privileges and immunities, substantive due process and equal protection.

a) Privileges and Immunities

Plaintiffs **Jones**, Ebong, Nwankwo, Molalegne, and Quick Pick Cabs, Inc. seek declaratory and injunctive relief based on the allegation that the Colorado regulatory regime for taxicabs deprives them of privileges and immunities of citizenship under the Fourteenth Amendment. That which plaintiffs seek to redress in this context is their "basic right to pursue their chosen livelihoods and to operate a legitimate business." (Amended Complaint at 1.)

The privileges and immunities clause of the Fourteenth Amendment protects very few rights. To my knowledge, in the history of the United States Supreme Court, only one decision determined that a state violated this provision and that decision was overruled within a few years. *Colgate v. Harvey,* 296 U.S. 404, 56 S.Ct. 252, 80 L.Ed. 299 (1935), overruled in *Madden v. Commonwealth of Kentucky,* 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940). In the *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1873), the Supreme Court held that this clause neither incorporates the Bill of Rights nor protects all rights of individual citizens. Rather the provision protects only those rights peculiar to being a citizen of the United States; it does not protect those rights which relate to state citizenship. As a court of this district noted, "the argument that the clause creates a substantive right to pursue one's lawful
1234 occupation or profession free from state limitations was laid to rest long *1234 ago by the United States Supreme Court." *Galahad v. Weinshienk,* 555 F.Supp. 1201, 1207 (D.Colo.1983). Here, plaintiffs have failed to allege that defendants have eliminated a federal right protected by the privileges and immunities clause. I will dismiss the privileges and immunities claim against all defendants for failure to state a claim upon which relief can be granted.

b) Substantive Due Process

Plaintiffs **Jones**, Ebong, Nwankwo, Molalegne, and Quick Pick Cabs, Inc., seek declaratory and injunctive relief claiming that Colorado's regulatory regime for taxicabs deprives them of due process under the Fourteenth Amendment. Plaintiffs make a substantive due process attack on the Colorado regulatory scheme.

The due process clause of the Fourteenth Amendment includes a substantive component which guards against arbitrary and capricious government action. *Sinaloa Lake Owners Ass'n v. City of Simi Valley,* 882 F.2d 1398, 1407 (9th Cir.1989), *cert. denied,* 494 U.S. 1016, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990). Substantive due process imposes limits on what a state may do regardless of what procedural protection is provided. *Harrington v. Almy,* 977 F.2d 37, 43 (1st Cir.1992) (quoting *Pittsley v. Warish,* 927 F.2d 3, 6 (1st Cir.), *cert. denied,* ___ U.S. ___, 112 S.Ct. 226, 116 L.Ed.2d 183 (1991).

The Tenth Circuit case law is unclear on what interest is required to trigger substantive due process guarantees. *Compare* Harris v. Blake, 798 F.2d 419, 424 (10th Cir. 1986), *cert. denied,* 479 U.S. 1033, 107 S.Ct. 882, 93 L.Ed.2d 836 (1987) (claim for denial of substantive due process requires that plaintiff allege a liberty or property interest); *Brenna v. Southern Colorado State College,* 589 F.2d 475, 476 (10th Cir.1978) (same); *Weathers v. West Yuma County School Dist.,* 530 F.2d 1335, 1342 (10th Cir.1976) (same), *with* Mangels v. Pena, 789 F.2d 836, 839 (10th Cir.1986) ("Rights of substantive due process are founded not upon state provisions but upon deeply rooted notions of fundamental personal interests derived from the Constitution.") The interest alleged by the plaintiffs, their liberty to pursue a chosen livelihood, has not been treated as a fundamental right by the courts. *See* City of New Orleans v. Dukes, 427 U.S. 297, 303-04, 96 S.Ct. 2513, 2516-17, 49 L.Ed.2d 511 (1976); *Harper v. Lindsay,* 616 F.2d 849, 854 (5th Cir.1980). Nor is the mere denial of a business or employment opportunity, "without more," the deprivation of a liberty interest because plaintiffs ability to obtain future business or employment opportunities is not jeopardized. *Bannum, Inc. v. Town of Ashland,* 922 F.2d 197, 201 (4th Cir.1990). The necessary "more" referred to by the court is provided when there is either public disparagement damaging to an individual's standing in the community or a stigmatic injury to an employment interest likely to impair future work-related opportunities. *Schneeweis v. Jacobs,* 771 F.Supp. 733, 737 (E.D.Va. 1991), *aff'd,* 966 F.2d 1444 (4th Cir.1992). Here, plaintiffs allege no public disparagement or stigmatic injury to their future ability to obtain employment.

Even assuming arguendo a protectable interest, I conclude that plaintiffs have failed to state a claim under substantive due process. The regulatory scheme at issue here is economic or business regulation based on the exercise of Colorado's police powers. Colorado's scheme for the regulation of motor vehicle carriers of passengers does not employ any classification based on a "suspect" category. Further, the regulatory scheme does not implicate any fundamental constitutionally-protected values. Thus, the substantive due process inquiry requires me to determine if the governmental action is rationally related to a legitimate state interest. *Allright Colorado, Inc. v. City and County of Denver,* 937 F.2d 1502, 1511 (10th Cir.), *cert. denied,* ___ U.S. ___, 112 S.Ct. 587, 116 L.Ed.2d 612 (1991).

Governmental bodies have "wide latitude in enacting social and economic legislation; the federal courts do not sit as arbiters of the wisdom or utility of these laws." *Allright Colorado,* 937 F.2d at 1512, quoting *Alamo Rent-A-Car, Inc.,* 825 F.2d at 370. I need not satisfy myself that the challenged rules will in fact further their articulated purposes; it is sufficient if the
1235 Colorado General Assembly could rationally have concluded that *1235 the purposes would be achieved. See *Allright Colorado,* 937 F.2d at 1512.

The Colorado Supreme Court has specifically identified the following as public health, welfare, and safety interests justifying public utility regulation: (1) prevention of, or reduction of, destructive use of the public highways, *Public Utilities Comm. v. Manley,* 99 Colo. 153, 60 P.2d 913, 919 (1936); (2) increased safety of those traveling on or using the public highways, *McKay v. Public Utilities Comm'n,* 104 Colo. 402, 91 P.2d 965, 969 (1939); (3) coordination of commercial motor vehicle transportation on the public highways, *id.;* and (4) prevention, "in the interest of the general public, [of] unnecessary duplication of facilities or systems for furnishing [service] to customers," *Public Serv. Co. v. Public Utilities Comm'n,* 142 Colo. 135, 350 P.2d 543, 550 (1960), *cert. denied,* 364 U.S. 820, 81 S.Ct. 53, 5 L.Ed.2d 50 (1960). Plaintiffs agree that a legitimate state interest exists in protecting the public health, safety, and welfare and contest only whether the regulatory scheme is rationally related to protecting these legitimate interests. I find and conclude that they clearly are rationally related to a legitimate Colorado state interest. I will, therefore, dismiss plaintiffs claim based on violation of substantive due process.

F. Second Claim for Relief—Equal Protection

The Equal Protection Clause requires that no state "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const.Amend. XIV, § 1. A violation of equal protection occurs when the government treats someone differently than another who is similarly situated. *Jacobs, Visconsi & Jacobs v. City of Lawrence, Kan.,* 927 F.2d 1111, 1118 (10th Cir.1991);

see also *City of Cleburne, Tex. v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985); *Landmark Land Co. of Oklahoma, Inc. v. Buchanan*, 874 F.2d 717, 722 (10th Cir.1989). In determining whether an equal protection violation has occurred, the court must (1) identify the questioned classification of groups, and (2) determine whether the classification is valid applying the appropriate standard of review. *See* *Allright Colorado v. City and County of Denver*, 937 F.2d 1502, 1511 (10th Cir.1991). Plaintiffs bear the burden of demonstrating the unconstitutionality of the challenged classification and courts generally presume that the legislative act is valid. *Parham v. Hughes*, 441 U.S. 347, 351, 99 S.Ct. 1742, 1745-46, 60 L.Ed.2d 269 (1979).

The standard of review applicable when a plaintiff challenges economic or commercial legislation as violating the equal protection requires the state or municipal defendant to show that the classification has a rational basis. *Jacobs, Visconsi & Jacobs Co.*, 927 F.2d at 1119; *see also City of* *Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth.*, 825 F.2d 367 (11th Cir.1987), *cert. denied*, 484 U.S. 1063, 108 S.Ct. 1022, 98 L.Ed.2d 987 (1988). The Supreme Court has recently reiterated this principle:

> Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge *if* there *is any reasonably conceivable state* of *facts* that could provide a rational basis for the classification. [Citations omitted.] Where there are "plausible reasons" for [legislative] action, "our inquiry is at an end." [Citation omitted.]

Federal Communications Comm'n v. Beach Communications, Inc., ___ U.S. ___, ___, 113 S.Ct. 2096, 2101, 124 L.Ed.2d 211 (1993) (emphasis in original). The limitation in this analysis is that a State may not rely on a classification whose relationship to an asserted interest is so attenuated as to render the distinction arbitrary or irrational. *Cleburne*, 473 U.S. at 446, 105 S.Ct. at 3257-58.

1236 Here, plaintiffs' claim is grounded in their objection to the policy choice made by the Colorado General Assembly when it decided to regulate motor vehicle carriers of *1236 passengers under the doctrine of regulated monopoly. Plaintiffs identify three separate classification schemes. First, plaintiffs allege that there are two groups of common carriers by motor vehicle: one that transports property, and another that transports people. The transportation of property is regulated under the scheme of "regulated competition," while the transportation of people is regulated under the scheme of "regulated monopoly." Defendants do not dispute this classification, however, they argue there is a rational basis for it. Defendants have presented that the Colorado General Assembly could have determined the following: 1) that relaxed entry into the market for common carriers of property was acceptable as an experiment despite the possibility of the elimination of some carriers or an increase in the costs to carry the goods; 2) the availability of common carriers of passengers is an important means of public transportation and, thus, is too important to serve as a vehicle for an experiment in relaxed regulation; 3) public transportation of passengers is too important to risk the elimination of carriers, the disgruntlement of drivers who find their earnings decreasing, or the increase in the rates paid by passengers. I find and conclude, therefore, that a rational basis exists for this classification.

A second classification scheme alleged by plaintiffs is a difference in classification among transporters of passengers. Plaintiffs contend that while taxicab service is operated to impose an insurmountable barrier to entry, other passenger services, such as off-road scenic tours and charter buses seating over 32 passengers, impose no regulations that operate as barriers to entry. Defendants argue that a distinction between these two groups is justified because common carriers, such as taxicabs, are responsible for providing service in a designated service territory to any and all who seek its services while other passenger carriers are not. Defendants contend considerations such as wear and tear on the roads, control of traffic flow, and the need to assure the availability of different forms of transportation could have

motivated the General Assembly. Again, defendants have presented a rational basis for this classification.

Plaintiffs claim a third classification scheme exists in the organization of the taxicab industry within the state. They contend that in almost every other market in Colorado the taxicab industry truly is a "regulated monopoly" in that there is only one certified taxicab company within a service area. In Denver, however, there is a "shared regulated monopoly" as a result of the existing companies being "grandfathered" into the regulated monopoly scheme decades ago resulting in three operating companies. I find and conclude that plaintiffs have failed to state how this "classification," works to deny them equal protection. Nevertheless, there is certainly a conceivable rational basis for grandfathering in existing companies at the time the regulatory scheme was enacted. Accordingly, plaintiffs claim based on violation of equal protection must fail.

G. Third Claim for Relief—Equal Protection, Tillman

Plaintiff Tillman argues that the effect of the PUC regulatory regime is to artificially limit the supply of taxicabs in Denver which results in poor service for low-income neighborhoods where Tillman resides and works. The effective ban on new companies denies individuals in these neighborhoods, including Tillman, opportunities equal to those of other Denver residents to enjoy taxicab services. Tillman argues that the regulatory regime affects his fundamental right to intra-state travel, requiring me to apply strict scrutiny in determining that the state regulations are necessary to achieve a compelling government interest.

I have held, above, that Tillman lacks standing to bring this third claim for relief. Even assuming Tillman's standing to assert this claim, dismissal is appropriate for failure to state a claim.

The strict scrutiny test is invoked in either of two situations: first, where there is a "suspect" classification based upon race, alienage or national origin; and second, where a fundamental interest is at stake. These fundamental interests include the right to vote, the right of access
1237 to the courts, and the right to interstate travel. *1237 *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 18-20, 32-36, 93 S.Ct. 1278, 1288-90, 1296-98, 36 L.Ed.2d 16 (1973). The Supreme Court has never directly considered the right to intra-state travel. History teaches that the founding fathers were concerned with the former and not the later. I decline to recognize such a right under the facts presented here.

Accordingly, it is ORDERED that

1) defendants' motion to dismiss the privileges and immunities claim brought by plaintiffs Quick Pick Cabs and Ebong for lack of standing is GRANTED;

2) defendants' motion to dismiss the privileges and immunities claim brought by plaintiffs Rowland Nwankwo and Girma Molalegne for lack of standing is DENIED;

3) defendants' motion to dismiss the third claim for relief because Tillman lacks standing, or alternatively for failure to state a claim, is GRANTED;

4) defendants' motion to join necessary parties pursuant to Rule 19(a) is DENIED;

5) defendants' request that I abstain from hearing this case is DENIED;

6) defendants' motion to dismiss plaintiffs' first and second claims based on privileges and immunities, substantive due process and equal protection, for failure to state a claim for which relief may be granted is GRANTED;

7) this action is dismissed and costs are awarded to defendants.

298 U.S. 178 (1936)

McNUTT, GOVERNOR OF INDIANA, ET AL.
v.
GENERAL MOTORS ACCEPTANCE CORP.

No. 709.

Supreme Court of United States.

Argued April 1, **1936**.
Decided May 18, **1936**.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA.

179 *179 *Mr. Joseph W. Hutchinson,* Assistant Attorney General of Indiana, and *Mr. Leo M. Gardner,* with whom *Mr. Philip Lutz, Jr.,* Attorney General, was on the brief, for appellants.

Messrs. John Thomas Smith and *Phillip W. Haberman,* with whom *Messrs. Duane R. Dills, Stanley B. Ecker,* and *Paul Y. Davis* were on the brief, for appellee.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

Respondent, General Motors Acceptance Corporation of Indiana, brought this suit to restrain the enforcement of Chapter 231 of the Acts of 1935 of the General Assembly of Indiana. That Act provides for the regulation of the business of purchasing contracts arising out of retail installment sales, including provisions for licenses, for classifications of contracts, and for fixing maximum "finance charges." The validity of the Act was challenged as depriving respondent of its property without due process of law and denying it the equal protection of the laws in violation of the Fourteenth Amendment of the Federal Constitution. An interlocutory injunction was sought and, upon hearing by three judges (28 U.S.C. 380), a final decree was entered, upon findings of facts and conclusions of law, granting a permanent injunction. No opinion was rendered. The case comes here by direct appeal.

The question arises whether the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, so as to give the District Court jurisdiction. Jud. Code, § 24
180 (1), 28 U.S.C. 41 (1). The complaint alleged that the requisite amount was involved and this *180 allegation was denied by the answer. On the argument in this Court, leave was given to file an additional brief upon the question of jurisdiction and respondent has submitted its brief accordingly.

Respondent points to the allegations of its bill that the "net worth" of its business exceeds $50,000; that in 1934 it purchased retail installment contracts in Indiana aggregating in excess of $7,000,000; that the value of such purchases for the first six months of 1935 was in excess of $4,000,000; and that during 1934 respondent purchased in Indiana approximately 23,000 installment sales contracts from more than 500 retail dealers. These allegations were sustained by the findings of the District Court. The bill also alleged that respondent maintained offices in Indiana for which it paid yearly an aggregate rental of $13,147; that it employed on the average 85 employees whose aggregate annual salaries amounted to about $150,000. Respondent also refers to its allegations that the Act limits the amount which respondent "may

receive as its gross profit for the purchase of an installment contract to a sum not exceeding the maximum `finance charge' which may be fixed by the Department of Financial Institutions," — by prohibiting respondent "from purchasing any retail installment contracts at a less price than the unpaid balance thereon"; that the Act limits the amount which may be given by respondent "to retail sellers out of the gross `finance charge' received from retail buyers under installment sale contracts" sold to respondent, by requiring the Department "to fix this maximum amount without regard to any differentiation as between contracts sold to licensees by retail sellers with recourse against such sellers, and contracts sold by retail sellers without recourse against them; and that in other respects the statute imposes burdensome requirements which impair the "efficiency of the operations and earnings" of respondent.

181 *181 Respondent invokes the principle that jurisdiction is to be tested by the value of the object or right to be protected against interference. *Hunt* v. *New York Cotton Exchange,* 205 **U.S.** 322; *Bitterman* v. *Louisville & Nashville R. Co.,* 207 **U.S.** 205; *Berryman* v. *Whitman College,* 222 **U.S.** 334; *Glenwood Light Co.* v. *Mutual Light Co.,* 239 **U.S.** 121; *Healy* v. *Ratta,* 292 **U.S.** 263. But in the instant case, the statute does not attempt to prevent respondent from conducting its business. There is no showing that it cannot obtain a license and proceed with its operations. The value or net worth of the business which respondent transacts in Indiana is not involved save to the extent that it may be affected by the incidence of the statutory regulation. The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed. The particular allegations of respondent's bill as to the extent or value of its business throw no light upon that subject. They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve. The bill is thus destitute of any appropriate allegation as to jurisdictional amount save the general allegation that the matter in controversy exceeds $3,000. That allegation was put in issue and the record discloses neither finding nor evidence to sustain it.

In the absence of any showing in the record to support that general allegation, the question is upon which party lay the burden of proof. Respondent contends that the burden of proving the lack of jurisdiction rests upon the party challenging the jurisdiction and cites decisions of this Court to that effect. The question is thus sharply presented.

182 *182 The jurisdiction of the District Court in a civil suit of this nature is definitely limited by statute to one —

"where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens or subjects." Jud. Code, § 24 (1), 28 U.S.C. 41 (1).

Further, the Act of March 3, 1875, c. 137, § 5 (18 Stat. 472) as now applied to the District Courts (Jud. Code, § 37, 28 U.S.C. 80), explicitly charges those courts with the duty of enforcing these jurisdictional limitations. The provision in its present form is as follows:

"If in any suit commenced in a District Court, or removed from a state court to a District Court of the United States, it shall appear to the satisfaction of the said District Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said District Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

183 It is incumbent upon the plaintiff properly to allege the jurisdictional facts, according to the nature of the case. "Where the law gives no rule, the demand of the plaintiff must furnish one; but where the law gives the rule, the legal cause of action, and not the plaintiff's demand, must

be regarded." *Wilson* v. *Daniel,* 3 Dall. *183 401, 407, 408; *Barry* v. *Edmunds,* 116 **U.S.** 550, 560; *Vance* v. *Vandercook Co. (No. 2),* 170 **U.S.** 468, 481; *Lion Bonding Co.* v. *Karatz,* 262 **U.S.** 77, 85, 86. Where the pleadings properly alleged the jurisdictional facts, as for example, with respect to diversity of citizenship and jurisdictional amount, it was necessary at common law, and before the passage of the Act of 1875, to raise the issue of want of jurisdiction by plea in abatement. And where the jurisdictional issue was thus raised, the burden of proof was upon the defendant. The objection was waived by pleading to the merits. *De Wolf* v. *Rabaud,* 1 Pet. 476, 498; *Sheppard* v. *Graves,* 14 How. 505, 510; *De Sobry* v. *Nicholson,* 3 Wall. 420, 423; *Farmington* v. *Pillsbury,* 114 **U.S.** 138, 143. In equity, the defense could be presented by plea or demurrer but not by answer. *Livingston's Executrix* v. *Story,* 11 Pet. 351, 393; *De Sobry* v. *Nicholson, supra; Hunt* v. *New York Cotton Exchange,* 205 **U.S.** 322, 333. Demurrers and pleas were abolished by Rule 29 of the Equity Rules promulgated in 1912. 226 **U.S.**, appendix p. 8.

By the Conformity Act of 1872 (17 Stat. 197; R.S. 914; 28 U.S.C. 724) all defenses in civil actions at law were made available to a defendant in the federal courts under any form of plea, answer or demurrer which would have been open to him under like pleading in the courts of the State within which the federal court was held. In that view we decided that where, under the Nebraska Code of Civil Procedure, the answer took the place of all pleas at common law, in abatement or to the merits, the allegation of the citizenship of the parties, which was property made in the petition and put in issue by the answer, must be proved by the plaintiff. And where the record showed "no proof or finding upon this essential point" the judgment was reversed for want of jurisdiction. *Roberts* v. *Lewis,* 144 **U.S.** 653, 656-658.
184 See, to *184 the same effect, *W.L. Wells Co.* v. *Gastonia Cotton Co.,* 198 **U.S.** 177, 182.

The Act of 1875, in placing upon the trial court the duty of enforcing the statutory limitations as to jurisdiction by dismissing or remanding the cause at any time when the lack of jurisdiction appears, applies to both actions at law and suits in equity. The trial court is not bound by the pleadings of the parties, but may, of its own motion, if led to believe that its jurisdiction is not properly invoked, "inquire into the facts as they really exist." *Wetmore* v. *Rymer,* 169 **U.S.** 115, 120; *Gilbert* v. *David,* 235 **U.S.** 561, 567; *North Pacific Steamship Co.* v. *Soley,* 257 **U.S.** 216, 221. This Court has had occasion to consider the application of the statute under varying conditions. See *Barry* v. *Edmunds, supra; Morris* v. *Gilmer,* 129 **U.S.** 315; *Deputron* v. *Young,* 134 **U.S.** 241; *Anderson* v. *Watt,* 138 **U.S.** 694, 701; *Wetmore* v. *Rymer, supra; Steigleder* v. *McQuesten,* 198 **U.S.** 141, 143; *Gilbert* v. *David, supra; North Pacific Steamship Co.* v. *Soley, supra; Broad-Grace Arcade Corp.* v. *Bright,* 284 **U.S.** 588.

In *Anderson* v. *Watt, supra,* a suit in equity, the Court said that under the Act of 1875 "the objection to the jurisdiction upon a denial of the averment of citizenship is not confined to a plea in abatement or a demurrer, but may be taken in the answer, and the time at which it may be raised is not restricted." In *Wetmore* v. *Rymer, supra,* an action of ejectment, after a verdict and judgment for the plaintiff, the trial court set them aside and entertained defendant's motion to dismiss for want of jurisdiction, giving leave to both parties to file affidavits showing the value of the land in controversy. Upon consideration of the evidence, the trial court decided that the jurisdictional amount was not involved. This Court disagreed with that conclusion.
185 Speaking of the effect of *185 the Act of 1875, the Court observed that the statute did not prescribe any particular mode in which the question of jurisdiction was to be brought to the attention of the court, nor how, when raised, it should be determined. The Court said: "When such a question arises in an action at law its decision would usually depend upon matters of fact, and also usually involves a denial of formal, but necessary, allegations contained in the plaintiff's declaration or complaint. Such a case would be presented when the plaintiff's allegation that the controversy was between citizens of different States, or when, as in the present case, the allegation that the matter in dispute was of sufficient value to give the court jurisdiction was denied. — In such cases, whether the question was raised by the defendant or by the court on its own motion, the court might doubtless order the issue to be tried by the jury." But "the questions might arise in such a shape that the court might consider and determine them without the intervention of a jury" and "it would appear to have been the intention of Congress to leave the mode of raising and trying such issues to the discretion of the trial judge."

In *Gilbert v. David, supra,* an action at law in the federal court in Connecticut, the question arose with respect to the citizenship of the plaintiff — which was put in issue by defendants' answer. Later, defendants moved to dismiss the cause for want of jurisdiction. Plaintiff then moved to strike that motion from the files upon the ground that it was an irregular method of raising the question and because the matter was already in issue under the pleadings. Taking that view, the trial court directed the trial to proceed upon the question of jurisdiction, and upon hearing the testimony the court found that both parties were citizens of Connecticut and dismissed the action. The judgment was affirmed by this Court. The Court said: "Under the
186 former practice, *186 before the passage of the Act of 1875 . . . it was necessary to raise the issue of citizenship by a plea in abatement, when the pleadings properly averred the citizenship of the parties. . . . The objection may be made now by answer before answering to the merits, or it may be made by motion. . . . It may be raised by a general denial in the answer, where the state practice permits of that course. *Roberts v. Lewis,* 144 **U.S.** 653. In the State of Connecticut, under the form of denial contained in this answer, the answer raised the issue. . . . Moreover, the parties to the suit regarded the matter as at issue under the pleadings, and it was so held by the court. . . . The question was properly before the court." The Court further held that while the question might have been submitted to the jury, the trial court was not bound to take that course and that it was its privilege to dispose of the issue upon the testimony. From the citation of *Roberts v. Lewis, supra,* it is apparent that the Court considered that the burden of proof upon the issue of citizenship was upon the plaintiff, and it also appeared from the record that the plaintiff assumed that burden upon the trial.

In *North Pacific Steamship Co. v. Soley, supra,* the suit was in equity and the question was whether the jurisdictional amount was involved. The plaintiff's allegation to that effect was denied by the answer. Upon hearing the evidence offered by the complainant, and that of the defendant, the trial court held that the jurisdictional amount was not involved and dismissed the suit. On direct appeal to this Court, under the former practice where jurisdictional questions alone were presented, the Court said: "The objection that jurisdiction to entertain the suit did not exist is one which may be taken by answer. *Anderson v. Watt,* 138 **U.S.** 694. Indeed, under § 37 it is the duty of the court, when it shall appear to its satisfaction that the suit does
187 not really and substantially *187 involve the necessary amount to give it jurisdiction, to dismiss the same, and this the court may do whether the parties raise the question or not. In the present case the issue was raised by answer, and, therefore, it became necessary for the court to determine the question of jurisdiction upon the facts presented, and when brought directly here, it is the duty of this court to review the decision upon the testimony as one presenting a jurisdictional question." The Court then considered the facts and sustained the ruling of the District Court.

The question of the burden of proof was considered by this Court in *Chase v. Wetzlar,* 225 **U.S.** 79. That was a suit in equity in the federal court in New York to enforce "equitable liens upon or claims to the title of personal property," and jurisdiction depended on the presence of the property within the district. 18 Stat. 472; Jud. Code, § 57; 28 U.S.C. 118. The allegation of the bill that the property was within the district was traversed by the plea, which was held to be "sufficient in law and form," and to which a general replication was filed. The case was heard upon the pleadings and the trial court ruled that the burden was upon the complainant to establish the existence of the essential jurisdictional facts which the plea traversed, and as no proof had been offered by the complainant the bill was dismissed for the lack of jurisdiction. On direct appeal this Court affirmed the decree.

As to the contention that the defendant was bound to prove the allegations of his plea, the Court observed: "The theory as to the burden of proof being on the defendant, on which this proposition proceeds, it is insisted, is sanctioned by the following decisions of this court: *Sheppard v. Graves* (1852), 14 How. 505; *De Sobry v. Nicholson* (1865), 3 Wall. 420; *Wetmore v. Rymer* (1898), 169 **U.S.** 115; *Hunt v. New York Cotton Exchange* (1907), 205
188 **U.S.** 322. And a decision of the Circuit *188 Court of Appeals for the Eighth Circuit in *Hill v. Walker,* 167 Fed. 241, is also referred to as containing a full summary of the decided cases on the subject." The Court distinguished those cases upon the ground that none of them involved the question of jurisdiction under the statute requiring the presence of property within the district. In view of that distinction, the Court thought it unnecessary "to now consider the conflict of opinion which has sometimes arisen concerning whether the doctrine of the cases

relied upon and the fundamental conception upon which those cases rested entirely harmonizes with the provision of the act of 1875 requiring a Federal court of its own motion to dismiss a pending suit when it is found not to be really within its jurisdiction — see *Roberts v. Lewis,* 144 **U.S.** 653, and the cases cited in the dissenting opinion in *Hill v. Walker, supra,*" because the Court thought that the doctrine was inapplicable to the case before it. The existence of property within the jurisdiction was deemed to be such a fundamental pre-requisite to the exercise of power to render a binding decree that in no possible view could it be said that the plaintiff did not have the burden of proving the essential jurisdictional fact. The Court concluded its discussion of the point by saying: "In other words, even putting aside for the sake of argument the effect on the doctrines announced in the decisions relied upon of the enactment of the act of 1875 as to the duty to dismiss to which we have referred, the burden of proof to establish that the court was vested with power to act, we think, in a case like this, in the nature of things rested upon the complainant." *Chase v. Wetzlar, supra,* pp. 85-87.

The question which was thus suggested and put aside in *Chase v. Wetzlar* is definitely before **us** in the instant case and should be decided. The Act of 1875 prescribes a uniform rule and
189 there should be a consistent practice in dealing with jurisdictional questions. We think that *189 the terms and implications of the Act leave no sufficient ground for varying rules as to the burden of proof. The prerequisites to the exercise of jurisdiction are specifically defined and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether these conditions have been met. They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing. If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations. In the nature of things, the authorized inquiry is primarily directed to the one who claims that the power of the court should be exerted in his behalf. As he is seeking relief subject to this supervision, it follows that he must carry throughout the litigation the burden of showing that he is properly in court. The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence. We think that only in this way may the practice of the District Courts be harmonized with the true intent of the statute which clothes them with adequate authority and imposes upon them a correlative duty.

190 *190 Here, the allegation in the bill of complaint as to jurisdictional amount was traversed by the answer. The court made no adequate finding upon that issue of fact, and the record contains no evidence to support the allegation of the bill. There was thus no showing that the District Court had jurisdiction and the bill should have been dismissed upon that ground.

The decree is reversed and the cause is remanded to the District Court with directions to dismiss the bill of complaint for the want of jurisdiction.

Reversed.

MR. JUSTICE STONE took no part in the consideration and decision of this case.

71 U.S. 475 (____)
4 Wall. 475

THE STATE OF MISSISSIPPI
v.
JOHNSON, PRESIDENT.

Supreme Court of United States.

478 *478 Messrs. Sharkey, R.J. Walker, and Garland, by briefs filed.

Mr. Stanbery, A.G., contra.

497 *497 The CHIEF JUSTICE delivered the opinion of the court.

A motion was made, some days since, in behalf of the State of **Mississippi**, for leave to file a bill in the name of the State, praying this court perpetually to enjoin and restrain Andrew **Johnson**, President of the United States, and E.O.C. Ord, general commanding in the District of **Mississippi** and Arkansas, from executing, or in any manner carrying out, certain acts of Congress therein named.

The acts referred to are those of March 2d and March 23d, 1867, commonly known as the Reconstruction Acts.

498 The Attorney-General objected to the leave asked for, upon *498 the ground that no bill which makes a President a defendant, and seeks an injunction against him to restrain the performance of his duties as President, should be allowed to be filed in this court.

This point has been fully argued, and we will now dispose of it.

We shall limit our inquiry to the question presented by the objection, without expressing any opinion on the broader issues discussed in argument, whether, in any case, the President of the United States may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime.

The single point which requires consideration is this: Can the President be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional?

It is assumed by the counsel for the State of **Mississippi**, that the President, in the execution of the Reconstruction Acts, is required to perform a mere ministerial duty. In this assumption there is, we think, a confounding of the terms ministerial and executive, which are by no means equivalent in import.

A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.

The case of Marbury v. Madison, Secretary of State,[*] furnishes an illustration. A citizen had been nominated, confirmed, and appointed a justice of the peace for the District of Columbia,

and his commission had been made out, signed, and sealed. Nothing remained to be done except delivery, and the duty of delivery was imposed by law on the Secretary of State. It was held that the performance of this duty might be enforced by mandamus issuing from a court having jurisdiction.

499 *499 So, in the case of Kendall, Postmaster-General, v. Stockton & Stokes,[*] an act of Congress had directed the Postmaster-General to credit Stockton & Stokes with such sums as the Solicitor of the Treasury should find due to them; and that officer refused to credit them with certain sums, so found due. It was held that the crediting of this money was a mere ministerial duty, the performance of which might be judicially enforced.

In each of these cases nothing was left to discretion. There was no room for the exercise of judgment. The law required the performance of a single specific act; and that performance, it was held, might be required by mandamus.

Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill. By the first of these acts he is required to assign generals to command in the several military districts, and to detail sufficient military force to enable such officers to discharge their duties under the law. By the supplementary act, other duties are imposed on the several commanding generals, and these duties must necessarily be performed under the supervision of the President as commander-in-chief. The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political.

An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshal, as "an absurd and excessive extravagance."

It is true that in the instance before us the interposition of the court is not sought to enforce action by the Executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of Executive discretion.

500 *500 It was admitted in the argument that the application now made to us is without a precedent; and this is of much weight against it.

Had it been supposed at the bar that this court would, in any case, interpose, by injunction, to prevent the execution of an unconstitutional act of Congress, it can hardly be doubted that applications with that object would have been heretofore addressed to it.

Occasions have not been wanting.

The constitutionality of the act for the annexation of Texas was vehemently denied. It made important and permanent changes in the relative importance of States and sections, and was by many supposed to be pregnant with disastrous results to large interests in particular States. But no one seems to have thought of an application for an injunction against the execution of the act by the President.

And yet it is difficult to perceive upon what principle the application now before us can be allowed and similar applications in that and other cases have been denied.

The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained.

It will hardly be contended that Congress can interpose, in any case, to restrain the enactment of an unconstitutional law; and yet how can the right to judicial interposition to prevent such an enactment, when the purpose is evident and the execution of that purpose certain, be distinguished, in principle, from the right to such interposition against the execution of such a law by the President?

The Congress is the legislative department of the government; the President is the executive

department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.

The impropriety of such interference will be clearly seen upon consideration of its possible consequences.

Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience,
501 it is needless to *501 observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court?

These questions answer themselves.

It is true that a State may file an original bill in this court. And it may be true, in some cases, that such a bill may be filed against the United States. But we are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us.

It has been suggested that the bill contains a prayer that, if the relief sought cannot be had against Andrew **Johnson**, as President, it may be granted against Andrew **Johnson** as a citizen of Tennessee. But it is plain that relief as against the execution of an act of Congress by Andrew **Johnson**, is relief against its execution by the President. A bill praying an injunction against the execution of an act of Congress by the incumbent of the presidential office cannot be received, whether it describes him as President or as a citizen of a State.

The motion for leave to file the bill is, therefore,

DENIED.

[*] 1 Cranch, 137.

[*] 12 Peters, 527.

THE

LAW OF NATIONS;

OR,

PRINCIPLES OF THE LAW OF NATURE,

APPLIED TO THE

CONDUCT AND AFFAIRS

OF

NATIONS AND SOVEREIGNS.

FROM THE FRENCH

OF

MONSIEUR DE VATTEL.

"Nihil est enim illi principi Deo qui omnem hunc mundum regit, quod quidem in terris fiat, acceptius, quam concilia cœtusque hominum jure sociati, quæ civitates appellantur."—CICERO, SOM. SCIP.

FROM THE NEW EDITION,

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BOOK III.

OF WAR.

CHAP. I.

BOOK III. CHAP. I. OF WAR,—ITS DIFFERENT KINDS,—AND THE RIGHT OF MAKING WAR.

§ 1. Definition of war. (136)

WAR is *that state in which we prosecute our right by force.* We also understand, by this term, the act itself, or the manner of prosecuting our right by force: but it is more conformable to general usage, and more proper in a treatise on the law of war, to understand this term in the sense we have annexed to it.

§ 2. Public war. (136)

Public war is that which takes place between nations or sovereigns, and which is carried on in the name of the public power, and by its order. This is the war we are here to consider:—*private war*, or that which is carried on between private individuals, belongs to the law of nature properly so called.

§ 3. Right of making war. (136)

In treating of the right to security (Book II. Chap. IV.), we have shown that nature gives men a right to employ force, when it is necessary for their defence, and for the preservation of their rights. This principle is generally acknowledged: reason demonstrates it; and nature herself has engraved it on the heart of man. Some fanatics indeed, taking in a literal sense the moderation recommended in the gospel, have adopted the strange fancy of suffering themselves to be massacred or
[292] plundered, rather than oppose force to violence. But we need not fear that this error will make any great progress. The generality of mankind will, of themselves, guard against its contagion—happy, if they as well knew how to keep within the just bounds which nature has set to a right that is granted only through necessity! To mark those just bounds,—and, by the rules of justice, equity, and humanity, to moderate the exercise of that harsh, though too often necessary right,—is the intention of this third book.

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(136) See definition of war and of the king's sole right to declare it, as regards England, per Sir Wm. Scott, *The Hoop*, 1 Rob. R. 196; *Nayade*, 4 Rob. Rep. 252; Bro. Ab. tit. Denizen, pl. 20, and Chitty's L. N. 28, 29, 30.—C.

§ 4. It belongs only to the sovereign power.

As nature has given men no right to employ force, unless when it becomes necessary for self defence and the preservation of their rights (Book II. § 49, &c.), the inference is manifest, that, since the establishment of political societies, a right, so dangerous in its exercise, no longer remains with private persons except in those rencounters where society cannot protect or defend them. In the bosom of society, the public authority decides all the disputes of the citizens, represses violence, and checks every attempt to do ourselves justice with our own hands. If a private person intends to prosecute his right against the subject of a foreign power, he may apply to the sovereign of his adversary, or to the magistrates invested with the public authority: and if he is denied justice by them, he must have recourse to his own sovereign, who is obliged to protect him. It would be too dangerous to allow every citizen the liberty of doing himself justice against foreigners; as, in that case, there would not be a single member of the state who might not involve it in war. And how could peace be preserved between nations, if it were in the power of every private individual to disturb it? A right of so momentous a nature,—the right of judging whether the nation has real grounds of complaint, whether she is authorized to employ force, and justifiable in taking up arms, whether prudence will admit of such a step, and whether the welfare of the state requires it,—that right, I say, can belong only to the body of the nation, or to the sovereign, her representative. It is doubtless one of those rights, without which there can be no salutary government, and which are therefore called rights of majesty (Book I. § 45).

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Thus the sovereign power alone is possessed of authority to make war. But, as the different rights which constitute this power, originally resident in the body of the nation, may be separated or limited according to the will of the nation (Book I. § 31 and 45), it is from the particular constitution of each state, that we are to learn where the power resides, that is authorized to make war in the name of the society at large. The kings of England, whose power is in other respects so limited, have the right of making war and peace.* Those of Sweden have lost it. The brilliant but ruinous exploits of Charles XII. sufficiently warranted the states of that kingdom to reserve to themselves a right of such importance to their safety.

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(137) The right of declaring war is, by his prerogative, vested in the king of the United Kingdom of Great Britain and Ireland. Bro. Ab. tit. Denizen, pl. 20. The ship *Hoop*, per Sir W. Scott, 1 Rob. R. 196, post, 432.—C. {And, by the Constitution of the United States, in Congress. Art. 1, § 8.}

* I here speak of the right considered in itself. But as a king of England cannot, without the concurrence of parliament, either raise money or compel his subjects to take up arms, his right of making war is, in fact, but a slender prerogative, unless the parliament second him with supplies.—Ed. 1797.

§ 5. Defensive and offensive war.

War is either *defensive* or *offensive*. He who takes up arms to repel the attack of an enemy, carries on a defensive war. He who is foremost in taking up arms, and attacks a nation that lived in peace with him, wages offensive war. The object of a defensive war is very simple; it is no other than self defence: in that of offensive war there is as great a variety as in the multifarious concerns of nations; but, in general, it relates either to the prosecution of some rights, or to safety. We attack a nation with a view either to obtain something to which we lay claim, to punish her for an injury she has done us, or to prevent one which she is preparing to do, and thus avert a danger with which she seems to threaten us. I do not here speak of the justice of war:—that shall make the subject of a particular chapter:—all I here propose is to indicate, in general, the various objects for which a nation takes up arms—objects which may furnish lawful reasons, or unjust pretences, but which are at least susceptible of a colour of right. I do not, therefore, among the objects of offensive war, set down conquest, or the desire of invading the property of others: views of that nature, destitute even of any reasonable pretext to countenance them, do not constitute the object of regular warfare, but of robbery, which we shall consider in its proper place.

CHAP. II.

OF THE INSTRUMENTS OF WAR,—THE RAISING OF TROOPS, &C., —THEIR COMMANDERS, OR THE SUBORDINATE POWERS IN WAR. (138)

§ 6. Instruments of war.

THE sovereign is the real author of war, which is carried on in his name, and by his order. The troops, officers, soldiers, and, in general, all those by whose agency the sovereign makes war, are only instruments in his hands. They execute his will and not their own. The arms, and all the apparatus of things used in war, are instruments of an inferior order. For the decision of questions that will occur in the sequel, it is of importance to determine precisely what are the things which belong to war. Without entering here into a minute detail, we shall only observe that whatever is peculiarly used in waging war, is to be classed among the

(138) What are instruments of war, or contraband, and of the prohibitions respecting them, as regards neutral commerce, see Chitty's L. N. 119 to 128; 1 Chitty's Commercial Law, 445 to 449. L'art de la guerre n'est pas ainsi qu'on le croit vulgairement, l'art de *detruire* mais l'art de *paralyser* des forces de l'ennemi. Cours le Droit Public.—Paris, 1830; tom. 2, pages 85, 86, & Id. 406.—C.

§ 26. What is in general a just cause of war.

The right of employing force, or making war, belongs to nations no farther than is necessary for their own defence, and for the maintenance of their rights (§ 3). Now, if any one attacks a nation, or violates her perfect rights, he does her an injury. Then, and not till then, that nation has a right to repel the aggressor, and reduce him to reason. Further, she has a right to prevent the intended injury, when she sees herself threatened with it (Book II. § 50). Let us then say in general, that the foundation, or cause of every just war is injury, either already done or threatened. The justificatory reasons for war show that an injury has been received, or so far threatened as to authorize a prevention of it by arms. It is evident, however, that here the question regards the principal in the war, and not those who join in it as auxiliaries. When, therefore, we would judge whether a war be just, we must consider whether he who undertakes it has in fact received an injury, or whether he be really threatened with one. And, in order to determine what is to be considered as an injury, we must be acquainted with a nation's *rights*, properly so called,—that is to say, her *perfect rights*. These are of various kinds, and very numerous, but may all be referred to the general heads of which we have already treated, and shall further treat in the course of this work. Whatever strikes at these rights is an injury, and a just cause of war.

§ 27. What war is unjust.

The immediate consequence of the premises is, that if a nation takes up arms when she has received no injury, nor is threatened with any, she undertakes an unjust war. Those alone, to whom an injury is done or intended, have a right to make war.

§ 28. The object of war.

From the same principle we shall likewise deduce the just and lawful object of every war, which is, to *avenge or prevent injury*. To *avenge* signifies here to prosecute the reparation of an injury, if it be of a nature to be repaired,—or, if the evil be irreparable, to obtain a just satisfaction,—and also to punish the offender, if requisite, with a view of providing for our future safety. The right to security authorizes us to do all this (Book II. §§ 49—52). We may therefore distinctly point out, as objects of a lawful war, the three following:—1. To recover what belongs, or is due to us. 2. To provide for our future safety by punishing the aggressor or offender. 3. To defend ourselves, or to protect ourselves from
[303] injury, by repelling unjust violence. The two first are the objects of an offensive, the third of a defensive war. Camillus, when on the point of attacking the Gauls, concisely set forth to his soldiers all the subjects on which war can be grounded or justified—*omnia, quæ defendi, repetique, et ulcisci fas sit.**

* Livy, lib. v. cap. 49.

As the nation, or her ruler, ought, in every undertaking, not only to respect justice, but also to keep in view the advantage of the state, it is necessary that proper and commendable motives should concur with the justificatory reasons, to induce a determination to embark in a war. These reasons show that the sovereign has a right to take up arms, that he has just cause to do so. The proper motives show, that in the present case it is advisable and expedient to make use of his right. These latter relate to prudence, as the justificatory reasons come under the head of justice.

§ 29. Both justificatory reasons and proper motives requisite in undertaking a war.

I call *proper and commendable motives* those derived from the good of the state, from the safety and common advantage of the citizens. They are inseparable from the justificatory reasons,—a breach of justice being never truly advantageous. Though an unjust war may for a time enrich a state, and extend her frontiers, it renders her odious to other nations, and exposes her to the danger of being crushed by them. Besides, do opulence and extent of dominion always constitute the happiness of states? Amidst the multitude of examples which might here be quoted, let us confine our view to that of the Romans. The Roman republic ruined herself by her triumphs, by the excess of her conquests and power. Rome, when mistress of the world, but enslaved by tyrants and oppressed by a military government, had reason to deplore the success of her arms, and to look back with regret on those happy times when her power did not extend beyond the bounds of Italy, or even when her dominion was almost confined within the circuit of her walls.

§ 30. Proper motives.

Vicious motives are those which have not for their object the good of the state, and which, instead of being drawn from that pure source, are suggested by the violence of the passions. Such are the arrogant desire of command, the ostentation of power, the thirst of riches, the avidity of conquest, hatred, and revenge.

Vicious motives.

The whole right of the nation, and consequently of the sovereign, is derived from the welfare of the state; and by this rule it is to be measured. The obligation to promote and maintain the true welfare of the society or state gives the nation a right to take up arms against him who threatens or attacks that valuable enjoyment. But if a nation, on an injury done to her, is induced to take up arms, not by the necessity of procuring a just reparation, but by a vicious motive, she abuses her right. The viciousness of the motive tarnishes the lustre of her arms, which might otherwise have shone in the cause of justice:—the war is not undertaken for the lawful cause which the nation had to engage in it: that cause is now no more than a pretext. As to the sovereign in particular, the ruler of the nation—what right has he to expose the safety of the state, with the lives and fortunes of the citizens, to gratify his passions? It is only for the good of the nation

§ 31. War undertaken upon just grounds, but from vicious motives.

that the supreme power is intrusted to him; and it is with that view that he ought to exert it: that is the object prescribed to him even in his least important measures: and shall he undertake the most important and the most dangerous, from motives foreign or contrary to that great end? Yet nothing is more common than such a destructive inversion of views; and it is remarkable, that, on this account, the judicious Polybius gives the name of *causes** to the motives on which war is undertaken,—and of *pretexts*† to the justificatory reasons alleged in defence of it. Thus he informs us that the cause of the war which Greece undertook against the Persians was the experience she had had of their weakness, and that the pretext alleged by Philip, or by Alexander after him, was the desire of avenging the injuries which the Greeks had so often suffered, and of providing for their future safety.

§ 32. Pretexts.

Let us, however, entertain a better opinion of nations and their rulers. There are just causes of war, real justificatory reasons; and why should there not be sovereigns who sincerely consider them as their warrant, when they have besides reasonable motives for taking up arms? We shall therefore give the name of *pretexts* to those reasons alleged as justificatory, but which are so only in appearance, or which are even absolutely destitute of all foundation. The name of pretexts may likewise be applied to reasons which are, in themselves, true and well-founded, but, not being of sufficient importance for undertaking a war, are made use of only to cover ambitious views, or some other vicious motive. Such was the complaint of the czar Peter I. that sufficient honours had not been paid him on his passage through Riga. His other reasons for declaring war against Sweden I here omit.

Pretexts are at least a homage which unjust men pay to justice. He who screens himself with them shows that he still retains some sense of shame. He does not openly trample on what is most sacred in human society: he tacitly acknowledges that a flagrant injustice merits the indignation of all mankind.

§ 33. War undertaken merely for advantage.

Whoever, without justificatory reasons, undertakes a war merely from motives of advantage, acts without any right, and his war is unjust. And he, who, having in reality just grounds for taking up arms, is nevertheless solely actuated by interested views in resorting to hostilities, cannot indeed be charged with injustice, but he betrays a vicious disposition: his conduct is reprehensible, and sullied by the badness of his motives. War is so dreadful a scourge, that nothing less than manifest justice, joined to a kind of necessity, can authorize it, render it commendable, or at least exempt it from reproach.

§ 34. Na-

Nations that are always ready to take up arms on any pros-

* Αιτιαι. Histor. lib. iii. cap. 6. † Προφασεις.

pect of advantage, are lawless robbers: but those who seem to delight in the ravages of war, who spread it on all sides, without reasons or pretexts, and even without any other motive than their own ferocity, are monsters, unworthy the name of men. They should be considered as enemies to the human race, in the same manner as, in civil society, professed assassins and incendiaries are guilty, not only towards the particular victims of their nefarious deeds, but also towards the state, which therefore proclaims them public enemies. All nations have a right to join in a confederacy for the purpose of punishing and even exterminating those savage nations. Such were several German tribes mentioned by Tacitus—such those barbarians who destroyed the Roman empire: nor was it till long after their conversion to Christianity that this ferocity wore off. Such have been the Turks and other Tartars—Genghis-khan, Timur Bec or Tamerlane, who, like Attila, were scourges employed by the wrath of Heaven, and who made war only for the pleasure of making it. Such are, in polished ages and among the most civilized nations, those supposed heroes, whose supreme delight is a battle, and who make war from inclination purely, and not from love to their country.

tions who make war without reason or apparent motives.

§ 35. How defensive war is just or unjust.

Defensive war is just when made against an unjust aggressor. This requires no proof. Self-defence against unjust violence is not only the right, but the duty of a nation, and one of her most sacred duties. But if the enemy who wages offensive war has justice on his side, we have no right to make forcible opposition; and the defensive war then becomes unjust: for that enemy only exerts his lawful right:—he took arms only to obtain justice which was refused to him; and it is an act of injustice to resist any one in the exertion of his right.

§ 36. How it may become just against an offensive war which at first was just.

All that remains to be done in such a case is, to offer the invader a just satisfaction. If he will not be content with this, a nation gains one great advantage—that of having turned the balance of justice on her own side; and his hostilities, now becoming unjust, as having no longer any foundation, may very justly be opposed.

The Samnites, instigated by the ambition of their chiefs, had ravaged the lands of the allies of Rome. When they became sensible of their misconduct, they offered full reparation for the damages, with every reasonable satisfaction: but all their submissions could not appease the Romans; whereupon Caius Pontius, general of the Samnites, said to his men, "Since the Romans are absolutely determined on war, necessity justifies it on our side; an appeal to arms becomes lawful on the part of those who are deprived of every other resource."—*Justum est bellum, quibus necessarium; et pia arma, quibus nulla nisi in armis relinquitur spes.**

* Livy, lib. ix. init.

BOOK. III. CHAP. III.

§ 37. How an offensive war is just in an evident cause.

In order to estimate the justice of an offensive war, the nature of the subject for which a nation takes up arms must be first considered. We should be thoroughly assured of our right, before we proceed to assert it in so dreadful a manner. If, therefore, the question relates to a thing which is evidently just, as the recovery of our property, the assertion of a

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clear and incontestable right, or the attainment of just satisfaction for a manifest injury, and if we cannot obtain justice otherwise than by force of arms, offensive war becomes lawful. Two things are therefore necessary to render it just: 1, some right which is to be asserted—that is to say, that we be authorized to demand something of another nation: 2, that we be unable to obtain it otherwise than by force of arms. Necessity alone warrants the use of force. It is a dangerous and terrible resource. Nature, the common parent of mankind, allows of it only in cases of the last extremity, and when all other means fail. It is doing wrong to a nation, to make use of violence against her, before we know whether she be disposed to do us justice, or to refuse it.

Those who, without trying pacific measures, run to arms on every trifling occasion, sufficiently show that justificatory reasons are, in their mouths, mere pretexts: they eagerly seize the opportunity of indulging their passions and gratifying their ambition under some colour of right.

§ 38. In a doubtful cause.

In a doubtful cause, where the rights are uncertain, obscure and disputable, all that can be reasonably required is, that the question be discussed (Book II. § 331), and that, if it be impossible fully to clear it up, the contest be terminated by an equitable compromise. If, therefore, one of the parties should refuse to accede to such conciliatory measures, the other is justifiable in taking up arms to compel him to an accommodation. And we must observe, that war does not decide the question: victory only compels the vanquished to subscribe to the treaty which terminates the difference. It is an error, no less absurd than pernicious, to say that war is to decide controversies between those who acknowledge no superior judge—as is the case with nations. Victory usually favours the cause of strength and prudence, rather than that of right and justice. It would be a bad rule of decision; but it is an effectual mode of compelling him who refuses to accede to such measures as are consonant to justice; and it becomes just in the hands of a prince who uses it seasonably, and for a lawful cause.

§ 39. War cannot be just on both sides.

War cannot be just on both sides. One party claims a right; the other disputes it: the one complains of an injury; the other denies having done it. They may be considered as two individuals disputing on the truth of a proposition; and it is impossible that two contrary sentiments should be true at the same time.

§ 40. Some-

It may however happen that both the contending parties

are candid and sincere in their intentions; and, in a doubtful cause, it is still uncertain which side is in the right. Wherefore, since nations are equal and independent (Book II. § 36, and Prelim. §§ 18, 19), and cannot claim a right of judgment over each other, it follows, that in every case susceptible of doubt, the arms of the two parties at war are to be accounted equally lawful, at least as to external effects, and until the decision of the cause. But neither does that circumstance deprive other nations of the liberty of forming their own judgment on the case, in order to determine how they are to act, and to assist that party who shall appear to have right on his side; nor does that effect of the independence of nations operate in exculpation of the author of an unjust war, who certainly incurs a high degree of guilt. But if he acts in consequence of invincible ignorance or error, the injustice of his arms is not imputable to him.

times reputed lawful.

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§ 41. War undertaken to punish a nation.

When offensive war has for its object the punishment of a nation, it ought, like every other war, to be founded on right and necessity. 1. On right:—an injury must have been actually received. Injury alone being a just cause of war (§ 26), the reparation of it may be lawfully prosecuted: or if, in its nature, it be irreparable (the only case in which we are allowed to punish), we are authorized to provide for our own safety, and even for that of all other nations, by inflicting on the offender a punishment capable of correcting him, and serving as an example to others. 2. A war of this kind must have necessity to justify it: that is to say, that, to be lawful, it must be the only remaining mode to obtain a just satisfaction; which implies a reasonable security for the time to come. If that complete satisfaction be offered, or if it may be obtained without a war, the injury is done away, and the right to security no longer authorizes us to seek vengeance for it.—(See Book II. §§ 49, 52.)

The nation in fault is bound to submit to a punishment which she has deserved, and to suffer it by way of atonement: but she is not obliged to give herself up to the discretion of an incensed enemy. Therefore, when attacked she ought to make a tender of satisfaction, and ask what penalty is required; and if no explicit answer be given, or the adversary attempts to impose a disproportionate penalty, she then acquires a right to resist, and her defence becomes lawful.

On the whole, however, it is evident that the offended party alone has a right to punish independent persons. We shall not here repeat what we have said elsewhere (Book II. § 7) of the dangerous mistake, or extravagant pretensions, of those who assume a right of punishing an independent nation for faults which do not concern them—who, madly setting themselves up as defenders of the cause of God, take upon them to punish the moral depravity, or irreligion, of a people not committed to their superintendency.

CHAP. XI.

OF THE SOVEREIGN WHO WAGES AN UNJUST WAR.

§ 183. An unjust war gives no right whatever.

HE who is engaged in war derives all his right from the justice of his cause. The unjust adversary who attacks or threatens him,—who withholds what belongs to him,—in a word, who does him an injury,—lays him under the necessity of defending himself, or of doing himself justice, by force of arms; he authorizes him in all the acts of hostility necessary for obtaining complete satisfaction. Whoever therefore takes up arms without a lawful cause, can absolutely have no right whatever: every act of hostility that he commits is an act of injustice.

§ 184. Great guilt of the sovereign who undertakes it.

He is chargeable with all the evils, all the horrors of the war: all the effusion of blood, the desolation of families, the rapine, the acts of violence, the ravages, the conflagrations, are his works and his crimes. He is guilty of a crime against the enemy, whom he attacks, oppresses, and massacres without cause: he is guilty of a crime against his people, whom he forces into acts of injustice, and exposes to danger, without reason or necessity,—against those of his subjects who are [379] ruined or distressed by the war,—who lose their lives, their property, or their health, in consequence of it: finally, he is guilty of a crime against mankind in general, whose peace he disturbs, and to whom he sets a pernicious example. Shocking catalogue of miseries and crimes! dreadful account to be given to the King of kings, to the common Father of men! May this slight sketch strike the eyes of the rulers of nations,—of princes and their ministers! Why may not we expect some benefit from it? Are we to suppose that the great are wholly lost to all sentiments of honour, of humanity, of duty, and of religion? And, should our weak voice, throughout the whole succession of ages, prevent even one single war, how gloriously would our studies and our labour be rewarded!

§ 185. His obligations.

He who does an injury is bound to repair the damage, or to make adequate satisfaction if the evil be irreparable, and even to submit to punishment, if the punishment be necessary, either as an example, or for the safety of the party offended, and for that of human society. In this predicament stands a prince who is the author of an unjust war. He is under an obligation to restore whatever he has taken,—to send back the prisoners at his own expense,—to make compensation to the enemy for the calamities and losses he has brought on him,—to reinstate ruined families,—to repair, if it were possible, the loss of a father, a son, a husband,

the supreme council or the general assembly of the states, be justly conquered by an absolute monarch, she must never more think of such privileges: they are what the constitution of the new state to which she is annexed does not permit.

§200. Lands of private persons.

In the conquests of ancient times, even individuals lost their lands. Nor is it matter of surprise that in the first ages of Rome such a custom should have prevailed. The wars of that era were carried on between popular republics and communities. The state possessed very little, and the quarrel was in reality the common cause of all the citizens. But at present war is less dreadful in its consequences to the subject: matters are conducted with more humanity: one sovereign makes war against another sovereign, and not against the unarmed citizens. The conqueror seizes on the possessions of the state, the public property, while private individuals are permitted to retain theirs. They suffer but indirectly by the war; and the conquest only subjects them to a new master.

§ 201. Conquest of the whole state. (170)

But if the entire state be conquered, if the nation be subdued, *in what manner can the victor treat it*, without transgressing the bounds of justice? What are his rights over the conquered country? Some have dared to advance this monstrous principle, that the conqueror is absolute master of his conquest,—that he may dispose of it as his property,—that he may treat it as he pleases, according to the common expression of *treating a state as a conquered country;* and hence they derive one of the sources of despotic government. But, disregarding such writers, who reduce men to the state of transferable goods or beasts of burthen,—who deliver them up as the property or patrimony of another man,—let us argue on principles countenanced by reason and conformable to humanity.

The whole right of the conqueror is derived from justifiable self-defence (§§ 3, 26, 28), which comprehends the support and prosecution of his rights. When, therefore, he has totally subdued a hostile nation, he undoubtedly may, in the first place, do himself justice respecting the object which had given rise to the war, and indemnify himself for the expenses and damages he has sustained by it: he may, according to the exigency of the case, subject the nation to punishment, by way of example: he may even, if prudence so require, *render*

(170) When a country has been conquered by the British, or any other arms, and having become a dominion of the king in right of his crown, the conquered inhabitants, once received by the conqueror, become his subjects, and are universally to be regarded in that light, and not as enemies or aliens. *Elphinstone* v. *Bedreechund*, Knapp's Rep. 338; *Campbell* v. *Hall*, 23 State Trials, p. 322; and Cowper, 205; and *Fabrigas* v. *Moslyn*, Cowp. Rep. 165.

But statutes previously passed do not in general extend to a *conquered* country; see 2 Merivale's Rep. 156; 4 Modern Rep. 222; 1 Chitty's Com. L. 639, 640; 1 Bla. Com. 102—3. As to the application of the laws of *England* to her foreign possessions, see *Gardiner* v. *Fell*, 1 Jac. & Walk. 27; and Id. 30, n. (*a*).—C.

her incapable of doing mischief with the same ease in future. But, for the attainment of these different objects, he is to prefer the gentlest methods,—still bearing in mind that the doing of harm to an enemy is no further authorized by the law of nature, than in the precise degree which is necessary for justifiable self-defence, and reasonable security for the time to come. Some princes have contented themselves with imposing a tribute on the conquered nation,—others, with depriving her of some of her rights, taking from her a province, or erecting fortresses to keep her in awe: others, again, confining their quarrel to the sovereign alone, have left the [389] nation in the full enjoyment *of all their rights*,—only setting over her a *new* sovereign of their own appointment.

But if the conqueror thinks proper to retain the sovereignty of the conquered state, and has a right to retain it, the same principles must also determine the manner in which he is to treat that state. If it is against the sovereign alone that he has just cause of complaint, reason plainly evinces that he acquires no other rights by his conquest than such as belonged to the sovereign whom he has dispossessed: and, on the submission of the people, he is bound to *govern them according to the laws of the state.* If the people do not voluntarily submit, the state of war still subsists.

A conqueror who has taken up arms, not only against the sovereign, but against the nation herself, and whose intention it was to subdue a fierce and savage people, and once for all to reduce an obstinate enemy,—such a conqueror may with justice lay burthens on the conquered nation, both as a compensation for the expenses of the war, and as a punishment. He may, according to the degree of indocility apparent in their disposition, govern them with a tighter rein, so as to curb and subdue their impetuous spirit: he may even, if necessary, keep them for some time in a kind of slavery. But this forced condition ought to cease from the moment the danger is over,—the moment the conquered people are become citizens: for then the right of conquest is at an end, so far as relates to the pursuit of those rigorous measures, since the conqueror no longer finds it necessary to use extraordinary precautions for his own defence and safety. Then at length every thing is to be rendered conformable to the rules of a wise government and the duties of a good prince.

When a sovereign, arrogating to himself the absolute disposal of a people whom he has conquered, attempts to reduce them to slavery, he perpetuates the state of warfare between that nation and himself. The Scythians said to Alexander the Great, "There is never any friendship between the master and slave: in the midst of peace the rights of war still subsist."*

* Inter dominum et servum nulla amicitia est; etiam in pace, belli tamen jura servantur.—Q. Curt. lib. vii. cap. viii.

Should it be said, that in such a case there may be peace, and a kind of compact by which the conqueror consents to spare the lives of the vanquished, on condition that they acknowledge themselves his slaves,—he who makes such an assertion is ignorant that war gives no right to take away the life of an enemy who has laid down his arms and submitted (§ 140). But let us not dispute the point: let the man who holds such principles of jurisprudence, keep them for his own use and benefit: he well deserves to be subject to such a law. But men of spirit, to whom life is nothing, less than nothing, unless sweetened with liberty, will always conceive themselves at war
[390] with that oppressor, though actual hostilities are suspended on their part through want of ability. We may, therefore, safely venture to add, that if the conquered country is to be really subject to the conqueror as to its lawful sovereign, he must rule it according to the ends for which civil government has been established. It is generally the prince alone who occasions the war, and consequently the conquest. Surely it is enough that an innocent people suffer the calamities of war: must even peace itself become fatal to them? A generous conqueror will study to relieve his new subjects, and mitigate their condition: he will think it his indispensable duty. "Conquest (says an excellent man) ever leaves behind it an immense debt, the discharge of which is absolutely necessary to acquit the conqueror in the eye of humanity."*

It fortunately happens, that, in this particular as in every thing else, sound policy and humanity are in perfect accord. What fidelity, what assistance, can you expect from an oppressed people? Do you wish that your conquest may prove a real addition to your strength, and be well affected to you?—treat it as a father, as a true sovereign. I am charmed with the generous answer recorded of an ambassador from Privernum. Being introduced to the Roman senate, he was asked by the consul—"If we show you clemency, what dependence can we have on the peace you are come to sue for?" "If (replied the ambassador) you grant it on reasonable conditions, it will be safe and permanent: otherwise, it will not last long." Some took offence at the boldness of this speech; but the more sensible part of the senate approved of the Privernian's answer, deeming it the proper language of a man and a freeman. "Can it be imagined (said those wise senators) that any nation, or even any individual, will longer continue in an irksome and disagreeable condition, than while compelled to submit to it? If those to whom you give peace receive it voluntarily, it may be relied on: what fidelity can you expect from those whom you wish to reduce to slavery?"†

* Montesquieu, in his Spirit of Laws.

† Quid, si pœnam (inquit consul) remittimus vobis, qualem nos pacem vobiscum habituros speremus? Si bonam dederitis, inquit, et fidam et per-

"The most secure dominion," said Camillus, "is that which is acceptable to those over whom it is exercised."*

Such are the rights which the law of nature gives to the conqueror, and the duties which it imposes on him. The manner of exerting the one, and fulfilling the other, varies according to circumstances. In general, he ought to consult the true interests of his own state, and by sound policy to [391] reconcile them, as far as possible, with those of the conquered country. He may, in imitation of the kings of France, unite and incorporate it with his own dominions. Such was the practice of the Romans: but they did this in different modes according to cases and conjunctures. At a time when Rome stood in need of an increase of population, she destroyed the town of Alba, which she feared to have as a rival: but she received all its inhabitants within her walls, and thereby gained so many new citizens. In after times the conquered cities were left standing, and the freedom of Rome was given to the vanquished inhabitants. Victory could not have proved so advantageous to those people as their defeat.

The conqueror may likewise simply put himself in the place of the sovereign whom he has dispossessed. Thus the Tartars have acted in China: the empire was suffered to subsist in its former condition, except that it fell under the dominion of a new race of sovereigns.

Lastly, the conqueror may rule his conquest as a separate state, and permit it to retain *its own form of government*. But this method is dangerous: it produces no real union of strength; it weakens the conquered country, without making any considerable addition to the power of the victorious state.

§ 202. To whom the conquest belongs. (171)

It is asked, to whom the conquest belongs,—to the prince who has made it, or to the state? This question ought never to have been heard of. Can the prince, in his character of sovereign, act for any other end than the good of the state? Whose are the forces which he employs in his wars? Even if he made the conquest at his own expense, out of his own revenue or his private and patrimonial estates, does he not make use of the personal exertions of his subjects in achieving it? Does he not shed their blood in the contest? But, supposing even that he were to employ foreign or mercenary troops, does he not expose his nation to the enemy's

petuam; si malam, haud diuturnam. Tum vero *minari, nec id ambigue Privernatem*, quidam, *et illis vocibus ad rebellandum incitari pacatos populos*. Pars melior senatûs ad meliora responsa trahere, et dicere viri et liberi vocem auditam: an credi posse ullum populum, aut hominem denique, in eâ conditione cujus eum pœniteat, diutius quam necesse sit, mansurum? ibi pacem esse fidam, ubi voluntarii pacati sint; neque eo loco, ubi servitutem esse velint, fidem sperandam esse.—Tit. Liv. lib. viii. cap. xxi.

* Certe id firmissimum longe imperium est, quo obedientes gaudent.—Tit. Liv. lib. viii. cap. xiii.

(171) *Ante*, 365, s. 164, and note (165).

118 U.S. 425 (1886)

NORTON
v.
SHELBY COUNTY.

Supreme Court of United States.

Argued March 24, 25, 1886.
Decided May 10, 1886.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

428 *428 *Mr. Joseph H. Choate* for plaintiff in error.

Mr. D.H. Poston for plaintiff in error (*Mr. W.K. Poston* was with him on his brief) cited.

Mr. W.B. Glisson, Mr. R.D. Jordan, and *Mr. Julius A. Taylor* for defendant in error.

434 *434 Mr. JUSTICE FIELD delivered the opinion of the court.

This is an action upon twenty-nine bonds, of $1000 each, alleged to be the bonds of **Shelby County**, Tennessee, issued on the 1st of March, 1869, and payable on the 1st of January, 1873, with interest from January 1, 1869, at six per cent. per annum, payable annually on the surrender of matured interest coupons attached; and three coupons of $60 each. The following is a copy of one of the bonds and of a coupon:

"$1000 UNITED STATES OF AMERICA, $1000

Issued under and by virtue of section 6 of an act of the Legislature of the State of Tennessee, passed February 25th, 1867, amended on the 12th day of February, 1869, and by authority conferred upon the **county** commissioners of **Shelby County** by section 25 of an act passed March 9th, 1867.

State of Tennessee.

(Vignette.)

A special tax is levied by authority of law upon all the taxable property in the **county** of **Shelby**, to meet the principal and interest of these bonds, collectible in equal annual instalments running through six years, as the bonds themselves mature.

Shelby County Railroad Bond No. 176.

1000 dollars.

Be it known that the **county** of **Shelby**, State of Tennessee, is indebted to the Mississippi River Railroad Company or bearer in the sum of one thousand dollars, payable in the city of Memphis on the first day of January, eighteen hundred and seventy-three, with interest at the rate of six per cent. per annum from January 1, 1869, payable annually in said city upon surrender of the matured interest coupons hereto attached.

This is one of three hundred $1000 bonds, all of the same denomination and rate of interest, issued by **Shelby County** in payment of a subscription of three hundred thousand dollars to the Mississippi River Railroad Company, made by the **county** commissioners under the authority of the acts above recited, transferable by delivery and redeemable in six years, at the rate of fifty thousand dollars a year, commencing January 1, 1870.

435 *435 Dated at the city of Memphis, **county** of **Shelby**, State of Tennessee, the first day of March, 1869.

[Seal **County** Court of **Shelby County**, Tenn.]

BARBOUR LEWIS, *President of the Board of **County** Commissioners of **Shelby County**.* JNO. LOAGUE, *Clerk of **County** Court of **Shelby County**.*" "$60 STATE OF TENNESSEE, $60 ***Shelby County.*** Coupon No. ____ of Bond No. 264.

The trustee of **Shelby County** will pay to the bearer sixty dollars in the city of Memphis on the 1st day of January, 1875, being interest due on bond No. 264, for $1000, of bonds issued to Mississippi River Railroad Company.

[Seal **County** Court of **Shelby County**, Tenn.] (Signed) JOHN LOAGUE, *Clerk of **Shelby County** Court.*"

The plaintiff contends —

1st. That the commissioners, by whose directions the bonds were issued, and whose president signed them, were lawful officers of **Shelby County**, and authorized under the acts mentioned in the heading of the bonds, to represent and bind the **county** by the subscription to the railroad company, and that the bonds issuéd were, therefore, its legal obligations.

2d. That if the commissioners were not officers *de jure* of the **county**, they were officers *de facto,* and, as such, their action in making the subscription and issuing the bonds is equally bìnding upon the **county**; and

3d. That the action of the commissioners, whatever their want of authority, has been ratified by the **county**.

The defendant contends —

1st. That the commissioners were not lawful officers of the **county**, and that there was no such office in Tennessee as that of **county** commissioner.

436 2d. That there could not be any such *de facto* officers, as *436 there was no such office known to the laws, and, therefore, that the subscription was made and the bonds were issued without authority and are void; and

3d. That the action of the commissioners was never ratified, and was incapable of ratification by the **county**.

Upon the first question presented, that which relates to the lawful existence and authority of the **county** commissioners, we are relieved from the necessity of passing. That has been authoritatively determined by the Supreme Court of Tennessee, and is not open for consideration by us.

From an early period in the history of the State — indeed, from a period anterior to the adoption of her constitution of 1796 — to the passage of the act of March 9, 1867, the administration of the government in local matters in each **county** was lodged in a **county** court, or quarterly court as it was sometimes called, composed of justices of the peace, elected in its different districts. The constitution of 1796 recognizes that court as an existing tribunal, and the constitution of 1834 prescribes the duties of the justices of the peace composing it. This **county** court alone had the power to make a **county** subscription to the Mississippi River Railroad Company, to issue bonds for the amount, and to levy taxes for its

payment, unless the act of March 9, 1867, invested the board of commissioners with that authority. Statutes of 1867, ch. 48, § 6. That act created the board, and provided that it should consist of five persons, residents of the **county** for not less than two years, each to serve for the period of five years and until his successor should be elected and qualified. The 25th section vested in it all the powers and duties then possessed by the quarterly court of the **county**, and in addition thereto the authority "to subscribe stock in railroads which the **county** court of **Shelby County** has been authorized by general and special law to subscribe, and under the same conditions and restrictions, and to represent such stock in all elections for directors, and provide for payment of subscriptions as made."

The validity of this act superseding the **county** court was at once assailed as in violation of
437 the constitution of the State. Within a month after its passage William Walker and other *437 justices of the peace of the **county**, in their official character, and as citizens and taxpayers, filed a bill in chancery in the name of the State, at their relation, against the commissioners appointed, alleging that they had usurped and were unlawfully exercising the powers and functions of the justices, and had taken into custody the records of the **county** under the act, which the relators insisted was in violation of the constitution, mentioning several sections with which it conflicted; and praying that the act be adjudged void, that the attempt of the commissioners to exercise the powers of the justices be declared a usurpation, and that the commissioners be perpetually enjoined from exercising them. The case having been decided adversely to the relators, an appeal was taken to the Supreme Court of the State, and pending the appeal the subscription to the stock of the Mississippi River Railroad Company was made by the commissioners, and the bonds were issued. Before the appeal was heard the Supreme Court of the State had under consideration a similar statute passed on the 12th of March, 1868, for Madison **County**, and extended to White **County**, which, in like manner, undertook to supersede the quarterly courts of those counties and substitute in their place boards of commissioners with the same powers as those conferred upon the commissioners of **Shelby County**. The case in which such consideration was had was *Pope* v. *Phifer,* 3 Heiskell, 691. Under this act three commissioners were appointed by the governor, being the number prescribed to constitute the board of White **County**. The bill was filed to restrain them from organizing as a board, to have the act declared unconstitutional, and to perpetually enjoin them from acting under it. The court states in its opinion that the question as to the validity of the act was argued with great ability by counsel on both sides, and the opinion itself shows that the question was carefully considered. The chancellor, as in the case of the State at the relation of Walker and others against the Commissioners, dismissed the bill. The Supreme Court reversed the decree, and perpetually enjoined the defendants from acting as a board of commissioners. It held that the act creating the board and conferring on the commissioners
438 appointed by *438 the governor the powers of justices of the peace of the **county** court was unconstitutional and void; that the **county** court was one of the institutions of the State, recognized in the constitution; that the powers conferred by it upon the justices of the peace in their collective capacity were intended to be exercised by that court; and that the power to tax for purposes of the **county** could not, by any special or local law, be taken from the justices of the peace as a **county** court and conferred upon local tribunals of particular counties composed of commissioners appointed by the governor.

This decision was made in February, 1871. In June following the case mentioned above of the State at the relation of Walker and others against the Commissioners of **Shelby County** was decided in conformity with it, the Supreme Court holding that at the time the bill was filed the justices were entitled to the relief prayed, and that the decree dismissing the bill was erroneous, and it so adjudged and decreed. But it said that as the act under which the bill alleged that the defendants had usurped office had since then been repealed, and that they had not afterwards assumed to exercise the powers and perform the duties named in the act, it was only necessary, in addition to what was decreed above, to dispose of the costs; and that disposition was made by taxing them against the defendants and awarding execution therefor.

439 In the same month the Supreme Court decided the case of Butterworth against **Shelby County**, which also involved a consideration of the validity of the act creating the board of commissioners of that **county**.[*] The action was upon **county** warrants issued by the board

and signed by Barbour Lewis as its president, as the bonds in this suit are signed. The court held that the act creating the board was unconstitutional, that the board was an illegal body, and that, as a necessary consequence, the warrants of the **county** were invalid. Judgment was accordingly rendered for the defendant. Chief Justice Nicholson, in delivering the opinion of the court, referred to *439 the two decisions mentioned, and said that they had "determined that the legislature exceeded its constitutional powers in assuming to abolish the **county** court and substitute in its place a board of **county** commissioners with the powers before belonging to the **county** court. The act of March 9, 1867, was, therefore, a nullity and the board of commissioners appointed and organized thereunder was an unauthorized and illegal body. The act was inoperative as to the existing organization, powers, and duties of the **county** court. Neither the board of commissioners nor Barbour Lewis, its president, had any more powers under said act than if no act had been passed."

Counsel for the plaintiff have endeavored to show that the adjudication in these cases has been questioned by later decisions, and therefore should have no controlling force in this litigation. A careful examination of those decisions fails to support this position. The opinion that the act was invalid because it was special legislation applicable only to certain counties would seem indeed to be thus modified. But the adjudication that the constitution did not permit the appointment of commissioners to take the place of the justices of the peace for the **county**, and perform the duties of the **county** court, stands unimpaired, and as such is binding upon us. Two of the cases, as we have seen, were brought against the commissioners, in one case, of **Shelby County**, and in the other, of White **County**, to test the validity of the acts under which they were appointed, or about to be appointed, and their right to assume and exercise the functions and powers of the justices of the peace, and hold the **county** court in their place. From the nature of the questions presented we cannot review or ignore this determination. Upon the construction of the constitution and laws of a State, this court, as a general rule, follows the decisions of her highest court, unless they conflict with or impair the efficacy of some principle of the Federal Constitution, or of a Federal statute, or a rule of commercial or general law. In these cases no principle of the Federal Constitution, or of any Federal law, is invaded, and no rule of general or commercial law is disregarded. The
440 determination made relates to the existence *440 of an inferior tribunal of the State, and that depending upon the constitutional power of the legislature of the State to create it and supersede a pre-existing institution. Upon a subject of this nature the Federal courts will recognize as authoritative the decision of the State court. As said by Mr. Justice Bradley, speaking for the court in *Claiborne* ***County*** *v. Brooks,* 111 U.S. 400, 410: "It is undoubtedly a question of local policy with each State, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State." It would lead to great confusion and disorder if a State tribunal, adjudged by the State Supreme Court to be an unauthorized and illegal body, should be held by the Federal courts, disregarding the decision of the State court, to be an authorized and legal body, and thus make the claims and rights of suitors depend, in many instances, not upon settled law, but upon the contingency of litigation respecting them being before a State or a Federal court. Conflicts of this kind should be avoided if possible by leaving the courts of one sovereignty within their legitimate sphere to be independent of those of another, each respecting the adjudications of the other on subjects properly within its jurisdiction.

On many subjects the decisions of the courts of a State are merely advisory, to be followed or disregarded, according as they contain true or erroneous expositions of the law, as those of a foreign tribunal are treated. But on many subjects they must necessarily be conclusive; such as relate to the existence of her subordinate tribunals; the eligibility and election or appointment of their officers; and the passage of her laws. No Federal court should refuse to accept such decisions as expressing on these subjects the law of the State. If, for instance, the Supreme Court of a State should hold that an act appearing on her statute book was never passed and never became a law, the Federal courts could not disregard the decision and declare that it was a law and enforce it as such. *South Ottawa* v. *Perkins,* 94 U.S. 260; *Post* v. *Supervisors,* 105 U.S. 667.

441 *441 The decision of the Supreme Court of Tennessee as to the constitutional existence of the

board of commissioners of **Shelby County** is one of this class. That court has repeatedly adjudged, after careful and full consideration, that no such board ever had a lawful existence; that it was an unauthorized and illegal body; that its members were usurpers of the functions and powers of the justices of the peace of the **county**; and that their action in holding the **county** court was utterly void. This court should neither gainsay nor deny the authoritative character of that determination. It follows that in the disposition of the case before us we must hold that there was no lawful authority in the board to make the subscription to the Mississippi River Railroad Company and to issue the bonds of which those in suit are a part.

But it is contended that if the act creating the board was void, and the commissioners were not officers *de jure,* they were nevertheless officers *de facto,* and that the acts of the board as a *de facto* court are binding upon the **county**. This contention is met by the fact that there can be no officer, either *de jure* or *de facto,* if there be no office to fill. As the act attempting to create the office of commissioner never became a law, the office never came into existence. Some persons pretended that they held the office, but the law never recognized their pretensions, nor did the Supreme Court of the State. Whenever such pretensions were considered in that court, they were declared to be without any legal foundation, and the commissioners were held to be usurpers.

The doctrine which gives validity to acts of officers *de facto,* whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their
442 title is investigated and determined. *442 It is manifest that endless confusion would result if in every proceeding before such officers their title could be called in question. But the idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an officer who holds no office, and a public office can exist only by force of law. This seems to us so obvious that we should hardly feel called upon to consider any adverse opinion on the subject but for the earnest contention of plaintiff's counsel that such existence is not essential, and that it is sufficient if the office be provided for by any legislative enactment, however invalid. Their position is, that a legislative act, though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. That position, although not stated in this broad form, amounts to nothing else. It is difficult to meet it by any argument beyond this statement. An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

In *Hildreth* v. *M'Intire,* 1 J.J. Marsh. 206, we have a decision from the Court of Appeals of Kentucky which well illustrates this doctrine. The legislature of that State attempted to abolish the Court of Appeals established by her constitution, and create in its stead a new court. Members of the new court were appointed and undertook to exercise judicial functions. They dismissed an appeal because the record was not filed with the person acting as their clerk. A certificate of the dismissal signed by him was received by the lower court, and entered of record, and execution to carry into effect the original decree was ordered to issue. To reverse this order an appeal was taken to the constitutional Court of Appeals. The question was whether the court below erred in obeying the mandate of the members of the new court, and its solution depended upon another, whether they were judges of the Court of Appeals and the person acting as their clerk was its clerk. The court said: "Although they assumed the
443 functions of judges and clerk, and attempted to act as such, *443 their acts in that character are totally null and void unless they had been regularly appointed under, and according to, the constitution. A *de facto* court of appeals cannot exist under a written constitution which ordains one supreme court, and defines the qualifications and duties of its judges, and prescribes the mode of appointing them. There cannot be more than one court of appeals in Kentucky as long as the constitution shall exist; and that must necessarily be a court `*de jure.*' When the government is entirely revolutionized, and all its departments usurped by force, or the voice of a majority, then prudence recommends and necessity enforces obedience to the authority of

those who may act as the public functionaries, and in such a case the acts of a *de facto* executive, a *de facto* judiciary, and a *de facto* legislature must be recognized as valid. But this is required by political necessity. There is no government in action except the government *de facto*, because all the attributes of sovereignty have, by usurpation, been transferred from those who had been legally invested with them, to others who, sustained by a power above the forms of law, claim to act, and do act, in their stead. But when the constitution or form of government remains unaltered and supreme, there can be no *de facto* department, or *de facto* office. The acts of the incumbents of such departments or office cannot be enforced conformably to the constitution, and can be regarded as valid only when the government is overturned. When there is a constitutional executive and legislature, there cannot be any other than a constitutional judiciary. Without a total revolution there can be no such political solecism in Kentucky as a `*de facto'* court of appeals. There can be no such court whilst the constitution has life and power. There has been none such. There might be under our constitution, as there have been, `*de facto*' officers. But there never was and never can be, under the present constitution, a `*de facto'* office." And the court held that the gentlemen who acted as judges of the legislative tribunal were not incumbents of *de jure* or *de facto* offices, nor were they *de facto* officers of *de jure* offices, and the order below was reversed.

444 In some respects the case at bar resembles this one from Kentucky. *444 Under the constitution of Tennessee there was but one **county** court. That was composed of the justices of the **county** elected in their respective districts. The commissioners appointed under the act of March 9, 1867, by the governor were not such justices, and could not hold such court, any more than the legislative tribunal of Kentucky could hold the Court of Appeals of that State. In ***Shelby County*** v. *Butterworth,* from the opinion in which we have already quoted, Chief Justice Nicholson, speaking of the claim that Barbour Lewis, the President of the Board of **County** Commissioners, was a *de facto* officer, after referring to the decisions of the Supreme Court of the State holding that the board of commissioners was an illegal and unconstitutional body, said: "This left the organization of the **county** court in its former integrity, with its officers entitled to their offices and creating no vacancy to be filled by the illegal action under the act of 1867. It follows that Barbour Lewis could not be a *de facto* officer, as there was no legal board of which he could be president, and as there was no vacancy in the legal organization. The warrants issued by him show the character in which he was acting, and repel the presumption that he was a *de facto* officer. He could be under the circumstances, as we can judicially know from the law and pleadings in the case, nothing but a usurper. There must be a legal office in existence, which is being improperly held, to give to the acts of such incumbent the validity of an officer *de facto."*

Numerous cases are cited in which expressions are used which, read apart from the facts of the cases, seemingly give support to the position of counsel. But, when read in connection with the facts, they will be seen to apply only to the invalidity, irregularity, or unconstitutionality of the mode by which the party was appointed or elected to a legally existing office. None of them sanctions the doctrine that there can be a *de facto* office under a constitutional government, and that the acts of the incumbent are entitled to consideration as valid acts of a *de facto* officer. Where an office exists under the law, it matters not how the appointment of
445 the incumbent is made, so far as the validity of his acts are concerned. It is *445 enough that he is clothed with the insignia of the office, and exercises its powers and functions. As said by Mr. Justice Manning, of the Supreme Court of Michigan, in *Carleton* v. *The People*, 10 Mich. 250, 259, "where there is no office there can be no officer *de facto,* for the reason that there can be none *de jure.* The **county** offices existed by virtue of the constitution the moment the new **county** was organized. No act of legislation was necessary for that purpose. And all that is required when there is an office to make an officer *de facto,* is that the individual claiming the office is in possession of it, performing its duties, and claiming to be such officer under color of an election or appointment, as the case may be. It is not necessary his election or appointment should be valid, for that would make him an officer *de jure.* The official acts of such persons are recognized as valid on grounds of public policy, and for the protection of those having official business to transact."

The case of *The State* v. *Carroll,* 38 Conn. 449, decided by the Supreme Court of Connecticut, upon which special reliance is placed by counsel, and which is mentioned with

strong commendation as a landmark of the law, in no way militates against the doctrine we have declared, but is in harmony with it. That case was this: The constitution of Connecticut provided that all judges should be elected by its general assembly. An act of the legislature authorized the clerk of a city court, in case of the sickness or absence of its judge, to appoint a justice of the peace to hold the court during his temporary sickness or absence. A justice of the peace having thus been called in and having acted, a question arose whether the judgments rendered by him were valid. The court held that whether the law was constitutional or not, he was an officer *de facto,* and, as such, his acts were valid. The opinion of Chief Justice Butler is an elaborate and admirable statement of the law, with a review of the English and American cases, on the validity of the acts of *de facto* officers, however illegal the mode of their appointment. It criticises the language of some cases that the officer must act under color of authority conferred by a person having power, or *prima facie* power, to appoint or elect in the particular case; and it thus defines an officer *de facto:*

446 *446 "An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office are exercised:

"First. Without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be.

"Second. Under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent, requirement, or condition, as to take an oath, give a bond, or the like.

"Third. Under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public.

"Fourth. Under color of an election or an appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such."

Of the great number of cases cited by the Chief Justice none recognizes such a thing as a *de facto* office, or speaks of a person as a *de facto* officer, except when he is the incumbent of a *de jure* office. The fourth head refers not to the unconstitutionality of the act creating the office, but to the unconstitutionality of the act by which the officer is appointed to an office legally existing. That such was the meaning of the Chief Justice is apparent from the cases cited by him in support of the last position, to some of which reference will be made. One of them, *Taylor* v. *Skrine,* 3 Brevard, 516, arose in South Carolina in 1815. By an act of that State of 1799, the governor was authorized to appoint and commission some fit and proper person to sit as judge in case any of the judges on the circuit should happen to be sick, or become unable to hold the court in his circuit. A presiding judge of the court was thus
447 appointed by the governor. Subsequently the act was declared to *447 be unconstitutional, and the question arose whether the acts of the judge were necessarily void. It was held that he was a judge *de facto* and acting under color of legal authority, and that as such his acts were valid. Here the judge was appointed to fill an existing office, the duties of which the legal incumbent was temporarily incapable of discharging. Another case is *Cocke* v. *Halsey,* in 16 Pet. 71. It there appeared that, by the constitution of Mississippi, the judges and clerks of probate were elected by the people. The legislature provided by law that, in case of the disability of the clerk, the court might appoint one. An elected clerk having left the State for an indefinite period, the judge appointed another to serve during his absence. The law authorizing the appointment was declared unconstitutional, but the acts of the clerk were deemed valid as those of an officer *de facto.* Here the office was an existing one created by law.

To *Carleton* v. *The People,* 10 Mich. 250, we have already referred. By the constitution of Michigan the laws of the legislature took effect ninety days after their passage. The legislature on the 4th of February passed an act creating a new **county**, and authorized the election of **county** officers in April following. The officers were elected within the ninety days, that is,

before the act took effect, and they subsequently acted as such officers. The validity of their acts was questioned on the ground that there was at the time no law that authorized the election, but the officers were existing by the constitution, and as they subsequently entered upon the duties of those offices, it was held that they were officers *de facto.*

In *Clark* v. *Commonwealth,* from the Supreme Court of Pennsylvania, 29 Penn. St. 129, the question related only to the title of the officer. The constitution of that State provided for a division of the State into judicial districts, and for the election of the presiding judge of the **county** court for each district by the people thereof. The legislature passed a law transferring a **county** from one judicial district to another during the term for which the judge of the district had been elected, and whilst presiding judge of the district to which the **county** was thus
448 transferred he held court, at which a prisoner was convicted *448 of murder. It was contended that the act of the legislature was equivalent to an appointment of a judge for that **county**, and, therefore, unconstitutional. The Supreme Court held that, admitting the law to be unconstitutional, the judge was an officer *de facto,* and that the prisoner could not be heard to deny it. Here, also, the office was one created by law, and the only question was as to the constitutionality of the law authorizing the judge to exercise it.

It is evident, from a consideration of these cases, that the learned Chief Justice, in *State* v. *Carroll,* had reference, in his fourth subdivision, as we have said, to the unconstitutionality of acts appointing the officer, and not of acts creating the office. Other cases cited by counsel will show a similar view.

In *Brown* v. *O'Connell,* 36 Conn. 432, the constitution of the State provided that the judges of the courts should be appointed by the general assembly. An act of the legislature established a police court in the city of Hartford, and provided for the appointment of judges of the court by the common council. It was held that the judge could be appointed only by the general assembly, and to that extent the act was unconstitutional. There was no question as to the validity of the act, so far as it established a police court, and the appointee of the common council was held to be a judge *de facto.*

The case of *Blackburn* v. *The State,* 3 Head, 690, only goes to show that the illegality of an appointment to a judicial office does not affect the validity of the acts of the judge. The constitution of Tennessee requires a judge to be thirty years of age. A judge under that age having been appointed, it was held that he could be removed by a proper proceeding, but until that was done his acts were binding.

In *Fowler* v. *Beebe,* 9 Mass. 231, the legislature passed an act erecting the **county** of Hampden, and provided that the law should take effect from the 1st of August next ensuing. Before that date the governor, with the advice and consent of the then council, commissioned a person as sheriff of the **county**. There was no such office at the time his commission was issued, but when the law went into effect he acted under his commission. It was only the case
449 of a premature appointment; *449 and it was held that he was an officer *de facto,* and that the legality of his commission could not be collaterally questioned.

None of the cases cited militates against the doctrine that, for the existence of a *de facto* officer, there must be an office *de jure,* although there may be loose expressions in some of the opinions, not called for by the facts, seemingly against this view. Where no office legally exists, the pretended officer is merely a usurper, to whose acts no validity can be attached; and such, in our judgment, was the position of the commissioners of **Shelby County** who undertook to act as the **county** court, which could be constitutionally held only by justices of the peace. Their right to discharge the duties of justices of the peace was never recognized by the justices, but from the outset was resisted by legal proceedings, which terminated in an adjudication that they were usurpers, clothed with no authority or official function

450 It remains to consider whether the action of the commissioners in subscribing for stock of the Mississippi River Railroad Company and issuing the bonds, of which those in suit are a part, being originally invalid, was afterwards ratified by the **county**. The **County** Court, consisting of the justices of the peace, elected in their respective districts, alone had power to make a subscription and issue bonds. The sixth section of the act of February 25, 1867, to which the

bonds on their face refer, provides: "That the **County** Court of any **county** through which the line of the Mississippi River Railroad is proposed to run, a majority of the justices in commission at the time concurring, may make a corporate or **county** subscription to the capital stock of said railroad company, of an amount not exceeding two-thirds the estimated cost of grading the road-bed through the **county** and preparing the same for the iron rails; the said cost to be verified by the sworn statement of the president or chief engineer of said company. And after such subscription shall have been entered upon the books of the railroad company, either by the chairman of the **county** court, or by any other member of the court appointed therefor, the court shall proceed, without further reference or delay, to levy an *450 assessment on all the taxable property within the **county** sufficient to pay said subscription; and the same shall be payable in three equal annual instalments, commencing with the fiscal year in which said subscription shall be made. And it shall be lawful for **county** courts making subscriptions as herein provided, to issue short bonds to the railroad company, in anticipation of the collection of the annual levies, if thereby construction of the work may be facilitated. Statutes of 1866-1867, ch. 48, § 6, p. 131.

On the 5th of the following November the legislature passed an act declaring: "That the subscription authorized in said sixth section to be made to the capital stock of the Mississippi River Railroad Company, by the counties along the line of said railroad, may be made at any monthly term of the **county** courts of said counties, or at any special term of said courts: *Provided,* that a majority of all the justices in commission in the counties respectively shall be present when any such subscription is made; and *provided further,* that a majority of those present shall concur therein." Private Acts, 1867-1868, ch. 6, § 1, page 5.

Neither of these acts, as counsel observe, recognizes or in any way refers to the **county** commissioners, though the last act was passed eight months after the act creating the board of commissioners for **Shelby County**. Both provide that the subscription may be made by the **county** court, but upon the condition that a majority of all the justices in commission shall be present and a majority of those present shall concur therein.

The **county** court met on the 15th of November, 1869, for the first time after the passage of the act of March 9, 1867, and assumed its legitimate functions as the governing agency of the **county**. On the 11th of April, 1870, it again met and established the rate of taxation for the Mississippi River Railroad bonds at twenty cents on each one hundred dollars' worth of taxable property. At its meeting on the 16th of that month it ordered that the tax for those bonds should be ten cents on each one hundred dollars' worth of property. At the meeting on the 11th there were twenty two justices of the peace present, of whom eighteen voted for the
451 tax levy, and on the 16th only *451 twelve justices were present. There were in the **county** at that time forty five justices in commission. There were no other meetings of the **county** court until after May 5, 1870, on which day the new constitution of Tennessee went into effect, which declares that, "The credit of no **county**, city, or town shall be given or loaned to or in aid of any person, company, association or corporation, except upon an election to be first held by the qualified voters of such **county**, city, or town, and the assent of three-fourths of the votes cast at said election. Nor shall any **county**, city, or town become a stockholder with others in any company, association or corporation, except upon a like election and the assent of a like majority."

452 By this provision of the constitution the **county** court, as thus seen, was shorn of any power to order a subscription to stock of any railroad company without the previous assent of three-fourths of the voters of the **county** cast at an election held by its qualified voters, and, of course, it could not afterwards, without such assent, give validity to a subscription previously made by the commissioners. It could not ratify the acts of an unauthorized body. To ratify is to give validity to the act of another, and implies that the person or body ratifying has at the time power to do the act ratified. As we said in *Marsh* v. *Fulton* ***County***, 10 Wall. 676, 684, where it was contended, as in this case, that certain bonds of that **county**, issued without authority, were ratified by various acts of its supervisors: "A ratification is, in its effect upon the act of an agent, equivalent to the possession by him of a previous authority. It operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally. It follows that a ratification can only be made when the party ratifying possesses the

power to perform the act ratified. The supervisors possessed no authority to make the subscription or issue the bonds in the first instance without the previous sanction of the qualified voters of the **county**. The supervisors in that particular were the mere agents of the **county**. They could not, therefore, ratify a subscription without a vote of the **county**, because they could not make a subscription in the first instance without such authorization. It would be absurd to say that *452 they could without such vote, by simple expressions of approval, or in some other indirect way, give validity to acts, when they were directly in terms prohibited by statute from doing those acts until after such vote was had. That would be equivalent to saying that an agent, not having the power to do a particular act for his principal, could give validity to such act by its indirect recognition." 10 Wall. 676, 684. See also ***County*** *of Daviess v. Dickinson,* 117 U.S. 657; *McCracken* v. *City of San Francisco,* 16 Cal. 591, 623.

No election was held by the voters of **Shelby County** with reference to the subscription for stock of the Mississippi River Railroad Company after the new constitution went into effect. No subsequent proceedings, resolutions, or expressions of approval of the **county** court with reference to the subscription made by the **county** commissioners, or to the bonds issued by them, could supersede the necessity of such an election. Without this sanction the **county** court could, in no manner, ratify the unauthorized act, nor could it accomplish that result by acts which would estop it from asserting that no such election was had. The requirement of the law could not, in this indirect way, be evaded.

The case of *Aspinwall* v. *Commissioners of Daviess* ***County***, 22 How. 364, is directly in point on this subject. There the charter of the Ohio and Mississippi Railroad Company, created by the legislature of Indiana in 1848, as amended in 1849, authorized the commissioners of a **county**, through which the road passed, to subscribe for stock and issue bonds, provided a majority of the qualified voters of the **county** voted on the first of March, 1849, that this should be done. The election was held on that day, and a majority of the voters voted that a subscription should be made. In September, 1852, the board of commissioners, pursuant to the acts and election, subscribed for 600 shares of the stock of the railroad company, amounting to $30,000, and in payment of it issued thirty bonds of $1000 each, signed and sealed by the president of the board and attested by the auditor of the **county**, and delivered the same to the company. These bonds drew interest at the rate of six per cent. per annum,
453 for which coupons were attached. *453 The plaintiffs became the holders of sixty of these coupons, and upon them the suit was brought against the commissioners of the **county**. After the subscription was voted, but before it was made or the bonds issued, the new constitution of Indiana went into effect, which contained the following provision: "No **county** shall subscribe for stock in any incorporated company unless the same be paid for at the time of such subscription, nor shall any **county** loan its credit to any incorporated company, nor borrow money for the purpose of taking stock in any such company." Art. 10, section 6. This provision was set up against the validity of the bonds and coupons; and the question arose whether, under the charter of the company and its amendment, the right to the **county** subscription became so vested in the company as to exclude the operation of the new constitution. The court held that the provisions of the charter authorizing the commissioners to subscribe conferred a power upon a public corporation, which could be modified, changed, enlarged, or restrained by the legislature; that by voting for the subscription no contract was created which prevented the application of the new constitution; that the mere vote to subscribe did not of itself form a contract with the company within the protection of the Federal Constitution; that until the subscription was actually made no contract was executed; and that the bonds, being issued in violation of the new constitution of the State, were void. That constitution withdrew from the **county** commissioners all authority to make a subscription for the stock of an incorporated company, except in the manner and under the circumstances prescribed by that instrument, even though a vote for such subscription had been previously had, and a majority of the voters had voted for it. The doctrine of this case was reaffirmed in *Wadsworth* v. *Supervisors,* 102 U.S. 534.

It follows that no ratification of the subscription to the Mississippi River Railroad Company, or of the bonds issued for its payment, could be made by the **county** court subsequently to the new constitution of Tennessee, without the previous assent of three-fourths of the voters of the **county**, which has never been given.

454 *454 The question recurs whether any ratification can be inferred from the action of the **County** Court on the 11th and 16th of April, 1870, which was had before that Constitution took effect. At the meeting of the court on those days a rate of tax was established to be levied for the payment of the bonds, but it appears from its records that on both days less than a majority of the justices of the **county** were present; and the **County** Court under those circumstances could not even directly have authorized the subscription. The levy of a tax for the payment of the bonds, when a less number of justices were present than would have been necessary to order a subscription, could not operate as a ratification of a void subscription.

It is unnecessary to pursue this subject further. We are satisfied that none of the positions taken by the plaintiff can be sustained. The original invalidity of the acts of the commissioners has never been subsequently cured. It may be, as alleged, that the stock of the railroad company, for which they subscribed, is still held by the **county**. If so, the **county** may, by proper proceedings, be required to surrender it to the company, or to pay its value; for, independently of all restrictions upon municipal corporations, there is a rule of justice that must control them as it controls individuals. If they obtain the property of others without right, they must return it to the true owners, or pay for its value. But questions of that nature do not arise in this case. Here it is simply a question as to the validity of the bonds in suit, and as that cannot be sustained, the judgment below must be

Affirmed.

[*] This case does not appear to be reported. A copy of the opinion was furnished the court by counsel.

The Papers of William Woods Holden

• Volume I •

1841-1868

Horace W. Raper
Editor

Thornton W. Mitchell
Associate Editor

Raleigh
Division of Archives and History
North Carolina Department of Cultural Resources
2000

Jonathan Worth to Holden A&H:GP

State of North Carolina
Executive Department
Raleigh, July 1st, 1868

Gov. W. W. Holden
Raleigh, N.C.

Sir:—

Yesterday morning I was verbally notified by Chief Justice Pearson[1] that, in obedience to a telegram from Genl. Canby,[2] he would to-day, at 10 O'Clock A.M., administer to you the oaths required, preliminary to your entering upon the discharge of the duties of *Civil Governor* of the State; and that, therefore, you would demand possession of my office.

I intimated to the Judge my opinion that such proceeding was premature even under the reconstruction legislation of Congress, and that I should probably decline to surrender the office to you.

At sundown, yesterday evening, I received from Col. Williams,[3] commandant of this Military Post, an extract from the general orders, No. 120, of General Canby, as follows:–

Headquarters 2nd Military District.
Charleston, S.C., June 30th, 1868.
General Orders,
No. 120.

(Extract)

"To facilitate the organization of the new state governments, the following appointments are made. To be governor of North Carolina, W. W. Holden, Governor elect, vice, Jonathan Worth removed. To be Lieutenant Governor of North Carolina, Tod R. Caldwell, Lieutenant Governor elect, to fill an original vacancy. To take effect July 1st 1868, on the meeting of the General assembly of North Carolina."

I do not recognize the validity of the late election under which you, and those co-operating with you, claim to be invested with the civil government of the State. You have no evidence of your election, save the certificate of a Major General of the United States army. I regard all of you as, in effect, appointees of the Military power of the United States—and not as "deriving your powers from the consent of those you claim to govern." Knowing, however, that you are backed by Military force here, which I could not resist, if I would, I do not deem it necessary to offer a futile opposition, but vacate the office without the ceremony of actual eviction, offering no further opportunity than this my protest. I would submit to actual

expulsion in order to bring before the Supreme Court of the United States the question as to the constitutionality of the legislation under which you claim to be the rightful Governor of this State, if the past action of that tribunal furnished any hope of a speedy trial. I surrender the office to you under what I deem military duress, without stopping, as the occasion would well justify, to comment upon the singular co-incidence, that the present state government is surrendered, as *without legality*, to him whose own official sanction, but three years ago, declared it *valid*.

I am, very Respectfully
Jonathan Worth
Governor of North Carolina.

[1] Richmond Mumford Pearson.
[2] Major General Edward Richard Sprigg Canby.
[3] George Angustus Williams, New York; 1852, graduate U.S. Military Academy; captain, 1861; brevet lieutenant colonel, 1863; commanded Raleigh military post; retired, 1870. Heitman, *Historical Register and Dictionary of the United States Army*, s.v. "Williams, George Augustus."

TELEGRAM *Ed. R. S. Canby to Holden* A&H:GP

Charleston, July 3, 1868

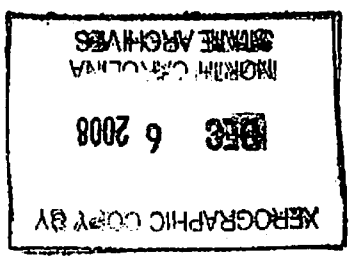
His Excellency
W. W. Holden, Govr. N.C.
Raleigh, N.C.

Your telegram announcing the ratification of the Constitutional Amendment[1] by the Legislature of No Ca has been recd., and instructions will be sent to-day to the Military Commanders in No Carolina to abstain from the exercise of any authority under the Reconstruction laws, except to close up unfinished business, and not to interfere in any civil matters unless the execution of the laws of June 25/68,should be obstructed by unlawful or forcible opposition to the inauguration of the new State Govt.

The RRd appoinments made by Gov. Worth have been annulled.

Ed. R. S. Canby

[1] The General Assembly ratified the 14th Amendment to the U.S. Constitution by a vote of 34 to 2 in the state Senate and 82 to 19 in the state House of Representatives.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NORTH CAROLINA
STATE ARCHIVES

STATE OF NORTH CAROLINA

EXECUTIVE DEPARTMENT,

Raleigh July 1st 1868.

Gov. W. W. Holden

Raleigh, N. C.

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"Head Quarters 2nd Military District
Charleston, S. C. June 30th 1868.

Genl. Orders
No. 120 (Extract)

To facilitate the organization of the new State governments, the following appointments are made. To be Governor of North Carolina W. W. Holden, Provisional duty, vice, Jonathan Worth removed. To be Lieutenant-Governor of North Carolina Lieut. R. Caldwell, Lieutenant Provisional duty, to fill an original vacancy. To take effect July 1st 1868, or the meeting of the General Assembly of North Carolina."

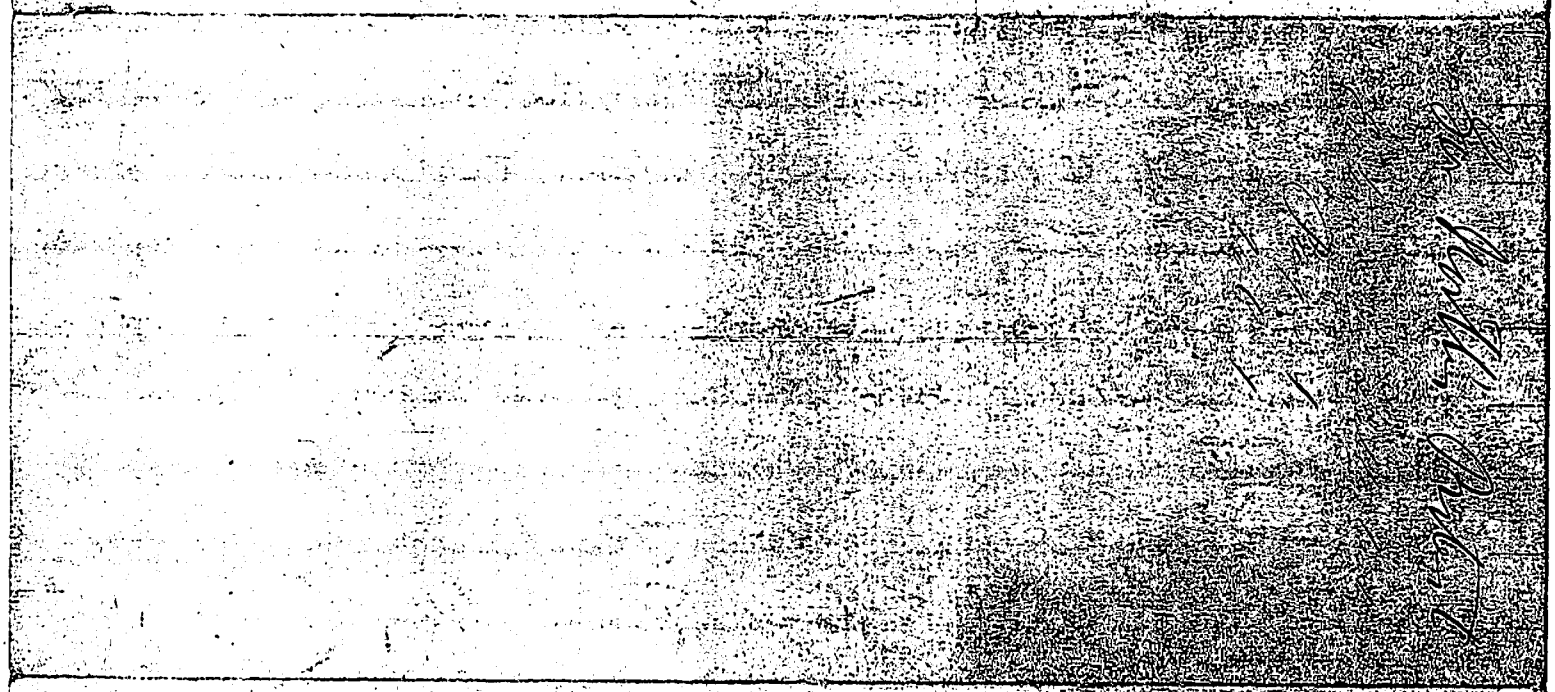
I do not recognize the validity of the late election under which you, and those co-operating with you, claim to be invested with the civil government of the State. You have no evidence of your election, save the certificate of a Major General of the United States Army. I regard all of you as, in effect, appointees of the Military power of the United States — and not as "deriving your powers from the consent of those you claim to govern." Knowing, however, that you are backed by military force here, which I could not resist, if I would, I do not deem it necessary to offer a futile opposition, but vacate the offices without the ceremo-

ing of actual eviction, offering no further opposition than this my protest. I would submit to actual expulsion in order to bring before the Supreme Court of the United States the question as to the constitutionality of the legislation under which you claim to be the rightful Governor of the State, if the past action of that tribunal furnished any hope of a speedy trial. I commend this Office to your candid, what I deem military duty, without stopping, as the occasion would well justify, to comment upon the singular coincidence that the present State government is surrendered, as without legality, to him whose own official sanction, but three years ago, declared it valid.

I am, Very Respectfully

Jonathan Worth

Governor of North Carolina.



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STATE ARCHIVES.

RALEIGH, NORTH CAROLINA CHIEF, ARCHIVES AND RECORDS SECTION

December 6, 2008 Debra A K Blake

238 S.E.2d 497 (1977)
293 N.C. 486

STATE of North Carolina
v.
David Owen BATDORF.

No. 34.

Supreme Court of North Carolina.

November 11, 1977.

501 *501 Rufus L. Edmisten, Atty. Gen. by J. Michael Carpenter, Associate Atty., Raleigh, for the State of North Carolina.

David J. Turlington, Jr., Clinton, for defendant-appellant.

502 *502 HUSKINS, Justice:

Defendant contends there was insufficient evidence to show (1) that the murder with which he is charged was committed in North Carolina so as to confer jurisdiction on the courts of this State and (2) that the crime was committed in Sampson County so as to fix venue in that county. Denial of his motions challenging both jurisdiction and venue constitutes his first assignment of error.

This Court has traditionally regarded a challenge to jurisdiction as an affirmative defense with the burden of persuasion on the defendant. *State v. Golden,* 203 N.C. 440, 166 S.E. 311 (1932); *State v. Davis,* 203 N.C. 13, 164 S.E. 737, *cert. denied,* 287 U.S. 649, 53 S.Ct. 95, 77 L.Ed. 561 (1932); *State v. Long,* 143 N.C. 670, 57 S.E. 349 (1907); *State v. Barrington,* 141 N.C. 820, 53 S.E. 663 (1906); *State v. Blackley,* 138 N.C. 620, 50 S.E. 310 (1905).

The majority of states, however, require the state to prove beyond a reasonable doubt that its courts have jurisdiction in a criminal case. See Annot., 67 A.L.R.3d 988, 1004 (1975); *State v. Wardenburg,* 261 Iowa 1395, 1401-02, 158 N.W.2d 147, 151 (1968), a case dealing with venue which necessarily entails a resolution of jurisdiction, and cases therein cited. For reasons which follow, we think North Carolina should adopt the majority rule.

We have recognized from earliest times that the criminal jurisdiction of our courts is territorially restricted. *State v. Brown,* 2 N.C. 100 (1794); *State v. Knight,* 1 N.C. 143 (1799); *State v. Cutshall,* 110 N.C. 538, 15 S.E. 261 (1892); *State v. Jones,* 227 N.C. 94, 40 S.E.2d 700 (1946). A defendant's contention that this State lacks jurisdiction may be an affirmative defense in that it presents, in the words of Justice Barnhill in *State v. Davis,* 214 N.C. 787, 793, 1 S.E.2d 104, 108 (1939), a matter "beyond the essentials of the legal definition of the offense itself." Jurisdictional issues, however, relate to the authority of a tribunal to adjudicate the questions it is called upon to decide. When jurisdiction is challenged, the defendant is contesting the very power of this State to try him. We are of the view that a question as basic as jurisdiction is not an "independent, distinct, substantive matter of exemption, immunity or defense" (*State v. Davis, supra*) and ought not to be regarded as an affirmative defense on which the defendant must bear the burden of proof. Rather, jurisdiction is a matter which, *when contested,* should be proven by the prosecution as a prerequisite to the authority of the

court to enter judgment.

Moreover, problems akin to double jeopardy are involved. The Full Faith and Credit Clause, U.S.Const. art. IV, § 1, does not require one state to accept the judicial determinations of a sister state as to which possesses jurisdiction in a given case. *Thompson v. Whitman,* 85 U.S. (18 Wall.) 457, 21 L.Ed. 897 (1873). *See also* *State v. Baldwin,* 305 A.2d 555 (Me.1973); *Frances Hosiery Mills, Inc. v. Burlington Industries, Inc.,* 285 N.C. 344, 204 S.E.2d 834 (1974). If different states could successively try an accused for equivalent criminal offenses arising out of the same conduct, the spirit, if not the letter, of the provisions against double jeopardy would be violated. *Fox v. Ohio,* 46 U.S. (5 How.) 410, 435, 12 L.Ed. 213, 224 (1847) (dissenting opinion); *State v. Brown, supra. See* *Green v. United States,* 355 U.S. 184, 187-88, 78 S.Ct. 221, 223, 2 L.Ed.2d 199, 204 (1957); *State v. Knight, supra.* It seems appropriate, therefore, that when jurisdiction is challenged the State should bear the burden of showing the authority of its trial courts to proceed to judgment. By placing upon the State the burden of proving beyond a reasonable doubt that the crime with which an accused is charged was committed in North Carolina, we minimize the possibility that a defendant will be tried here for a crime actually committed elsewhere. By so doing we enhance the prospect that sister states will give full faith and credit to our decisions respecting criminal jurisdiction even though such deference is not constitutionally required. *See* *State v. Baldwin, supra.* This is most desirable. For these reasons we hold that when jurisdiction is challenged, as here, the
503 State must carry the *503 burden and show beyond a reasonable doubt that North Carolina has jurisdiction to try the accused. Our former cases holding that a challenge to the jurisdiction is an affirmative defense with the burden of persuasion on the accused are no longer authoritative.

In the present case Judge Webb properly placed the burden of proof and instructed the jury that unless the State had satisfied it beyond a reasonable doubt that the killing of Leroy West occurred in North Carolina, a verdict of not guilty should be returned. While the court should have instructed the jury, if not so satisfied, to return a special verdict indicating lack of jurisdiction, the instruction given was favorable to defendant and affords him no just grounds for complaint.

Defendant argues, however, that the State's evidence on the question of jurisdiction was insufficient to carry the case to the jury. Therefore, he contends the court erred in denying his pretrial motion for dismissal and his motion for nonsuit at the close of all the evidence. For reasons which follow we hold these motions were properly denied.

A valid bill of indictment, regular on its face, was returned against defendant by the Sampson County Grand Jury. The murder weapon was concealed by defendant in North Carolina and was recovered in North Carolina. The victim's body was found in North Carolina. Materials with which the victim's body was trussed and weighted came from the North Carolina home of defendant's girl friend. These undisputed facts make out a prima facie showing of jurisdiction sufficient to carry the question to the jury and permit the jury to infer that the killing took place in North Carolina. *See, e.g., People v. Peete,* 54 Cal. App. 333, 202 P. 51 (1921); *Breeding v. State,* 220 Md. 193, 151 A.2d 743 (1959); *Commonwealth v. Knowlton,* 265 Mass. 382, 163 N.E. 251 (1928); *Commonwealth v. Costley,* 118 Mass. 1 (1875); *State v. Fabian,* 263 So.2d 773 (Miss.1972).

Even if *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), and *Mullaney v. Wilbur,* 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), include within their uncertain ambit the requirement that a state's jurisdiction to try a criminal defendant be proved beyond a reasonable doubt, permitting the jury to infer from the prima facie showing that the killing took place within North Carolina does not offend the Due Process Clause—the "rational connection" between the evidence offered and the inference which the jury was permitted to draw is sufficiently strong to meet due process standards. *See* *Mullaney v. Wilbur,* 421 U.S. at 702, n. 31, 95 S.Ct. 1881; *Barnes v. United States,* 412 U.S. 837, 845-46, nn. 9-11, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973), and cases there cited. *See also* *United States v. Jones,* 508 F.2d 1271 (4th Cir. 1975), *cert. denied,* 421 U.S. 950, 95 S.Ct. 1684, 44 L.Ed.2d 105.

Defendant's contention that the evidence was insufficient to fix venue in Sampson County is

likewise without merit. Former G.S. 15-134 (repealed effective 1 July 1975) provided that all offenses were deemed to have been committed in the county alleged in the indictment unless defendant denied same by plea in abatement and indicated by affidavit the proper county for trial of the charges against him. The statute did not state which party had the burden of proof if such plea were filed. "At common law, the burden of proof was upon the State to prove that the offense occurred in the county named in the bill of indictment. *State v. Oliver,* 186 N.C. 329, 119 S.E. 370." *State v. Overman,* 269 N.C. 453, 153 S.E.2d 44 (1967). The purpose of former G.S. 15-134 was to forestall the possibility that a criminal offender would escape punishment merely because of uncertainty as to the county in which the crime was committed. *State v. Mitchell,* 83 N.C. 674 (1880); *State v. Overman, supra.*

Former G.S. 15-134 has been replaced by G.S. 15A-135 which deletes the requirement that a defendant contesting venue execute an affidavit setting forth the proper venue and replaces the plea in abatement by "a motion to dismiss" for improper venue under G.S. 15A-952. The
504 new statute, *504 like the old, is silent concerning the burden of proof. Hence, the common law controls and the burden of proof is upon the State to show that the offense occurred in the county named in the bill of indictment. *State v. Miller,* 288 N.C. 582, 220 S.E.2d 326 (1975). Venue need not be shown beyond a reasonable doubt since it does not affect the question of a defendant's guilt or the power of the court to try him. Proof of venue by a preponderance of the evidence is sufficient. This accords with the rule in many states. See Annot., 67 A.L.R.3d 988 at 1000 (1975), and cases there cited from sixteen states and from seven federal circuit courts.

Here, the bill of indictment alleges that defendant committed the offense in Sampson County. The body of Leroy West was discovered in Sampson County. That evidence makes a prima facie showing that Sampson County is the proper venue. *See United States v. Rees,* 193 F.Supp. 849 (D.C. Md.1961); *People v. Peete, supra; Breeding v. State, supra; Commonwealth v. Knowlton, supra; Commonwealth v. Costley, supra; People v. Sparks,* 53 Mich.App. 452, 220 N.W.2d 153 (1974); *Sanders v. State,* 286 So.2d 825 (Miss.1973); *State v. Fabian, supra; Hawkins v. State,* 60 Neb. 380, 83 N.W. 198 (1900); *State v. Coolidge,* 109 N.H. 403, 260 A.2d 547 (1969), *reversed on other grounds,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *McGlocklin v. State,* 516 P.2d 1357 (Okl.Cr.App.1973). Upon such prima facie showing defendant must go forward with evidence sufficient to rebut the inferences arising therefrom. He remains silent at his own risk. Since defendant's rebuttal evidence points to no particular place beyond the boundaries of Sampson County as the scene of the crime, we hold that the State's evidence was sufficient to support the conclusion that the offense occurred in Sampson County and to fix venue in Sampson County. Defendant's motion to dismiss for improper venue was properly denied. His first assignment of error is overruled.

Defendant's remaining assignments concern alleged inadequacies in the charge to the jury. He contends Judge Webb failed to instruct that in order to convict defendant the jury must be satisfied beyond a reasonable doubt that the killing occurred in North Carolina and that the burden was on the prosecution to prove that fact. This contention is puzzling. The court instructed the jury at length that unless the prosecution had satisfied it beyond a reasonable doubt that the killing occurred in North Carolina, it should return a verdict of not guilty. This charge was reiterated near the end of the judge's instructions. As noted above, a correct instruction would have required the jury, if not so satisfied, to return a special verdict indicating lack of jurisdiction *because a court with no jurisdiction could neither acquit nor convict.* Even so, Judge Webb's instruction was favorable to defendant and adequately guaranteed him the right to have the facts determinative of jurisdiction found beyond a reasonable doubt by a jury of his peers.

Finally, defendant assigns as error the court's charge with respect to permissible inferences arising from the discovery of the corpse in Sampson County. Defendant argues that Judge Webb failed to instruct the jury that the inference arising from the discovery of the body in North Carolina is rebuttable and failed to require the jury to consider the evidence of both the State and defendant in its determination of where the killing occurred.

The court charged the jury as follows, the challenged portion being in parentheses:

> "Now, (I charge you ladies and gentlemen, if you are satisfied from the evidence beyond a reasonable doubt that the body was found in North Carolina, that is some evidence from which you may conclude that the killing occurred in North Carolina.)
>
> However, you are not compelled to do so. That is evidence which you will take into account along with all other evidence in determining whether you are satisfied beyond a reasonable doubt that this killing occurred in North Carolina."

We hold this instruction was entirely proper. The assignment of error based thereon is overruled.

505 *505 For the reasons given, the verdict and judgment must be upheld.

NO ERROR.

94 Cal.App.2d 751 (1949)

LEWIS ANDREW STUCK, Appellant, v. BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA et al., Respondents.

Civ. No. 14132.

California Court of Appeals. First Dist., Div. One.

Nov. 23, 1949.

Richard M. Lyman, Jr., Myron Harris and William H. Older for Appellant.

Fred N. Howser, Attorney General, and J. Albert Hutchinson, Deputy Attorney General, for Respondents.

WARD, J.

In July, 1918, the petitioner and appellant, Lewis Andrew **Stuck**, was granted a license to practice medicine and surgery in the State of California. On the 12th day of May, 1948, an accusation against him containing four counts of alleged unprofessional conduct was filed with
754 the Board of **Medical Examiners** of this state. Counts numbered two and *754 three were dismissed by the board and therefore do not merit consideration. Dr. **Stuck** was found guilty on counts one and four and his license to practice medicine in the State of California was revoked.

The first count in substance alleged that Dr. **Stuck** aided and abetted Samuel N. Stern, an unlicensed person, "in the practice of medicine and surgery ... and the diagnosis of the conditions of human beings, as the same are defined" in the Business and Professions Code. Thereinafter the place, the dates, the names of eight or ten women, the physical condition and the "transaction" or diagnosis made by Samuel N. Stern relative to each woman are set forth in detail.

The fourth count charges that Dr. **Stuck** offered "to procure an abortion upon the persons of divers women" and that such abortions "were not then and there necessary to preserve the lives of the ... women." Six names and the dates of the commission of the alleged acts constituting unprofessional conduct are thereupon set forth.

If the evidence is sufficient to sustain any one of the designated charges of aiding or abetting or the agreement or offer to procure a criminal abortion (Bus. & Prof. Code, 2377, 2378, 2392; Pen. Code, 274), the action of the State Board of **Medical Examiners** in revoking the license of Dr. **Stuck** must be upheld (2360).

755 [1] One of the board's findings is not specifically attacked. Petitioner fails to point out wherein the finding may be considered erroneous. With reference to a similar situation in regard to a demurrer, in Trabing v. California Navigation & Improvement Co., 121 Cal. 137, at page 139 [53 P. 644], the court stated: "In appellant's brief only the special demurrer is considered, and we shall therefore assume the sufficiency of the complaint as against a general demurrer; ..."

Also, in Universal Insurance Co., v. Manhattan Motor Line, Inc., 82 Cal.App.2d 425, at page 428 [186 P.2d 437], it was declared by this court: "The second and third causes of action are not argued, although the court found contrary to the contentions of plaintiff on all counts. Plaintiff states that of the three counts contained in the complaint 'the most important is the first, and it is to this count that the evidence was principally directed.' ... There does not appear to be any argument or further reference to the subject matter in counts two and three. (See Rules on Appeal, rules 13 and 15(a).) In view of this circumstance, any claimed erroneous matter in connection with *755 the last two counts may be deemed to have been waived. (Romero v. Letts, 7 Cal.2d 503 [61 P.2d 449]; County of Humboldt v. Kay, 57 Cal.App.2d 115 [134 P.2d 501].)" (See 2 Cal.Jur. 728.) The finding herein may be accepted as true. It is stated as follows: "Samuel N. Stern at all times hereinafter mentioned possessed no license, certificate, or authority to practice medicine or surgery or any other healing art or to engage in the diagnosis of the conditions of human beings and the treatment of the sick and afflicted as the same are defined in the Business and Professions Code of the State of California, or otherwise."

In 1945, the Government Code provided for the acquisition of jurisdiction by a state board upon the service of an accusation (11505) plus a notice of defense that might be filed by the accused within 15 days after such service upon him (11506). The "notice of defense ... may (1) Request a hearing; (2) Object to the accusation upon the ground that it does not state acts or omissions upon which the agency may proceed; (3) Object to the form of the accusation on the ground that it is so indefinite or uncertain that he can not identify the transaction or prepare his defense; (4) Admit the accusation in whole or in part; (5) Present new matter by way of defense." (1945 Supp., 11506, subd. (a).) In the present matter a hearing was requested by appellant to permit him to present his "defense to the charges contained in said accusation."

[2] Assuming that subdivision (a)(2) of Government Code, section 11506, may be considered to mean a general objection--the question of the board's jurisdiction over the subject matter--that question may be raised at any time during the pendency of the proceeding before the board, the superior court or an appellate court. [3] The answer to such an objection, so far as the facts of this case may be concerned, is found in Business and Professions Code, division 2, chapter 5, articles 1 to 16, inclusive. In brief, the board has power over the subject matter, though such question could be raised for the first time on appeal. (Emery v. Pacific Employers Ins. Co., 8 Cal.2d 663 [67 P.2d 1046].) [4] However, as the board is a tribunal of special jurisdiction the accusation should set forth its jurisdiction. The accusation in this proceeding sets forth facts showing the board's jurisdiction over the subject matter and the person of Dr. **Stuck**. [5] In addition, Dr. **Stuck** submitted himself to the jurisdiction of the
756 board, *756 which is permitted if the forum has jurisdiction of the subject matter. (7 Cal.Jur. 17, p. 598.)

[6] Subdivision (a)(3) of Government Code, section 11506, permitting an objection to the form of the accusation on the ground that it is indefinite or uncertain, provides for a ground similar to that which may be raised on special demurrer before the board or the superior court. In the event that such an objection is meritorious the agency, in this instance the Board of **Medical Examiners**, may file or permit the filing of an amended or supplemental accusation. (11507.) Unless an objection is taken as provided in subdivision (a)(3), that is, to the form of the accusation, "all objections to the form of the accusation shall be deemed waived." (11506, subd. (b).) At this point it may be well to state that the decision in Reardon v. City of Daly City, 71 Cal.App.2d 759 [163 P.2d 462], cited by the board on this appeal, is not in point. In the Reardon case it was held that in a mandamus proceeding to restore a party to a public office the right to a public trial may be waived. It was there stated that rights might be waived the same as in a civil case. Nothing in that case is suggestive of the right of a party to waive jurisdiction over the subject matter.

757 [7] Petitioner appellant contends that the accusation is fatally defective as a matter of law in that there is no allegation therein that appellant "knew or had any information" that "Stern was an unlicensed physician" or that he "owned, controlled, operated, conducted or was in any way connected with an establishment located at 330-15th Street, Oakland, California." Count one alleges that Dr. **Stuck** aided and abetted Mr. Stern, an unlicensed person, in the practice of medicine and surgery upon certain named human beings on certain dates at an

establishment therein designated. There is no allegation that Stern owned, controlled or directed any others in the conduct of the designated office. Such allegation would have been surplusage, as under the facts set forth it was not pertinent whether Stern owned the premises or the paraphernalia contained therein. The facts of Bley v. Board of Dental **Examiners**, 120 Cal.App. 426 [7 P.2d 1053], on account of a different background are not in point on this particular issue. (See 1 Cal.Jur. 10-yr. Supp. [1942 Pocket Part], Administrative Law, 13, p. 34, and cited cases.) The word "abet" not only means assistance or aid but "includes knowledge of the wrongful purpose of the perpetrator." (7 Cal.Jur. 889, 1 C.J.S. 306, n. 6.) By the allegations of *757 count one the accused was informed not only of the kind of acts he aided and abetted, but in explicit detail, all of which resulted, as alleged, in Dr. **Stuck** being guilty of unprofessional conduct in the practice of medicine and surgery. (See Smulson v. Board of Dental **Examiners**, 47 Cal.App.2d 584 [118 P.2d 483]; Bley v. Board of Dental **Examiners**, supra.)

There is a further objection to the sufficiency of the accusation in that "There is no allegation in the accusation in Count 1 that Stern, an unlicensed person, made a vaginal examination or gave a diagnosis of pregnancy on the persons named, wherein Stern was alleged to have been aided and abetted by appellant." Appellant is mistaken. In count one the names of the women involved, the type of examination, the diagnosis and subsequent treatment or operation are set forth in tabulated form. For instance, with respect to the first woman named in the accusation it is alleged that on July 30, 1946, a "Vaginal Examination and diagnosis of pregnancy" was made, and on August 1, 1946, an "Abortion by dilation and curretage" was performed. The same method of alleging the details relative to each named woman is followed throughout.

[8] One more objection made by appellant may be noted as follows: "Referring to Count 4 of the pleadings we find that appellant is charged with offering to procure an abortion. Yet, in the findings of the Board relating to this count, the Board found the appellant guilty of agreeing or offering to procure an abortion. Such a finding as to agreeing or offering is fatal to the judgment of the Board ..." Without attempting to distinguish the finely spun difference between agreeing and offering, as used in the findings, each of such terms may be said to mean that Dr. **Stuck** volunteered assistance in the commission of an abortion. However, the point is trivial.

[9] It appears that a criminal charge pending in Alameda County, involving some of the same principals and at least similar facts, was dismissed. The dismissal of a criminal charge involving charges similar to those that appear in the accusation has no direct bearing on the action of the board in revoking Dr. **Stuck's** license. As stated in Bold v. Board of **Medical Examiners**, 135 Cal.App. 29, at pages 34-35 [26 P.2d 707]: "We think it is clear ... that proceedings before the Board of **Medical Examiners**, instead of being criminal in character,
758 are designed, rather, to protect the public by *758 eliminating from the ranks of practitioners those who are found by members of their own profession to be dishonest, immoral or disreputable. As was said in the Matter of Newell Smith, 10 Wend. (N.Y.) 449, quoted by the learned trial judge, in his memorandum decision upon the writ of certiorari: 'The trial and acquittal of the defendant upon the indictment for producing the abortion was no bar to this proceeding; they are entirely distinct and independent proceedings, having different objects and results in view; the one having regard to the general welfare and criminal justice of the state; the other simply and exclusively to the respectability and character of the **medical** profession, and the consequences connected with or necessarily flowing from it.' "

759 [10] That Samuel N. Stern practiced medicine without a license and performed illegal abortions may be accepted as a proven fact. Appellant relies upon the claim that he did not know Mr. Stern and had not had any dealings with Stern directly. Two other licensed physicians and surgeons charged with aiding and abetting Stern in the practice of medicine and surgery were tried by the board jointly with Dr. **Stuck**. The theory of the attorney general is that the three accused were conspirators with Stern in practicing medicine without a license or in the performance of abortions. The Business and Professions Code provides that abetting the violation of or entering into a conspiracy to violate a provision of the chapter covering the practice of medicine constitutes unprofessional conduct. (Ch. 5, 2378.) However, the original accusation against Dr. **Stuck** does not charge a conspiracy but is limited to the charge of

aiding and abetting. Conspirators and abettors are classified as principals. (Pen. Code, 31.) The board found that Dr. **Stuck** was an abettor. The superior court made the same finding. This court, therefore, will disregard any reference to the conspiracy theory and eliminate from consideration all evidence directed to the charge of unprofessional conduct against either of the two licensed physicians, Dr. Stock or Dr. Boge, who were charged with unprofessional conduct and tried jointly with Dr. **Stuck**. There may have been some connection between Dr. Stock and Mr. Stern, or Dr. Boge and Mr. Stern, but from the evidence presented herein there was nothing in common between either Dr. Stock or Dr. Boge personally in connection with the accusation against Dr. **Stuck**. However, it is reasonable to conclude that, irrespective of evidence directed against Dr. Stock or Dr. Boge, the board and the reviewing court were justified in the *759 findings made against Dr. **Stuck**. As the record does not indicate that Dr. **Stuck** was in any way prejudiced by the procedure adopted and that the judgment of revocation of Dr. **Stuck's** license was not a miscarriage of justice (Cal. Const., art. VI, 4 1/2), this court may proceed to a consideration of the sufficiency of the evidence.

[11] The narration of a single tale of the alleged transactions on which the accusation was based demonstrates the propriety of the board's and the court's findings. The testimony of one of the women named in the accusation is substantially as follows: The witness met Dr. **Stuck** for the first time in August, 1946, when she called at his office in the Latham Square Building, Oakland, California. On presentation of the evidence it was here stipulated that the witness identified Dr. **Stuck**. Upon entering the reception room of his office, the location of which she had ascertained from the building directory, she waited for a period and Dr. **Stuck** appeared. He invited her to come into a private office, whereupon she told him that she was pregnant and had come to him as she had heard that he might help her. Dr. **Stuck** "said no" but gave her a slip of paper, indicating an address for her to write down-- 330-15th Street, Oakland--where she was to go for the help she desired. He made no examination, asked no history of her condition, nor was any fee discussed. The next day, the 15th of August, the witness went to the address given her by Dr. **Stuck** and on entering the building she was met in the waiting room by a woman whom she described as appearing to be a nurse. The nurse took the witness into an inner office where they had some conversation as to the purpose of her visit, and when the witness mentioned she had come from Dr. **Stuck**, the nurse "called the doctor in." He proceeded to ask the witness some questions as to her condition, after which he made a vaginal examination and indicated that for a fee of $300 he "would perform a curettement." She made an appointment for the operation to take place at the same office on the following day. When she returned the next day she saw and talked to the same woman nurse and the same man, and paid to him the $300. Thereupon she was taken into another room, "sort of an operating room," and in the presence of the nurse the curettement was performed. The witness stated that she was conscious during the operation, that the pain experienced "was kind of general" but felt as though it were being performed "by scraping" in
760 the region of her *760 uterus. The "scraping effect" was detected by the patient "Both by feeling it and sounds"--she "could hear it." Toward the end of the operation she felt "a cramp-like pain" and when the operation was concluded she went into a small room in the office quarters where she "laid down for a while." On being questioned as to whether since that date she had given birth to a child, the witness replied in the negative.

The facts just related constitute evidence sufficient to sustain the finding of the truth of the accusation in counts one and four. It is not necessary to repeat the story of any of the other women designated in either count. The conclusion reached herein is, in part, based upon code provisions and the views of the Supreme Court of this state. "The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." (Gov. Code (1945 Supp.), 11513(c).) "Where ... the legislature has created a professional board and has conferred upon it power to administer the provisions of a general regulatory plan governing the members of the profession, the overwhelming weight of authority has rejected any analogy which would

require such a board to conduct its proceedings for the revocation of a license in accordance with theories developed in the field of criminal law." (Webster v. Board of Dental **Examiners**, 17 Cal.2d 534, at pp. 537-538 [110 P.2d 992].)

Since 1935 the gist of the offense commonly referred to as abortion is the intent to procure the miscarriage of any woman unless the treatment or operation is necessary to preserve the life of such woman. (Pen. Code, 274; Rinker v. State Board of **Medical Examiners**, 59 Cal.App.2d 222 [138 P.2d 403]; People v. Ramsey, 83 Cal.App.2d 707 [189 P.2d 802].) There is no evidence in this case that either Mr. Stern or Dr. **Stuck** gave any consideration to the necessity of preserving the life of any woman operated upon with intent to procure an abortion. Some of the women named in the accusation were not aborted. In such instances
761 only a vaginal examination was *761 made, which also is part of the practice of medicine and surgery. Stern, an unlicensed person, was guilty of that offense, and Dr. **Stuck** assisted and abetted him by procuring women for examination, diagnosis and treatment.

In each instance of the "transactions" included in the present accusation, Dr. **Stuck** supplied the patient to Stern. The fact that there is no evidence that Dr. **Stuck** knew Stern is of no consequence. Dr. **Stuck** had been told that each of the women was pregnant and desired an abortion. If Dr. **Stuck** sent a woman to an address where he believed an abortion establishment was being conducted, it is immaterial that the abortion was procured by "A" if Dr. **Stuck** intended that the operation should be performed by "B." In the reference by a licensed practitioner of persons for diagnosis or treatment of a condition of the human body, it is incumbent upon the licensed practitioner to protect the prospective patient from an unlicensed practitioner. In the present case, when all the evidence is considered, a reasonable inference may be drawn that Dr. **Stuck** knew that the diagnostician and operator at the 15th Street address was an unlicensed practitioner. On occasions when one or more of the witnesses so referred had asked Dr. **Stuck** whether the person at the given address "was an M.D.," Dr. **Stuck** had replied "he thought so."

[12] When a reasonable inference is based upon definite facts the appellate court will not "substitute its own conclusions for those reached by the trial court." (Webster v. Board of Dental **Examiners**, supra, at p. 540.)

The judgment rendered against the petitioner and appellant is affirmed.

Peters, P. J., and Bray, J., concurred.

315 U.S. 442 (1942)

THOMSON, TRUSTEE OF CHICAGO & NORTHWESTERN RAILWAY CO., ET AL.
v.
GASKILL ET AL.

No. 139.

Supreme Court of United States.

Argued January 7, 8, 1942.
Decided March 2, 1942.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

443 *443 *Messrs. Wymer Dressler* and *W.M. McFarland,* with whom *Messrs. W.C. Fraser, J.M. Grimm, Robert D. Neely, W.T. Faricy,* and *Samuel H. Cady* were on the brief, for petitioners.

Mr. S.L. Winters, with whom *Mr. Nelson C. Pratt* was on the brief, for respondents.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The question for decision is whether the record shows an essential requisite of the jurisdiction of the District Court, namely, that the "matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000." Judicial Code, § 24 (1), 28 U.S.C. § 41 (1). There were other questions which, in the view we take of the case, need not be stated.

444 Respondents, forty-one conductors and brakemen employed by the Chicago & Northwestern Railway Company, *444 brought suit against the railroad and one Kimball, an employee of the road, in the United States District Court for the District of Nebraska. The complaint alleged that the plaintiffs "belong to" the trackage of the railroad called the Nebraska Division; that "the controversy arises over the division of seniority rights between the Nebraska Division to which plaintiffs belong, and the Sioux City Division to which the defendant George Kimball belongs, over the Northwestern road from Omaha, Nebraska to Sioux City, Iowa"; that trains running between these points moved over 31 miles of the Nebraska Division and 70 miles of the Sioux City Division; that prior to May 1, 1930, seniority rights of the plaintiffs were governed by certain contracts "referred to sometimes as the `Schedule of Wages and Rules of Compensation for Conductors and Trainmen,'" which provided that, when trains were operated over more than one seniority district, the "percentage of miles run over each division will govern in assignment to such runs"; that since May 1, 1930, the railroad has assigned all of the work on the Omaha-Sioux City run to the Sioux City Division; that, although the railroad insists that the plaintiffs' seniority rights have been abrogated "by an alleged agreement between the said defendant railroad trainmen, and the order of Railway Conductors," the plaintiffs are not bound by such agreement; and that, on account of the "wrongful deprivation" of their seniority rights, the plaintiffs have been damaged in excess of $3,000.

445 The railroad's answer stated that the plaintiffs had only such seniority rights as were derived from agreements between the railroad and the Order of Railroad Conductors and the Brotherhood of Railroad Trainmen; that the agreements could be abrogated or modified by the railroad and the unions without the consent of the plaintiffs; that the track between Omaha and

Blair, located on the Omaha-Sioux *445 City run, was not part of the Nebraska Division of the railroad; that this trackage is owned by the Chicago, St. P., M. & O. Railway Company; that the only part of the Nebraska Division on the run between Omaha and Sioux City is 7.5 miles long; and that the complaint did not show the existence of the required jurisdictional amount. The District Court ordered the plaintiffs to prove that more than $3,000 was involved, and ten of them submitted affidavits. The substance of each affidavit was that, since May 1, 1930, the Chicago & Northwestern had "operated trains over thirty-one miles of the Nebraska Division in violation of existing contracts," and that, "to the best of [affiant's] knowledge and ability," his loss exceeded $3,000. The defendants submitted affidavits supporting the allegations of their answers. But neither the pleadings nor the affidavits of the parties contain the terms of the various agreements referred to in the complaint and upon which the plaintiffs' action is based.

Upon the defendants' motion to dismiss the cause for want of jurisdiction, the District Court held that the pleadings and supporting affidavits established that "the amount in controversy as to any one plaintiff does not amount to as much as $3,000," and that the nature of the suit was not such as to permit aggregation of the claims of all the plaintiffs. Accordingly, the action was dismissed. The first conclusion of the District Court was not challenged either in the Circuit Court of Appeals or before us. The plaintiffs contended that their claims should be aggregated because "the rights of the plaintiffs are so interlocked and interwoven that the rights of one cannot be determined without the others being parties thereto." The Circuit Court of Appeals reversed the dismissal, holding that the plaintiffs' claims could be aggregated for purposes of determining the value of the matter in controversy. The Court stated that, although
446 it found the complaint *446 "very difficult of analysis," it had construed it "most favorably to the pleader, for the purpose of passing on the sole question of jurisdiction raised on the appeal." 119 F.2d 105, 108. We brought the case here, 314 U.S. 590, in view of the important question affecting the jurisdiction of the district courts.

The policy of the statute conferring diversity jurisdiction upon the district courts calls for its strict construction. *Healy* v. *Ratta,* 292 U.S. 263, 270; and see *Elgin* v. *Marshall,* 106 U.S. 578, 580. Accordingly, if a plaintiff's allegations of jurisdictional facts are challenged by the defendant, the plaintiff bears the burden of supporting the allegations by competent proof. *McNutt* v. *General Motors Acceptance Corp.,* 298 U.S. 178, 188-89; *KVOS, Inc.* v. *Associated Press,* 299 U.S. 269, 278; *Gibbs* v. *Buck,* 307 U.S. 66, 72. The bill must be dismissed if the evidence in the record does not support the allegations as to jurisdictional amount. And our review of the District Court's determination of the jurisdictional amount must be confined to this record. *Henneford* v. *Northern Pacific Ry. Co.,* 303 U.S. 17, 19; *Clark* v. *Paul Gray, Inc.,* 306 U.S. 583, 589-90.

Since the record does not contain the various agreements upon which the plaintiffs' action is founded, there is no basis for determining whether this is a suit "in which several plaintiffs, having a common undivided interest, unite to enforce a single title or right, and in which it is enough that their interests collectively equal the jurisdictional amount," *Lion Bonding Co.* v. *Karatz,* 262 U.S. 77, 86; see *Shields* v. *Thomas,* 17 How. 3, 5; *Troy Bank* v. *White-head & Co.,* 222 U.S. 39, 40-41; *Gibbs* v. *Buck,* 307 U.S. 66, 74-75, or one in which "the matters in dispute are separate and distinct, and are joined in one suit for convenience or economy," *Davis* v. *Schwartz,* 155 U.S. 631, 647; see *Clay* v. *Field,* 138 U.S. 464, 479-80; *Russell* v.
447 *Stansell,* *447 105 U.S. 303. Aggregation of plaintiffs' claim cannot be made merely because the claims are derived from a single instrument, *Pinel* v. *Pinel,* 240 U.S. 594, or because the plaintiffs have a community of interest, *Clark* v. *Paul Gray, Inc.,* 306 U.S. 583. In a diversity litigation the value of the "matter in controversy" is measured not by the monetary result of determining the principle involved, but by its pecuniary consequence to those involved in the litigation. *Wheless* v. *St. Louis,* 180 U.S. 379, 382; *Oliver* v. *Alexander,* 6 Pet. 143, 147.

The record contains no showing of the requisite jurisdictional amount, and the District Court was therefore without jurisdiction. The judgment will be reversed and the cause remanded to the District Court without prejudice to an application for leave to amend the bill of complaint.

Reversed.

MR. JUSTICE ROBERTS took no part in the consideration or decision of this case.

80 U.S. 128 (____)
13 Wall. 128

UNITED STATES
v.
KLEIN

Supreme Court of United States.

134 *134 Mr. Akerman, Attorney-General, Mr. Bristow, Solicitor-General, and Mr. C.H. Hill, Assistant Attorney-General, in support of the motion.

Messrs. Bartley and Casey, P. Phillips, Carlisle, McPherson, and T.D. Lincoln, arguing in this or similar cases against the motion.

136 *136 The CHIEF JUSTICE delivered the opinion of the court.

The general question in this case is whether or not the proviso relating to suits for the proceeds of abandoned and captured property in the Court of Claims, contained in the appropriation act of July 12th, 1870, debars the defendant in error from recovering, as administrator of V.F. Wilson, deceased, the proceeds of certain cotton belonging to the decedent, which came into the possession of the agents of the Treasury Department as captured or abandoned property, and the proceeds of which were paid by them according to law into the Treasury of the **United States**.

The answer to this question requires a consideration of the rights of property, as affected by the late civil war, in the hands of citizens engaged in hostilities against the **United States**.

It may be said in general terms that property in the insurgent **States** may be distributed into four classes:

1st. That which belonged to the hostile organizations or was employed in actual hostilities on land.

2d. That which at sea became lawful subject of capture and prize.

3d. That which became the subject of confiscation.

4th. A peculiar description, known only in the recent war, called captured and abandoned property.

The first of these descriptions of property, like property of other like kind in ordinary international wars, became, wherever taken, ipso facto, the property of the **United States**.[*]

137 The second of these descriptions comprehends ships and vessels with their cargoes belonging to the insurgents or *137 employed in aid of them; but property in these was not changed by capture alone but by regular judicial proceeding and sentence.

Accordingly it was provided in the Abandoned and Captured Property Act of March 12th, 1863,[*] that the property to be collected under it "shall not include any kind or description used

or intended to be used for carrying on war against the **United States**, such as arms, ordnance, ships, steamboats and their furniture, forage, military supplies, or munitions of war."

Almost all the property of the people in the insurgent **States** was included in the third description, for after sixty days from the date of the President's proclamation of July 25th, 1862,[†] all the estates and property of those who did not cease to aid, countenance, and abet the rebellion became liable to seizure and confiscation, and it was made the duty of the President to cause the same to be seized and applied, either specifically or in the proceeds thereof, to the support of the army.[‡] But it is to be observed that tribunals and proceedings were provided, by which alone such property could be condemned, and without which it remained unaffected in the possession of the proprietors.

It is thus seen that, except to property used in actual hostilities, as mentioned in the first section of the act of March 12th, 1863, no titles were divested in the insurgent **States** unless in pursuance of a judgment rendered after due legal proceedings. The government recognized to the fullest extent the humane maxims of the modern law of nations, which exempt private property of non-combatant enemies from capture as booty of war. Even the law of confiscation was sparingly applied. The cases were few indeed in which the property of any not engaged in actual hostilities was subjected to seizure and sale.

The spirit which animated the government received special illustration from the act under which
138 the present case arose. We have called the property taken into the custody *138 of public officers under that act a peculiar species, and it was so. There is, so far as we are aware, no similar legislation mentioned in history.

The act directs the officers of the Treasury Department to take into their possession and make sale of all property abandoned by its owners or captured by the national forces, and to pay the proceeds into the national treasury.

That it was not the intention of Congress that the title to these proceeds should be divested absolutely out of the original owners of the property seems clear upon a comparison of different parts of the act.

We have already seen that those articles which became by the simple fact of capture the property of the captor, as ordnance, munitions of war, and the like, or in which third parties acquired rights which might be made absolute by decree, as ships and other vessels captured as prize, were expressly excepted from the operation of the act; and it is reasonable to infer that it was the purpose of Congress that the proceeds of the property for which the special provision of the act was made should go into the treasury without change of ownership. Certainly such was the intention in respect to the property of loyal men. That the same intention prevailed in regard to the property of owners who, though then hostile, might subsequently become loyal, appears probable from the circumstances that no provision is anywhere made for confiscation of it; while there is no trace in the statute book of intention to divest ownership of private property not excepted from the effect of this act, otherwise than by proceedings for confiscation.

In the case of Padelford we held that the right to the possession of private property was not changed until actual seizure by proper military authority, and that actual seizure by such authority did not divest the title under the provisions of the Abandoned and Captured Property Act. The reasons assigned seem fully to warrant the conclusion. The government constituted itself the trustee for those who were by that act declared entitled to the proceeds of captured
139 and abandoned property, and for those whom it should thereafter *139 recognize as entitled. By the act itself it was provided that any person claiming to have been the owner of such property might prefer his claim to the proceeds thereof, and, on proof that he had never given aid or comfort to the rebellion, receive the amount after deducting expenses.

This language makes the right to the remedy dependent upon proof of loyalty, but implies that there may be proof of ownership without proof of loyalty. The property of the original owner is, in no case, absolutely divested. There is, as we have already observed, no confiscation, but the proceeds of the property have passed into the possession of the government, and

restoration of the property is pledged to none except to those who have continually adhered to the government. Whether restoration will be made to others, or confiscation will be enforced, is left to be determined by considerations of public policy subsequently to be developed.

It is to be observed, however, that the Abandoned and Captured Property Act was approved on the 12th of March, 1863, and on the 17th of July, 1862, Congress had already passed an act — the same which provided for confiscation — which authorized the President, "at any time hereafter, by proclamation, to extend to persons who may have participated in the existing rebellion, in any State or part thereof, pardon and amnesty, with such exceptions and at such time and on such conditions as he may deem expedient for the public welfare." The act of the 12th of March, 1863, provided for the sale of enemies' property collected under the act, and payment of the proceeds into the treasury, and left them there subject to such action as the President might take under the act of the 17th of July, 1862. What was this action?

The suggestion of pardon by Congress, for such it was, rather than authority, remained unacted on for more than a year. At length, however, on the 8th of December, 1863,[*] the President issued a proclamation, in which he referred to that act, and offered a full pardon,
140 with restoration of all *140 rights of property, except as to slaves and property in which rights of third persons had intervened, to all, with some exceptions, who, having been engaged in the rebellion as actual participants, or as aiders or abettors, would take and keep inviolate a prescribed oath. By this oath the person seeking to avail himself of the offered pardon was required to promise that he would thenceforth support the Constitution of the **United States** and the union of the **States** thereunder, and would also abide by and support all acts of Congress and all proclamations of the President in reference to slaves, unless the same should be modified or rendered void by the decision of this court.

In his annual message, transmitted to Congress on the same day, the President said "the Constitution authorizes the Executive to grant or withhold pardon at his own absolute discretion." He asserted his power "to grant it on terms as fully established," and explained the reasons which induced him to require applicants for pardon and restoration of property to take the oath prescribed, in these words: "Laws and proclamations were enacted and put forth for the purpose of aiding in the suppression of the rebellion. To give them their fullest effect there had to be a pledge for their maintenance. In my judgment they have aided, and will further aid, the cause for which they were intended. To now abandon them would not only be to relinquish a lever of power, but would also be a cruel and astounding breach of faith... For these and other reasons it is thought best that support of these measures shall be included in the oath, and it is believed the Executive may lawfully claim it in return for pardon and restoration of forfeited rights, which he has clear constitutional power to withhold altogether or grant upon the terms which he shall deem wisest for the public interest."

The proclamation of pardon, by a qualifying proclamation issued on the 26th of March, 1864,[*]
141 was limited to those persons only who, being yet at large and free from confinement *141 or duress, shall voluntarily come forward and take the said oath with the purpose of restoring peace and establishing the national authority.

On the 29th of May, 1865,[*] amnesty and pardon, with the restoration of the rights of property except as to slaves, and that as to which legal proceedings had been instituted under laws of the **United States**, were again offered to all who had, directly or indirectly, participated in the rebellion, except certain persons included in fourteen classes. All who embraced this offer were required to take and subscribe an oath of like tenor with that required by the first proclamation.

On the 7th of September, 1867,[†] still another proclamation was issued, offering pardon and amnesty, with restoration of property, as before and on the same oath, to all but three excepted classes.

And finally, on the 4th of July, 1868,[‡] a full pardon and amnesty was granted, with some exceptions, and on the 25th of December, 1868,[§] without exception, unconditionally and without reservation, to all who had participated in the rebellion, with restoration of rights of

property as before. No oath was required.

It is true that the section of the act of Congress which purported to authorize the proclamation of pardon and amnesty by the President was repealed on the 21st of January, 1867; but this was after the close of the war, when the act had ceased to be important as an expression of the legislative disposition to carry into effect the clemency of the Executive, and after the decision of this court that the President's power of pardon "is not subject to legislation;" that "Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders."[†] It is not important, therefore, to refer to this repealing act further than to say that it is impossible to believe, while the repealed provision was in full force, and the faith of the
142 legislature *142 as well as the Executive was engaged to the restoration of the rights of property promised by the latter, that the proceeds of property of persons pardoned, which had been paid into the treasury, were to be withheld from them. The repeal of the section in no respect changes the national obligation, for it does not alter at all the operation of the pardon, or reduce in any degree the obligations of Congress under the Constitution to give full effect to it, if necessary, by legislation.

We conclude, therefore, that the title to the proceeds of the property which came to the possession of the government by capture or abandonment, with the exceptions already noticed, was in no case divested out of the original owner. It was for the government itself to determine whether these proceeds should be restored to the owner or not. The promise of the restoration of all rights of property decides that question affirmatively as to all persons who availed themselves of the proffered pardon. It was competent for the President to annex to his offer of pardon any conditions or qualifications he should see fit; but after those conditions and qualifications had been satisfied, the pardon and its connected promises took full effect. The restoration of the proceeds became the absolute right of the persons pardoned, on application within two years from the close of the war. It was, in fact, promised for an equivalent. "Pardon and restoration of political rights" were "in return" for the oath and its fulfillment. To refuse it would be a breach of faith not less "cruel and astounding" than to abandon the freed people whom the Executive had promised to maintain in their freedom.

What, then, was the effect of the provision of the act of 1870[*] upon the right of the owner of the cotton in this case? He had done certain acts which this court[†] has adjudged to be acts in aid of the rebellion; but he abandoned the cotton to the agent of the Treasury Department, by
143 whom it has been sold and the proceeds paid into the Treasury of the *143 **United States**; and he took, and has not violated, the amnesty oath under the President's proclamation. Upon this case the Court of Claims pronounced him entitled to a judgment for the net proceeds in the treasury. This decree was rendered on the 26th of May, 1869; the appeal to this court made on the 3d of June, and was filed here on the 11th of December, 1869.

The judgment of the court in the case of Padelford, which, in its essential features, was the same with this case, was rendered on the 30th of April, 1870. It affirmed the judgment of the Court of Claims in his favor.

Soon afterwards the provision in question was introduced as a proviso to the clause in the general appropriation bill, appropriating a sum of money for the payment of judgments of the Court of Claims, and became a part of the act, with perhaps little consideration in either House of Congress.

144 This proviso declares in substance that no pardon, acceptance, oath, or other act performed in pursuance, or as a condition of pardon, shall be admissible in evidence in support of any claim against the **United States** in the Court of Claims, or to establish the right of any claimant to bring suit in that court; nor, if already put in evidence, shall be used or considered on behalf of the claimant, by said court, or by the appellate court on appeal. Proof of loyalty is required to be made according to the provisions of certain statutes, irrespective of the effect of any executive proclamation, pardon, or amnesty, or act of oblivion; and when judgment has been already rendered on other proof of loyalty, the Supreme Court, on appeal, shall have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction. It is further provided that whenever any pardon, granted to any suitor in the Court of Claims, for the proceeds of captured and abandoned property, shall recite in substance that the person

pardoned took part in the late rebellion, or was guilty of any act of rebellion or disloyalty, and shall have been accepted in writing without express disclaimer and protestation against the fact so recited, such pardon or acceptance shall be taken as conclusive evidence *144 in the Court of Claims, and on appeal, that the claimant did give aid to the rebellion; and on proof of such pardon, or acceptance, which proof may be made summarily on motion or otherwise, the jurisdiction of the court shall cease, and the suit shall be forthwith dismissed.

The substance of this enactment is that an acceptance of a pardon, without disclaimer, shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of the rights conferred by it, both in the Court of Claims and in this court on appeal.

It was urged in argument that the right to sue the government in the Court of Claims is a matter of favor; but this seems not entirely accurate. It is as much the duty of the government as of individuals to fulfil its obligations. Before the establishment of the Court of Claims claimants could only be heard by Congress. That court was established in 1855[*] for the triple purpose of relieving Congress, and of protecting the government by regular investigation, and of benefiting the claimants by affording them a certain mode of examining and adjudicating upon their claims. It was required to hear and determine upon claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the **United States**.[†] Originally it was a court merely in name, for its power extended only to the preparation of bills to be submitted to Congress.

In 1863 the number of judges was increased from three to five, its jurisdiction was enlarged, and, instead of being required to prepare bills for Congress, it was authorized to render final judgment, subject to appeal to this court and to an estimate by the Secretary of the Treasury of the amount required to pay each claimant.[‡] This court being of opinion[§] that the provision for an estimate was inconsistent with the finality essential to judicial decisions, Congress
145 repealed that provision.[†] Since then the Court of Claims has exercised *145 all the functions of a court, and this court has taken full jurisdiction on appeal.[*]

The Court of Claims is thus constituted one of those inferior courts which Congress authorizes, and has jurisdiction of contracts between the government and the citizen, from which appeal regularly lies to this court.

Undoubtedly the legislature has complete control over the organization and existence of that court and may confer or withhold the right of appeal from its decisions. And if this act did nothing more, it would be our duty to give it effect. If it simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make "such exceptions from the appellate jurisdiction" as should seem to it expedient.

But the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have. The proviso declares that pardons shall not be considered by this court on appeal. We had already decided that it was our duty to consider them and give them effect, in cases like the present, as equivalent to proof of loyalty. It provides that whenever it shall appear that any judgment of the Court of Claims shall have been founded on such pardons, without other proof of loyalty, the Supreme Court shall have no further jurisdiction of the case and shall dismiss the same for want of jurisdiction. The proviso further declares that every pardon granted to any suitor in the Court of Claims and reciting that the person pardoned has been guilty of any act of rebellion or disloyalty, shall, if accepted in writing without disclaimer of the fact recited, be taken as conclusive evidence in that court and on appeal, of the act recited; and on proof of pardon or
146 acceptance, summarily made on motion *146 or otherwise, the jurisdiction of the court shall cease and the suit shall be forthwith dismissed.

It is evident from this statement that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to

dismiss the cause for want of jurisdiction.

It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.

The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?

We think not; and thus thinking, we do not at all question what was decided in the case of Pennsylvania v. Wheeling Bridge Company.[*] In that case, after a decree in this court that the bridge, in the then state of the law, was a nuisance and must be abated as such, Congress passed an act legalizing the structure and making it a post-road; and the court, on a motion for process to enforce the decree, held that the bridge had ceased to be a nuisance by the exercise of the constitutional powers of Congress, and denied the motion. No arbitrary rule of
147 decision was prescribed in that case, *147 but the court was left to apply its ordinary rules to the new circumstances created by the act. In the case before us no new circumstances have been created by legislation. But the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary.

We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

It is of vital importance that these powers be kept distinct. The Constitution provides that the judicial power of the **United States** shall be vested in one Supreme Court and such inferior courts as the Congress shall from time to time ordain and establish. The same instrument, in the last clause of the same article, provides that in all cases other than those of original jurisdiction, "the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself.

The rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive.

It is the intention of the Constitution that each of the great co-ordinate departments of the government — the Legislative, the Executive, and the Judicial — shall be, in its sphere, independent of the others. To the executive alone is intrusted the power of pardon; and it is granted without limit. Pardon includes amnesty. It blots out the offence pardoned and removes
148 all its penal consequences. It may be granted on conditions. In these particular pardons, *148 that no doubt might exist as to their character, restoration of property was expressly pledged, and the pardon was granted on condition that the person who availed himself of it should take and keep a prescribed oath.

Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration. The court is required to receive special pardons as evidence of guilt and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority and directs the court to be instrumental to that end.

We think it unnecessary to enlarge. The simplest statement is the best.

We repeat that it is impossible to believe that this provision was not inserted in the appropriation bill through inadvertence; and that we shall not best fulfill the deliberate will of the legislature by DENYING the motion to dismiss and AFFIRMING the judgment of the Court of Claims; which is

ACCORDINGLY DONE.

Mr. Justice MILLER (with whom concurred Mr. Justice BRADLEY), dissenting.

I cannot agree to the opinion of the court just delivered in an important matter; and I regret this the more because I do agree to the proposition that the proviso to the act of July 12th, 1870, is unconstitutional, so far as it attempts to prescribe to the judiciary the effect to be given to an act of pardon or amnesty by the President. This power of pardon is confided to the President by the Constitution, and whatever may be its extent or its limits, the legislative branch of the government cannot impair its force or effect in a judicial proceeding in a constitutional court. But I have not been able to bring my mind to concur in the proposition that, under the act concerning captured and abandoned property, there remains in the former
149 owner, who had given aid and *149 comfort to the rebellion, any interest whatever in the property or its proceeds when it had been sold and paid into the treasury or had been converted to the use of the public under that act. I must construe this act, as all others should be construed, by seeking the intention of its framers, and the intention to restore the proceeds of such property to the loyal citizen, and to transfer it absolutely to the government in the case of those who had given active support to the rebellion, is to me too apparent to be disregarded. In the one case the government is converted into a trustee for the former owner; in the other it appropriates it to its own use as the property of a public enemy captured in war. Can it be inferred from anything found in the statute that Congress intended that this property should ever be restored to the disloyal? I am unable to discern any such intent. But if it did, why was not some provision made by which the title of the government could at some time be made perfect, or that of the owner established? Some judicial proceeding for confiscation would seem to be necessary if there remains in the disloyal owner any right or interest whatever. But there is no such provision, and unless the act intended to forfeit absolutely the right of the disloyal owner, the proceeds remain in a condition where the owner cannot maintain a suit for its recovery, and the **United States** can obtain no perfect title to it.

This statute has recently received the attentive consideration of the court in two reported cases.

In the case of the **United States** v. Anderson,[*] in reference to the relation of the government to the money paid into the treasury under this act, and the difference between the property of the loyal and disloyal owner, the court uses language hardly consistent with the opinion just read. It says that Congress, in a spirit of liberality, constituted the government a trustee for so much of this property as belonged to the faithful Southern people, and while it directed that all of it should be sold and its proceeds paid into the treasury, gave to this class of persons an
150 opportunity to establish *150 their right to the proceeds. Again, it is said, that "the measure, in itself of great beneficence, was practically important only in its application to the loyal Southern people, and sympathy for their situation doubtless prompted Congress to pass it." These views had the unanimous concurrence of the court. If I understand the present opinion, however, it maintains that the government, in taking possession of this property and selling it, became the trustee of all the former owners, whether loyal or disloyal, and holds it for the latter until pardoned by the President, or until Congress orders it to be restored to him.

The other case which I refer to is that of **United States** v. Padelford.[*] In that case the opinion makes a labored and successful effort to show that Padelford, the owner of the property, had secured the benefit of the amnesty proclamation before the property was seized under the same statute we are now considering. And it bases the right of Padelford to recover its proceeds in the treasury on the fact that before the capture his status as a loyal citizen had been restored, and with it all his rights of property, although he had previously given aid and comfort to the rebellion. In this view I concurred with all my brethren. And I hold now that as

long as the possession or title of property remains in the party, the pardon or the amnesty remits all right in the government to forfeit or confiscate it. But where the property has already been seized and sold, and the proceeds paid into the treasury, and it is clear that the statute contemplates no further proceeding as necessary to divest the right of the former owner, the pardon does not and cannot restore that which has thus completely passed away. And if such was not the view of the court when Padelford's case was under consideration I am at a loss to discover a reason for the extended argument in that case, in the opinion of the court, to show that he had availed himself of the amnesty before the seizure of the property. If the views now advanced are sound, it was wholly immaterial whether Padelford was pardoned before or after the seizure.

[*] Halleck's International Law.

[*] 12 Stat. at Large, 820.

[†] Ib. 1266.

[‡] Ib. 590.

[*] 13 Stat. at Large, 737.

[*] 13 Stat. at Large, 741.

[*] 13 Stat. at Large, 758.

[†] 15 Id. 699.

[‡] Ib. 702.

[§] Ib. 711.

[†] 14th January, 1867.

[*] 16 Stat. at Large, 235.

[†] **United States** v. Padelford, 9 Wallace, 531.

[*] 10 Stat. at Large, 612.

[†] Ib.

[‡] 12 Ib. 765.

[§] 2 Wallace, 561.

[†] 14 Stat. at Large, 9.

[*] 14 Stat. at Large, 44, 391, 444.

[*] 18 Howard, 429.

[*] 9 Wallace, 65.

[*] 9 Wallace, 531.

288 F.Supp. 957 (1968)

UNITED STATES of America, Plaintiff,
v.
Manuel Amedee Amy VALENTINE, Felix Juan Feliciano Rosario, Hernando Delgado Acevedo, Digno Rafael Ortiz Rivera, Miguel Quiñones Mendoza, Jose Del Carmen Garcia Miranda, Juan M. Rivera Negron, Ricardo Ivan Zengotita Ramos, Florencio Merced Rosa, Ruben Arcelay Medina and Edwin Feliciano Grafals, Defendants.

Crim. Nos. 6-67, 8-67, 15-67, 16-67, 67-67, 73-67, 74-67, 75-67, 77-67, 80-67, 81-67.

United States District Court D. Puerto Rico.

August 20, 1968.

960 *958 *959 *960 Francisco A. Gil, Jr., **U. S.** Atty., Blas Herrero, Jr., Asst. **U. S.** Atty., San Juan, P. R., Marshall Tamor Golding, Atty., **U. S.** Dept. of Justice, Washington, D. C., for plaintiff.

Marvin Karpatkin, New York City, Roberto Busó Aboy, San Juan, P. R., Rubén Berrios, Rio Piedras, P. R., Luis M. Villaronga, San Juan, P. R., Rabinowitz, Boudin & Standard, New York City and Olaguibeet López Pacheco, Hato Rey, P. R., for defendants.

961 *961 # MEMORANDUM AND ORDER[*]

Defendants herein have been individually indicted for refusing to submit to induction into the armed forces of the United States in violation of 50 U.S.C. App. §§ 454, 462 and Selective Service Regulations, § 1632.14(b) (5).[1] All of them have moved to dismiss their indictments on procedural and substantive grounds, and seven of them have moved in addition for sundry pretrial relief.[2] All cases were consolidated for hearing on the several motions, at which all parties were represented by counsel. Evidence was heard where appropriate, oral argument was had on all motions, and both sides have submitted briefs. For the reasons stated herein, the Court has concluded that all of defendants' motions should be denied. This opinion will serve in place of findings of fact and conclusions of law.

I. PROCEDURAL VALIDITY OF THE INDICTMENT

Defendants attack the procedural validity of their indictments (and of the petit jury array as well) upon three separate grounds. They contest the constitutionality of the statutory requirement that proceedings in this Court be conducted in English,[3] and of the statutory
962 limitation of jury service in this court to *962 those who are literate in and have an adequate knowledge of English.[4] Additionally, they assert that the jury list from which the grand jury was and the petit jury will be drawn was unlawfully compiled and does not constitute a cross-section of the Puerto Rican community.

Their challenge raises interrelated questions the key to the solution of which lies in the

resolution of their attack on 48 U.S.C. § 864. Clearly, if that statute constitutionally requires proceedings in this court to be conducted in English, it is equally constitutional to require adequate comprehension of English as a condition for jury service here; one could hardly serve as a juror if he could not understand the proceedings in court. See Miranda v. United States, 255 F.2d 9, 16-17(C.A.1).[5] And if literacy and competency in English may constitutionally be imposed as qualifications for jury service, the cross-sectional adequacy of the jury list and of the methods by which it was compiled must be judged in that context.

A. *Constitutionality of the English language requirements.*

Defendants question Congress' constitutional authority to require that proceedings in a court which is part of the federal judicial system be conducted in English.[6]

In any other district court, the contention would be too patently frivolous to require an answer. But Puerto Rico is unique among the judicial entities in which United States district courts are located. As the Supreme Court of Puerto Rico recently held, "the vehicle of expression, the
963 language of the Puerto *963 Rican people—an integral part of our origin and our Spanish culture—has been and continues to be the Spanish language." People v. Superior Court, Opinion No. 65-111, June 30, 1965 (unreported), Bar Association slip opinion, p. 6. No other federal district court is located in a state or territory in which the primary language of a majority of the American citizens resident therein is other than English. Indeed, Congress from the beginning has recognized that Puerto Rico is unique, in that it is fully populated by a homogeneous Spanish-speaking people "living in compact and ancient communities, with definitely formed customs and political conceptions" (Balzac v. People of Porto Rico, 258 **U.S.** 298, 310, 42 S.Ct. 343, 347, 66 L.Ed. 627), and hence has never attempted to force English upon the people of this island as the language in which local government proceedings are to be conducted.

It does not follow, however, that because proceedings in local courts are conducted in Spanish, proceedings in this court must also be conducted in that language. This court is not a local court of Puerto Rico. Rather, it is a United States district court, part of the federal judicial system, litigating cases arising under the Constitution and laws of the United States or by reason of diversity of state citizenship. See Balzac v. People of Porto Rico, supra, 258 **U.S.** at 312, 42 S.Ct. 343; Mora v. Mejías, 206 F.2d 377, 382 (C.A.1, 1953); Miranda v. United States, supra, 255 F.2d at 13; United States v. Montañez, 371 F.2d 79, 83-84 (C.A.2, 1967). Hence, the very reasoning which led the Supreme Court of Puerto Rico to conclude that proceedings in the Commonwealth courts need be conducted only in Spanish applies in reverse to justify conducting proceedings in this court in English. Just as Spanish is "the language of the Puerto Rican people" (People v. Superior Court, supra), the United States has from the time of its independence been an English-speaking nation. Although the American population has included occasional enclaves of foreign-speaking peoples, there has never been any tradition of official bilingualism, such as prevails in countries like Canada, Belgium, Switzerland or India. The past history of the United States discloses no more than occasional minor and temporary accommodations to the language preferences of foreign-speaking peoples where they comprised a substantial segment of the original population of newly
964 acquired areas.[7] But no *964 Continental American court, federal or state, has ever conducted its proceedings in any language other than English.[8] Thus, while it was proper for Congress to recognize from the beginning Puerto Rico's uniqueness among newly acquired territories, and not force English here as the official local language (as it could have done before commonwealth status was agreed upon), it is equally proper that this court, being a federal rather than a local court, conduct its proceedings in the English rather than the Spanish language. As the Commonwealth Supreme Court recognized, the language requirements of §§ 864 and 867 "are in agreement with and in line with the tradition that the judicial proceedings throughout the whole federal jurisdiction be conducted in the English language." People v. Superior Court, supra.

965 Indeed, it is difficult to conceive how this court could remain a viable part of the federal judicial system if proceedings here were conducted in Spanish. The basic civil function of federal district court "in offering an opportunity to nonresidents of resorting to a tribunal not subject to

local influence" (see Balzac v. People of Porto Rico, supra, 258 **U.S.** at 312, 42 S.Ct. at 348) would be compromised and unreasonably restricted here, were litigants forced, in order to avail themselves of the facilities of this court, to litigate through interpreters in a language other than English. Similarly, this court's function as the forum in this district for the vindication of federal criminal laws and the resolution of civil controversies to which the United States is a party would be compromised were the Attorney General of the United States unable to appear here personally on the government's behalf unless he were conversant with Spanish, and were he limited by similar considerations in designating a member of his staff to appear. There would also be an anomalous limitation, unique within the federal system, on judges from other districts who could sit here by designation when needed. Moreover, the statutes which this court applies are (except in those instances where commonwealth or foreign statutes are at issue) written in English. The consequent necessity of phrasing an indictment or civil complaint in Spanish upon the basis of a statute written in English would manifestly lend itself to the strong possibility of injustice through distortion of meaning in translation. Similar possibilities of injustice would arise on appeal, where the entire record would have to be translated back into English.[9] Finally, this court, and the attorneys who practice here, would be effectively insulated *965 from the body of law developed throughout the rest of the federal system, since the opinions of all other federal courts and the legislative histories of all federal enactments are published only in English.[10]

These considerations are not counterbalanced by any prejudice to litigants arising from the English language requirements. There is no real risk of litigants being tried by juries unable to understand the evidence since if any veniremen lack sufficient facility with English to render competent jury service, they can be and are eliminated on *voir dire.* No evidence was adduced to show that the *voir dire* process is inadequate in practice for this task.[11] While some of the criminal defendants here are tried in a language they do not understand, the problem is not unique to this district; the situation arises in other districts as well, although concededly not to the same extent as it does here.[12] A defendant's right to a fair trial, however, is personal, not collective; a non-English speaking defendant could not be thought to be the less prejudiced if he is tried in a district where few defendants are in the same situation than if he is tried in a district where many are. It is thus no more of a constitutional violation to try non-English speaking defendants in English in this court than to try other non-English speaking defendants in English in any other federal district court. Moreover, none of the defendants in these cases have attempted a showing of standing to raise the issue by asserting a lack of proficiency in English.

Defendants' main contention is that the English language requirements are unconstitutional because they preclude grand and petit juries drawn from a cross-section of the Puerto Rican community. There is no constitutional requirement, however, that juries be drawn from a cross-section of the *total* population without the imposition of any qualifications.[13] Aliens may be excluded from jury service without constitutional infringement (United States v. Wood, 299 **U.S.** 123, 145, 57 S.Ct. 177, 81 L.Ed. 78), as may minors. George v. United States, 196 F.2d
966 445, 452-454 (C.A.9, 1952), certiorari denied, 344 **U.S.** 843, 73 S.Ct. 58, *966 97 L.Ed. 656. Literacy, residence tenure, and lack of unamnestied felony conviction qualifications are imposed for jury service by 28 U.S.C. § 1861, and no one suggests that they are constitutionally invalid. It has been held that there is nothing in the Constitution which prohibits the legislative limitation of jury service to males (Strauder v. State of West Virginia, 100 **U.S.** 303, 310, 25 L. Ed. 664; see also Hoyt v. State of Florida, 368 **U.S.** 57, 60, 65, 82 S.Ct. 159, 7 L. Ed.2d 118), freeholders and taxpayers (Strauder v. State of West Virginia, supra; Brown v. Allen, 344 **U.S.** 443, 473, 73 S.Ct. 397, 97 L.Ed. 469), and those meeting educational, character, judgment and intelligence qualifications (Strauder v. State of West Virginia, supra; Gibson v. State of Mississippi, 162 **U.S.** 565, 589, 16 S.Ct. 904, 40 L.Ed. 1075; Franklin v. State of South Carolina, 218 **U.S.** 161, 167-168, 30 S.Ct. 640, 54 L.Ed. 980), or which prohibits reasonably imposed occupational exclusions (Rawlins v. State of Georgia, 201 **U.S.** 638, 640, 26 S.Ct. 560, 50 L.Ed. 899) or the use of "blue ribbon" juries. Fay v. People of State of New York, 332 **U.S.** 261, 67 S.Ct. 1613, 91 L.Ed. 2043. Clearly the sanctioning of these qualifications and limitations is irreconcilable with the contention that the Constitution requires that juries be drawn from a cross-section of the total community. Only this term, in

fact, the Supreme Court indicated that jurors who under no circumstances could impose the death penalty may be excluded in capital cases. (Witherspoon v. State of Illinois, 391 **U.S.** 510, 88 S.Ct. 1770, 20 L.Ed.2d 776), with only Mr. Justice Douglas objecting in dissent that the Constitution requires that a jury be "impartially drawn from a cross-section of the community" (391 **U.S.** at 524, 88 S.Ct. at 1778, 20 L.Ed.2d at 786) and hence that such exclusions are constitutionally impermissible. Id. 391 **U.S.** at 531-532, 88 S.Ct. 1770, 20 L.Ed.2d at 788.

What the Constitution does prohibit is the denial to a litigant of a fair trial by an unbiased and impartial tribunal. Brown v. State of New Jersey, 175 **U.S.** 172, 175, 20 S.Ct. 77, 44 L.Ed. 119; Hayes v. State of Missouri, 120 **U.S.** 68, 71, 7 S.Ct. 350, 30 L.Ed. 578; Northern Pacific R. R. Co. v. Herbert, 116 **U.S.** 642, 646, 6 S.Ct. 590, 29 L.Ed. 755. It is upon this basis that the deliberate legislative or administrative exclusion of Negroes from jury service (or the deliberate limitation of members of that race to token representation on jury lists, calculated to minimize the possibility that any of them will actually serve as a juror) is deemed a constitutional violation. Strauder v. State of West Virginia, supra, 100 **U.S.** at 308, 25 L.Ed. 664; Ex parte Virginia, 100 **U.S.** 339, 345, 25 L.Ed. 676; Neal v. State of Delaware, 103 **U.S.** 370, 396, 26 L.Ed. 567. The Supreme Court explained, in establishing the rule against Negro exclusion in *Strauder,* that the denial upon racial grounds of the right to serve as a juror is "a stimulant to that race prejudice which is an impediment to securing to individuals of that race equal justice which the law aims to secure to all others." 100 **U.S.** at 308, 25 L.Ed. 664. More recently, the Court reiterated this rationale, stating that "a Negro who confronts a jury on which no Negro is allowed to sit * * * might very well say that a community which purposely discriminates against all Negroes discriminates against him." Fay v. People of State of New York, supra, 332 **U.S.** at 293, 67 S.Ct. at 1630.

It does not follow, however, that all exclusions can be presumed to prejudice jury fairness. If they could be, aliens could not be tried before juries composed only of citizens, minors could not be tried before juries composed only of adults, non-residents and new residents could not be tried before juries composed only of those with residence tenure, the unlettered could not be tried before juries composed only of those who are literate, and recidivists could not be tried before juries from which those with unamnestied convictions are excluded. As the Supreme Court explained in *Fay,* the presumption that exclusionary practices directed against
967 Negroes "can carry such unjust consequences as to amount *967 to a denial of equal protection or due process of law" (332 **U.S.** at 283, 67 S.Ct. at 1625) draws its weight from "the long history of unhappy relations between the two races". Id. at 282, 67 S.Ct. at 1624; set also Hoyt v. State of Florida, supra, 368 **U.S.** at 68, 82 S.Ct. 159. The special circumstance presented by racial prejudice, and its potentially debilitating impact upon jury fairness, has been in fact so clearly recognized that for almost one hundred years federal legislation has forbidden and penalized the disqualification from federal or state jury service "on account of race, color or previous condition of servitude" of any "citizen possessing all other qualifications which are or may be prescribed by law." Act of March 1, 1875, ch. 114, § 4, 18 Stat. 336, formerly 8 U.S.C. § 44, now 18 U.S.C. § 243. While it is possible for exclusions upon other than racial grounds to affect jury fairness, "one who would have the judiciary intervene on grounds not covered by [18 U.S.C. § 243] must comply with the *exacting* requirements of proving *clearly* that *in his own case* the procedure has gone *so far afield* that its results are a denial of equal protection or due process" (emphasis added). Fay v. People of State of New York, supra, 332 **U.S.** at 283-284, 67 S.Ct. at 1625. Indeed, there have been only two cases in which the Supreme Court has struck down as unconstitutional exclusionary practices directed against other than Negroes.[14] The first was Hernandez v. State of Texas, 347 **U.S.** 475, 74 S.Ct. 667, 98 L.Ed. 866, where both the defendant and the excluded group were persons of Mexican descent and the Court found that such persons occupied a segregated place in the community from which the case arose, similar, if not identical, to the one occupied by Negroes, 347 **U.S.** at 479-480, 74 S.Ct. 667. The second is *Witherspoon,* supra. The jury in that case was entrusted with the duty of recommending death or imprisonment as the penalty, if it returned a guilty verdict, and veniremen were excluded for cause if they merely had reservations about, rather than absolute scruples against, capital punishment. The Court held that a narrow exclusion of those with absolute scruples would have had the reasonable justification of being calculated to produce a jury "simply `neutral'

with respect to penalty," but that the broader exclusion of those with mere reservations lacked this reasonableness and was calculated to produce "a tribunal organized to return a verdict of death." 391 **U.S.** at 520-521, 88 S.Ct. at 1776, 20 L.Ed.2d at 784. But while the Court reversed as to penalty, it affirmed as to guilt because the petitioner failed to substantiate his contention that a jury consisting only of persons with no death reservations is prosecution prone, instead of unbiased on the question of guilt. Id. at 516-518, 88 S.Ct. 1770, 20 L.Ed.2d at 782.

There is nothing in the record before this Court which in any way suggests that the exclusion from jury service in this district of persons not literate in English—which the Court expressly finds to be the necessary consequence of the reasonable requirement that proceedings in this court be conducted in English—operates to deprive the defendants in these consolidated cases—or in any other case—of due process of law. No showing has ever been attempted that Puerto Ricans who are literate in English are prosecution prone, either generally or in regard to the specific offense with which defendants are charged here. There is no showing that any of the defendants are themselves not literate in English, or are members of or associated with any class or group which is precluded from jury service by the English
968 language requirements. *968 And even had such a showing been made, there is no evidence that there exists against any class or group in Puerto Rico the same type of bias or invidious discrimination which has unfortunately existed against Negroes in certain parts of the United States, and which the Supreme Court found in *Hernandez* existed against persons of Mexican descent. The only evidence in the record on the subject of prejudice is the generalized and unspecific testimony of defendants' expert witness that an individual's "perceptions," arising from his socio-economic class, sex, education, or ability to speak English, can affect, without his realizing it, his impartiality as a juror. The Court finds this testimony to be even more "tentative and fragmentary" and "lacking in the sort of factual information that would assist the Court" than was the similar evidence on the subject of prosecution proneness adduced in *Witherspoon.* See 391 **U.S.** at 517 and n. 11 at 518, 88 S.Ct. at 1775, 20 L.Ed.2d at 782.[15]

B. *Validity of Jury Selection Procedures*

Defendants additionally contend that, irrespective of the constitutionality of the English language requirements, the jury list was not compiled in accordance with currently applicable law. A lengthy evidentiary hearing was held on this point, at which both Miss Carmen A. Carreras, the present court clerk, and Miss Mary Aguayo, who was clerk until July, 1964, testified concerning the methods by which the list was compiled. From their testimony, the following facts appear:

969 At the time of the drawing of the grand jury which indicted defendants, the active jury list for this District (using the term "jury list" to mean those names actually in the jury box plus those names held in reserve for inclusion in the jury box when needed) consisted of 853 names. Of that total, somewhat less than 300 names were placed thereon by the Commissioner and Miss Carreras. The remainder (approximately two-thirds of the total) were placed thereon by the Commissioner and Miss Aguayo. The primary method used by Miss Aguayo to obtain names of potential jurors was to write to companies and organizations listed in the yellow pages of the telephone books, requesting that they furnish her with a list of their employees or members who spoke English. Among the organizations canvassed by her were labor unions and women's clubs, and among the companies were the large sugar corporations maintaining plantations in Puerto Rico, and factories, including those which employ primarily women. Questionnaires were then sent to all persons whose names were furnished by these sources. Additionally, Miss Aguayo would ask jurors to give her the names of their wives and daughters, examine the lists of newly naturalized citizens and send them questionnaires, and—in a special effort to obtain jurors from the working class—personally canvass any members of that class, both male and female, whom she encountered and who appeared to possess a knowledge of the English language. She would also ask the latter group of persons to recommend their friends and associates. She found, universally, that the persons whom she personally approached, as well as their friends and associates, knew sufficient English to perform their jobs but not sufficient English to understand proceedings in court. She nevertheless continued these personal efforts until the end of her tenure. The primary method

used by Miss Carreras was to select *969 names from the Polk's Directories for Metropolitan San Juan and Ponce, the so-called "Island" telephone book, which includes towns and cities other than those comprised in the San Juan Metropolitan Area (and, before she obtained copies of the Polk's Directories, the Metropolitan San Juan telephone book), and send questionnaires thereto. She would select a few names from each page, using no systematized formula to determine which names to select. It was her estimate that she had sent out approximately nine hundred questionnaires since becoming clerk.

Miss Carreras was also subjected to an extensive and painstaking examination concerning the determinations made by the Commissioner and herself from the face of returned questionnaires as to qualifications, excuses, etc. From this examination, it appears that she and the Commissioner applied only the statutory qualifications, and did not set any additional standards of their own. All persons who asserted on their questionnaires sufficient knowledge of the English language were accepted as meeting the statutory language requirements. Some individuals who disclaimed ability in English were nevertheless also found qualified (it being left to the Court to make the final determination on *voir dire*) if other information appearing on the questionnaire (such as occupation) made a knowledge of English appear likely. Occupation was considered only to the extent that it indicated that the person returning the questionnaire might know sufficient English despite his disclaimers. Pursuant to the oral instructions of former Judge Ruiz Nazario, all teachers were excused from jury service on the ground of hardship. All other proffered hardship excuses were evaluated by Miss Carreras and the Commissioner on an individual basis. There were only five instances in which an individual (otherwise qualified and not exempt by statute) who did not assert an excuse was not placed on the jury list. Two of the persons involved were teachers, and a third was a croupier who was left off because he worked nights and jury service was thus thought to be a hardship for him. The other two had been convicted of felonies. Miss Carreras did not realize that they were disqualified only if their civil rights had not been restored by pardon or amnesty and hence rejected them without further inquiry.

Defendants do not claim that any cognizable classes or groups qualified for jury service were deliberately excluded, and the Court specifically finds that the jury officials here engaged in no systematic and intentional exclusions, either in their initial selection of the persons to whom questionnaires were to be sent or in their evaluation of returned questionnaires. What defendants—relying primarily upon Rabinowitz v. United States, 366 F.2d 34 (C.A. 5, 1966)—urge instead is that, irrespective of the jury officials' intent, they failed to fulfill their duty of taking affirmative measures to insure that the jury list comprised a fair cross-section of the Puerto Rican community. The proof which they offered, through the testimony and affidavits of Dr. Howard R. Stanton, professor of social planning at the University of Puerto Rico, is that the list does not reflect the Puerto Rican population with statistical accuracy in regard to age, sex, residence and occupation, and more particularly that it contains substantial overrepresentation of members of what they designate as the urban white collar class and a substantial underrepresentation of members of the urban and rural working classes.

Before considering defendants' contention and supporting evidence, it is necessary to note a distinction between a jury challenge which is based upon constitutional grounds and one which invokes a court's supervisory jurisdiction over the administration of justice in federal courts. As set forth earlier in this opinion, the Constitution guarantees no more than the right to a fair trial by an unbiased and impartial tribunal, and hence a litigant raising a constitutional challenge
970 must *970 establish that his right to such has been prejudiced by the exclusion of which he complains. A litigant invoking supervisory jurisdiction, however, need establish only "a departure from the scheme of jury selection which Congress adopted." Ballard v. United States, 329 **U.S.** 187, 193, 67 S.Ct. 261, 264, 91 L.Ed. 181; see also Thiel v. Southern Pacific Company, 328 **U.S.** 217, 222-223, 66 S. Ct. 984, 90 L.Ed. 1181. Thus, in one respect, a "supervisory" challenge is broader than a constitutional one, since a litigant need not show that the alleged exclusion specifically prejudices him; he establishes the necessary prejudice merely by showing that his case had been submitted to a jury which has been convened "in disregard of the prescribed standards of jury selection." Ballard v. United States, supra, 329 **U.S.** at 195, 67 S.Ct. at 265. In another respect, however, it is narrower, since a court may override a statute only on constitutional grounds; it cannot apply its supervisory powers to achieve a result which is contrary to that which Congress has commanded.

Here, Congress has ordained that jurors for this court (as for every other federal court) be selected only from among those who understand and are literate in English. This Court has found that requirement to be constitutional. Defendants are thus left only with a "supervisory" challenge. They therefore cannot complain because the jury list does not reflect a cross-section of the *total* Puerto Rican population, since Congress has entitled them to no more than a jury drawn from that segment of the population which meets the language qualifications. The statistical evidence which they offered, however, did not purport to set forth the age, sex, residence and occupational divisions of the qualified segment of the population, and, in fact, their expert witness acknowledged that no data exists in this regard. Thus, even were they correct in their premise that "the prescribed standards of jury selection" require that statistically accurate cross-sections be achieved in compiling jury lists, their challenge would still fail because they did not demonstrate that the eligible segment of the Puerto Rican population is not represented on this list with statistical accuracy. See United States v. Hunt, 265 F.Supp. 178, 190-191 (W.D. Tex.,1967); United States v. Brown, 281 F.Supp. 31, 37 (E.D.La.,1968).[16]

Defendants, through their expert, did attempt to prove that in any event the list was cross-sectionally defective because ninety percent of the persons on it (and ninety-five percent of the employed persons) were members of the urban white collar class, while that class provides no more than fifty percent of the eligible population. The witness based his conclusion as to the latter figure upon the premise that only fifty percent of those who reported to the census an ability to speak English were members of the white collar class, and that this proportion would not vary significantly no matter what level of English comprehension were used as a standard. The Court finds this testimony unconvincing. The census enumeration includes as English speakers all persons who "reported that they could make themselves understood in English," which is hardly a sufficient level of ability to render adequate service as a juror in trials conducted in that language. The witness' credibility was severely weakened
971 both by his admission that he is not an expert in "levels of *971 adequacy in speaking a foreign language" and by his unwillingness on cross-examination to agree to any feasible definition of the degree of language ability necessary to meet the statutory requirements. Moreover, his testimony did not take literacy into account. Census figures indicate that half the adult population of Puerto Rico is functionally illiterate, even in Spanish.[17] It is obvious that white collar workers, almost without exception, are going to be considerably more than functionally literate. They could hardly hold their positions if they were not. Thus, the fifty percent of the population who are not functionally literate, as well as those additional persons who just barely achieve that status, are going to be found in the urban and rural working classes. While some in those classes may be able to "make themselves understood in English," since those of them who are literate in Spanish comprise only a minority, it follows that those who are literate in English comprise an even smaller minority. This conclusion is fortified by Miss Aguayo's testimony that, in her personal approaches to working class people, she found that without exception they knew only enough English to perform their jobs but not sufficient English to serve as jurors.

The Court of Appeals for this Circuit held in an earlier case involving jury selection procedures in this court that, "although few wage earners are selected for federal jury service, the reason is that few in that class have sufficient knowledge of the English language to meet the statutory requirement for such service." Quiñones v. United States, 161 F.2d 79, 81 (C.A. 1, 1947), certiorari denied, 331 **U.S.** 833, 67 S.Ct. 1513, 91 L.Ed. 1846. There is no credible evidence in the record here to indicate that the situation is any different today.

Moreover, even if defendants had successfully proved that the jury list does not reflect the eligible population in this district with statistical accuracy, their challenge would still not be sustainable. The requirement that juries be "drawn from a cross-section of the community," as the Supreme Court explained in *Thiel,* 328 **U.S.** at 220, 66 S.Ct. at 985:

> * * * does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials *without systematic and intentional exclusion* of any of these groups (emphasis added).

Similarly, in *Ballard* the Court held that it was "the *purposeful and systematic exclusion* of women from the panel" which constituted the "departure from the scheme of jury selection which Congress adopted" (emphasis added). 329 **U.S.** at 193, 67 S.Ct. at 264. The cross-sectional requirement of *Thiel* and *Ballard* has been construed by the Supreme Court, the Court of Appeals for this Circuit, and other circuit and district courts, as extending no further than to forbid systematic and intentional exclusions. Frazier v. United States, 335 **U.S.** 497,
972 504, 69 S.Ct. 201, 93 L.Ed. *972 187; Gorin v. United States, 313 F.2d 641, 644 (C.A. 1, 1963), certiorari denied, 374 **U.S.** 829, 83 S.Ct. 1870, 10 L.Ed.2d 1052; Young v. United States, 94 **U.S.**App.D.C. 54, 212 F.2d 236, 238 (1954), certiorari denied, 347 **U.S.** 1015, 74 S.Ct. 870, 98 L.Ed. 1137; United States v. Clancy, 276 F.2d 617, 632 (C.A. 7, 1960), reversed on other grounds, 365 **U.S.** 312, 81 S.Ct. 645, 5 L.Ed.2d 574; Dow v. Carnegie-Illinois Steel Corporation, 224 F.2d 414, 423, (C.A. 3, 1955), certiorari denied, 350 **U.S.** 971, 76 S.Ct. 442, 100 L.Ed. 842; United States v. Dennis, 183 F.2d 201, 219, 223 (C.A. 2, 1950), affirmed, 341 **U.S.** 494, 71 S.Ct. 857, 95 L.Ed. 1137; United States v. Local 36 of International Fishermen & Allied Workers, 70 F. Supp. 782, 790 (S.D.Cal., 1947), affirmed, 177 F.2d 320 (C.A. 9, 1949), certiorari denied, 339 **U.S.** 947, 70 S.Ct. 801, 94 L.Ed. 1361; United States v. Greenberg, 200 F.Supp. 382, 393 (S.D.N.Y., 1961); United States v. Brandt, 139 F. Supp. 349, 354 (N.D. Ohio, 1955). As one district court explained, "absent intent or design, *even complete and total exclusion* of specific groups, classes, races and areas from the Grand Jury list does not invalidate the Grand Jury" (emphasis added). United States v. Fujimoto, 102 F.Supp. 890, 895 (D.Haw., 1952).

Nor are jury officials presently required to use any particular source to obtain the names of prospective jurors. To the contrary, they are accorded "a wide discretion." United States v. Brandt, supra, 139 F.Supp. at 360; see also United States v. Dennis, supra, 183 F.2d at 217. Defendants' expert witness testified that a better cross-section could have been obtained had Miss Carreras used voter registration lists, utility subscribers' lists, or the random samples already compiled by the commonwealth Departments of Labor or Health, instead of the Polk's Directories and the telephone books. But "[t]he Jury Commissioners in the federal courts are not required either by statute or by judicial decisions to select names of prospective jurors *from any particular list* such as voters, registration or taxpayers lists, as may be required by the laws of some States" (emphasis added). United States v. Frankfeld, 101 F.Supp. 449, 452 (D.Md., 1951). Defendants also complain that Miss Aguayo used a "key man" system, which they contend is unlawful. Technically speaking, she did not. The "key man" system involves the request for *selective* recommendations from the key men, while Miss Aguayo requested to be supplied with lists of *all* English-speaking employees or members by the companies and organizations which she contacted. In any event, use of the system is not *per se* unlawful. Scales v. United States, 367 **U.S.** 203, 259, 81 S.Ct. 1469, 6 L.Ed. 2d 782, affirming 260 F.2d 21, 44-46 (C.A. 4, 1958); United States v. Hoffa, 349 F.2d 20, 29-30 (C.A. 6, 1965), affirmed, 385 **U.S.** 293, 87 S.Ct. 408, 17 L.Ed.2d 374; Padgett v. Buxton-Smith Mercantile Company, 283 F.2d 597, 598 (C.A. 10, 1960), certiorari denied, 365 **U.S.** 828, 81 S.Ct. 713, 5 L.Ed.2d 705; Dow v. Carnegie-Illinois Steel Corporation, supra, 224 F.2d at 427; United States v. Cohen, 275 F.Supp. 724, 736 (D.Md., 1967); United States v. Hunt, supra, 265 F.Supp. at 185. To be sure, the new Jury Selection and Service Act of 1968 (P.L. 90-274, 82 Stat. 53) provides jury officials with specific directions as to the sources they must use to obtain the names of potential jurors and the methods they must follow in abstracting names from those sources, and is intended, among other purposes, to forbid the future use of the "key man" system. See H.Rep.No. 1076, 90th Cong., 2d Sess., p. 4. But the new legislation was enacted precisely because "existing statutory vagueness which is a substantial source of confusion in jury selection systems today" leaves jury officials without directions and free to use any sources and procedures which they deem proper. Id., p. 3, **U.S.** Code Cong. & Admin. News 1968, p. 749; see also S.Rep.No. 891, 90th Cong., 1st Sess., p. 10. Enactment
973 of the new *973 statute, which does not take effect until December 22, 1968, indicates that jury selection procedures in this court (as in many other federal courts) are subject to improvement. Contrary to defendants' assertion, however, it does not at all indicate that the procedures here or elsewhere are unlawful under present law. See United States v. Cohen, supra, 275 F.Supp. at 737 and 739.

Defendants' difficulty is that they erroneously assume the cross-sectional requirement to mean

that a jury list must comprise a statistical cross-section derived from a random sampling, in the sense that sociologists and statisticians use those terms. The law makes no such demand. See United States v. Dennis, supra, 183 F.2d at 224. Courts have been unanimous in holding that proportional representation is neither a necessary nor a proper goal of jury selection. Cassell v. State of Texas, 339 **U.S.** 282, 286, 70 S.Ct. 629, 94 L.Ed. 839; Hoyt v. State of Florida, supra, 368 **U.S.** at 69, 82 S.Ct. 159; Brown v. Allen, supra, 344 **U.S.** at 471, 73 S.Ct. 397; Fay v. People of State of New York, supra, 332 **U.S.** at 291, 67 S.Ct. 1613; Gorin v. United States, supra, 313 F.2d at 644; Chance v. United States, 322 F.2d 201, 204 (C.A. 5, 1963), certiorari denied, 379 **U.S.** 823, 85 S.Ct. 47, 13 L.Ed.2d 34; United States v. Henderson, 298 F.2d 522 (C.A. 7, 1962), certiorari denied, 369 **U.S.** 878, 82 S.Ct. 1150, 8 L.Ed.2d 280; Dow v. Carnegie-Illinois Steel Corporation, supra, 224 F.2d at 428; United States v. Flynn, 216 F.2d 354, 388 (C.A. 2, 1954), certiorari denied, 348 **U.S.** 909, 75 S.Ct. 295, 99 L.Ed. 713; United States v. Dennis, supra, 183 F.2d at 223; United States v. Greenberg, supra, 200 F.Supp. at 392; United States v. Romano, 191 F.Supp. 772, 774-775 (D.C.Conn. 1961); United States v. Foster, 83 F.Supp. 197, 208 (S.D.N.Y., 1949); United States v. Brown, supra, 281 F.Supp. at 38-39; United States v. Brandt, supra, 139 F. Supp. at 354-355; United States v. Fujimoto, supra, 102 F.Supp. at 894. In its most recent word on the subject, the Supreme Court cautioned in Swain v. State of Alabama, 380 **U.S.** 202, 208, 85 S.Ct. 824, 829, 13 L.Ed.2d 759:

> Neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group. "Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation."

Nor will proportional representation or statistically exact random sampling be required by the new jury act. The Senate Committee on the Judiciary has stated that the selection system established by its legislation will "not be entirely random," since "[a]t various points in the process, candidates for jury service may be eliminated if they fall short of the requirements for service specifically enumerated in" the act, and that even the initial selection process which the act provides "does not insist upon randomness in the sense in which that term might be understood by statisticians." S.Rep.No. 891, op. cit. 16, n. 9. Both that committee and the House Committee on the Judiciary have explained that the act does not require the qualified jury wheel (the equivalent of the present jury list) to be comprised of "groups that accurately mirror community makeup." Id. at 17; H.Rep. 1076, op. cit. 5. Thus, even under the new legislation, defendants would not be entitled to the type of jury list which they assert they are entitled to now.

In evaluating the validity of a jury selection procedure it must be kept in mind that a "cross-section," in contemplation of law, and a "cross-section," as the term is used in sociology, are discrete concepts invoked to serve totally dissimilar functions. As the testimony of defendants' expert disclosed, the function of a sociologist is "descriptive"; his need is for a cross-section of the *characteristics* of the community as a corporate entity in order that he may "describe" the
974 proportions in which an unknown characteristic which he wishes *974 to ascertain are distributed. He has no need for a cross-section of the actual individuals composing the community. with their infinite variety of combinations of characteristics, since the data which he seeks concerns the "average" individual but not specific corporeal individuals. The law, however, does not convene juries to conduct surveys and "describe" the community. Its need is to have judgments made on the rights of litigants. These judgments cannot be made by incorporeal "characteristics"; they require specific corporeal individuals, each with his own peculiar combination of characteristics, who made their decision only after they have heard the evidence. A broad cross-section is required as a source for jurors in order that the jury not be "the organ of any special group or class." Glasser v. United States, 315 **U.S.** 60, 86, 62 S.Ct. 457, 472, 86 L.Ed. 680. But since a jury list which comprises an accurate cross-section of all of the corporeal individuals in the community, with all of their permutations of characteristics, is as defendants' expert acknowledged, impossible of attainment (see also Swain v. State of Alabama, supra, 380 **U.S.** at 208, 85 S.Ct. 824; United States v. Brown, supra, 281 F.Supp. at 39; United States v. Hunt, supra, 265 F.Supp. at 197), the only feasible requirement for a legal cross-section is that there be no intentional and premeditated exclusions of any qualified

cognizable segment of the population.

Defendants assert, however, that the jury list here is, in effect, "the organ of [a] special group or class" because it consists almost entirely of members of what they designate as the "urban white collar" class and has few if any representatives of what they claim to be the other three "important" segments into which Puerto Rican society is divided: the urban working class, the coastal sugar plantation workers, and the *jibaros* or mountain farmers. Their contention does not bear scrutiny. Their classifications are based only on occupation, and take no account of other factors, such as actual income, personal history and family background. They include within the "urban white collar class" a wide range of persons, from the wealthy and powerful to the lowly clerk and secretary, or in other words from the upper class to the lower middle class. Indeed, their expert testified that the median annual income of the "class" is approximately $2,200. This attempted grouping thus can not be considered as only a single class for purposes of determining the adequacy of the jury selection process. Compare United States v. Hunt, supra, 265 F.Supp. at 201. On the other hand, their other three asserted "classes" are in fact merely the working class, trifurcated on the basis of the type and locale of work which its members perform. Indeed, the *jibaros* and sugar plantation workers could be further subdivided, based on such factors as residence in coffee growing or tobacco growing areas, employment by government-owned or private-owned corporations, those who own land, sharecrop or are landless, or upon the size of land holdings. Using defendants' approach, the possibilities are virtually limitless for defining a "class" and finding that it lacks representation on the jury list. Compare United States v. Local 36 of International Fishermen & Allied Workers, supra, 70 F.Supp. at 785-790. Nor is defendants' contention any more persuasive on the basis of their assertion that each of their four "classes" are subject to a separate "tradition," so that the jury list is unrepresentative of three of the four "traditions" which influence thinking in Puerto Rico. As appears from their expert's testimony, each individual is unique in respect to the various traditions by which he is influenced, and his current occupation is merely one of many factors in his total environment and history which shape his attitudes. For example, a white collar worker who arose to his present position from a working class start, whose father was originally a *jibaro,* and who has relatives who are sugar
975 plantation workers, would be influenced by *975 the traditions of more than one and may be all four "classes."[18] Thus, while the list may perhaps be deficient in persons who, for the limited purpose of conducting a sociological survey, are *statistically classified* as being subject to the *jibaro,* sugar plantation worker, and urban worker traditions, defendants have failed to establish that *in fact* it is insulated from any of the traditions which influence thinking in Puerto Rico.

The foregoing considerations supporting the lawfulness of the jury selection procedures here are not in any way vitiated by the opinion of the Court of Appeals for the Fifth Circuit in *Rabinowitz*. That court's holding that "[t]he Constitution and laws of the United States place an affirmative duty on the court clerk and the jury commissioner to develop and use a system that will probably result in a fair cross-section of the community being placed on the jury rolls" (366 F.2d at 57) is as far as this Court can ascertain, *sui generis.* It is in clear and direct conflict with the otherwise unanimous rulings, of which note has already been taken, of the Supreme Court and almost every other circuit, including this one, that jury officials are under only the negative duty to practice no intentional discriminations. The case is thus compelling authority only within its own circuit. Compare Pope v. United States, 372 F.2d 710, 724 (C.A. 8, 1967), remanded on other grounds, 392 **U.S.** 651, 88 S.Ct. 2145, 20 L.Ed.2d 1317.

976 A determination of the authoritativeness of the case is unnecessary, however, since it is manifestly inapposite to the facts disclosed in the record here. In *Pope* it was concluded that the case was concerned solely with racial representation on jury lists (372 F.2d at 724), and this Court finds itself in agreement. The Court is impressed with the fact that the government confessed error in *Rabinowitz* to the extent of suggesting that the convictions be reversed because the extreme racial disproportion on the jury list there, combined with the all-white composition of the resultant petit juries, created "a possibility of injustice sufficient to warrant reversal of the trial verdicts." See Supplemental Brief for the United States, Nos. 21256 and 21345, C.A. 5, pp. 40-41. It is also impressed with the fact that the opinion took no notice of a female underrepresentation which the record disclosed was almost as great as the racial one.

See Supplemental Brief for the United States, op. cit. 13, n. 7; see also 366 F.2d at 84 (Bell, J., dissenting). The cases upon which the opinion mainly relied were all concerned with *racial* discrimination in jury selection. See 366 F.2d at 57-58. The conclusion is inescapable that, although the opinion was phrased in terms of the use of "grossly inadequate sources" violating "the statutory scheme" (id. at 60; compare Ballard v. United States, supra, 329 **U.S.** at 193, 67 S.Ct. 261), its real genesis was the constitutional concern for impartial juries. The Court would appear to have concluded that, in parts of the country where racial segregation and its attendant "long history of unhappy relations between the two races" *976 (Fay v. People of State of New York, supra, 332 **U.S.** 282, 67 S.Ct. 1624) traditionally have prevailed, the assurance of fair trials for Negroes and those associated with their endeavors[19] is not adequately served by the mere negative injunction against deliberate discrimination in jury selection; rather, positive efforts to extend an opportunity for jury service to Negroes are required. Two district courts within the circuit appear to have arrived at this same interpretation of the command to which they were put by their court of appeals, and as a consequence have held that it is only in the pursuit of a racial cross-section that affirmative efforts are required. See United States v. Tillman, 272 F. Supp. 908, 913 n. 8 (N.D.Ga., 1967); United States v. Brown, supra, 281 F. Supp. at 37.

It is in any event clear that *Rabinowitz* purported neither to require the use of any particular method of jury selection nor to declare unlawful *per se* the "key man" system which the jury officials there had used. The Court of Appeals in a later decision explicitly stated that it had condemned only the improper use of the otherwise lawful "key man" system. Mobley v. United States, 379 F.2d 768, 773 (C.A. 5, 1967). Nor did the opinion purport to require jury lists which comprise statistical cross-sections of the relevant communities. To the contrary, it quoted, as a "caution," the language from *Swain* advising that proportional representation is both unnecessary and impossible of attainment. 366 F.2d at 59. All that the opinion demanded was affirmative efforts to obtain a fair cross-section. Thus, even were this Court to conclude that *Rabinowitz* is controlling upon it and that the opinion's cross-sectional requirements are not limited to racial groups or other groups similarly subject to community prejudice, defendants' challenge here would still have failed of its proof. An evaluation of the adequacy of efforts to obtain a cross-section requires an analysis of the groups who were extended an opportunity for jury service, and not merely the limited analysis which defendants made of the groups actually represented on the list. United States v. Brown, supra, 281 F.Supp. at 37; compare Billingsley v. Clayton, 359 F.2d 13, 23 (C.A. 5, 1966), certiorari denied, 385 **U.S.** 841, 87 S.Ct. 92, 17 L.Ed.2d 74. Representation on the list itself depends upon factors —e. g., the distribution of those who return their questionnaires, and of those who are unqualified, exempt, or who assert and are entitled to excuses—over which the officials have little effective control. United States v. Brown, supra.

The record here discloses, for example, that Miss Carreras sent out nine hundred questionnaires during her tenure, and yet was able to add only three hundred names to the list. Experience elsewhere shows that a substantially greater proportion of the working class and the less affluent than of the white collar and managerial classes and the more affluent fail to respond to solicitations for jury service, seek to avoid such service, or fail to qualify. Cf. United States v. Flynn, supra, 216 F.2d at 379, 381-383, 386; Billingsley v. Clayton, supra, 359 F.2d at 19-20; United States v. Brown, supra, 281 F.Supp. at 36. So also, the returned questionnaires in the record here disclose that most of those who failed to qualify for jury service because they could not speak or understand English were of the working class, rural residents, or in any event non-residents of San Juan. It is a reasonable assumption that many more persons in those categories who also lack knowledge of English did not bother to return their questionnaires. As far as the record shows, therefore, the persons to whom Miss Carreras sent questionnaires could in fact have comprised an exact cross-section of the total adult population of Puerto Rico; it is only in those who returned their questionnaires and
977 qualified *977 for jury service that such a cross-section is found to be lacking.

To be sure, in *Rabinowitz* the dispositive disproportion was on the jury list itself. The Court, however, found the disproportion to have been caused by a fatal flaw in the methods used by the officials there: in a segregated society, the officials relied almost exclusively upon white key men and instructed them to apply standards of competency—impermissibly higher, in the

court's view, than those required by statute—which tended to minimize their recommendation of Negroes. See 366 F.2d at 41-44, 55; see also Mobley v. United States, supra. No comparable flaw is disclosed in the record here. Miss Carreras used neutral lists, containing the names of men as well as women and working class people as well as of those in white collar or managerial occupations. Miss Aguayo, who compiled two-thirds of the list, solicited names from labor unions and women's clubs (compare United States v. Hunt, supra, 265 F.Supp. at 195; *Rabinowitz* at 366 F.2d 59, n. 61); asked factories and sugar plantations to supply her with the names of their employees, and gave her sources no more than the statutory standard to apply: viz., ability to understand English. In addition, she supplemented this approach, in an affirmative effort to achieve working class representation on the list, with the very type of personal canvass of which the Fifth Circuit approved in *Billingsley.* See 359 F.2d at 19, 23. Thus the officials here had done all that even *Rabinowitz* would require them to do.

Defendants assert, also in reliance upon *Rabinowitz,* an additional ground upon which they claim the jury list was compiled unlawfully: that Miss Carreras and the commissioner exceeded the scope of their statutory discretion and made determinations which were properly the function of the court. More particularly, they complain that the officials made capricious evaluations in determining whether the language requirements were met by potential jurors and whether excuses for hardship should have been granted; that hardship excuses were granted without obtaining information additional to that which appeared on the questionnaires, and that teachers and others were automatically excused despite the lack of a formal order from the Court to that effect. They also cite as specific abuses the exclusion of those convicted of felonies without inquiry as to whether they had been amnestied, as well as the grant of an unsolicited hardship excuse to a croupier.

This branch of defendants' challenge appears to assume that the jury officials have only ministerial functions under the current statutes. The law is otherwise. When the new jury legislation takes effect, the written plan for jury selection which each court must adopt will be required to specify, with supporting findings by the Court, the groups and occupational classes whose members will be either exempt or entitled to be excused upon individual request. Any additional individual exclusions or hardship excuses will be made or granted only by the court after the individuals have been actually summoned for jury service. Under current law, however, the duty of the jury commission "is to invoke its sound judgment and discretion in determining what persons should be called for jury service." United States v. Ware, 237 F.Supp. 849, 851 (D.C.D.C., 1964), affirmed 123 **U.S.**App.D.C. 34, 356 F.2d 787 (1965), certiorari denied, 383 **U.S.** 919, 86 S.Ct. 914, 15 L.Ed.2d 673. Among the determinations within the broad discretion granted to the commission is whether requested hardship excuses should be granted (United States v. Kelly, 349 F.2d 720, 778-779 (C.A.2, 1965), certiorari denied, 384 **U.S.** 947, 86 S.Ct. 1467, 16 L.Ed.2d 544; United States v. Flynn, supra, 216 F.2d at 387) and whether statutory qualifications are met in individual cases. United States v. Flynn, supra; United States v. Henderson, supra, 298 F.2d at 525; see also United States v. Brandt, 139 F.Supp. 362, 365 (N.D.Ohio, 1955). District judges may also direct the commission, as
978 did former Judge Ruiz Nazario of this *978 court, to exclude or excuse occupational groups in the public interest, without the necessity of reducing his direction to a written order. United States v. Van Allen, 208 F.Supp. 331, 337 (S.D.N.Y., 1962), affirmed sub nom. United States v. Kelly, supra; see also United States v. Cohen, supra, 275 F.Supp. at 730. One of the reasons, in fact, for the enactment of the new jury legislation is that current law does not specify "the bases upon which otherwise qualified jurors should be eliminated from jury service." S.Rep. No. 891, op. cit. 10.

For all of their extensive and painstaking examination of Miss Carreras, defendants developed no more than that, in retrospect, there was some inconsistency in the determinations which she and the Commissioner made in individual cases, and that perhaps some persons were left off the list who should have been placed thereon. This showing can hardly be deemed sufficient to overcome the presumption of regularity which attends the decisions and actions of jury officials. See United States v. Austrew, 190 F.Supp. 632, 634 (D.Md., 1961). The most that could be shown was "slight and harmless deviation from the prescribed procedure" which would warrant dismissal of these indictments only if defendants had shown, as they did not, that they were specifically prejudiced thereby. United States v. Brandt, 139 F.Supp. 349, 361

(N.D.Ohio, 1955). While some of the individual rejections reflected in the record may possibly comprise technical irregularities, they would invalidate the jury list only if they evidenced the intentional exclusion of the cognizable group. Ware v. United States, 123 **U.S.** App.D.C. 34, 356 F.2d 787, 790-791 (1965), certiorari denied, 383 **U.S.** 919, 86 S.Ct. 914, 15 L.Ed.2d 673. Clearly they do not. The individuals whose excuses for hardship or illness defendants question were for the most part members of the same white collar and managerial classes of whose preponderance on the jury list defendants complain.[20] While one excused individual was a cane weigher, his case alone can hardly be thought to evidence an intentional exclusion of the *entire* rural working class or a substantial part thereof. It is similarly difficult to construct a theory of purposeful exclusion because one croupier was granted a gratuitous compassionate excuse. And as *Ware* makes plain, Miss Carreras' peremptory rejection of two convicted felons due to misapprehension of the applicable statutory provision does not evidence "purposeful discrimination" (356 F.2d at 790), even if the highly dubious assumption were indulged that amnestied felons constitute a "cognizable group." Id. at 791.

This Court does not read *Rabinowitz* to sustain the proposition that the officials here abused their discretion. The pronouncement in that case that jury officials have no discretion to impose qualifications additional to the statutory ones is directly contrary to such prior authorities as *Henderson, Flynn, Kelly* and *Ware,* and, moreover, commanded the support of only a plurality of the participating judges. See 366 F.2d at 72. Its authority is therefore open to question even within the circuit (see United States v. Hunt, supra, 265 F.Supp. at 185-187), and not compelling without. See Pope v. United States, supra, 372 F. 2d at 723; United States v. Duke, 263 F.Supp. 828, 836 (S.D.Ind., 1967). Moreover, in the opinion of this Court, the pronouncement was inextricably intertwined with the underlying concern of the court of appeals for impartial juries in cases arising out of a racial conflict; the standards used by the
979 jury officials there *979 were condemned because they "eliminated many Negroes otherwise eligible to serve." 366 F.2d at 51. In any event, the condemned discretion involved the creation of "broad and vague subjective tests"—such as "good character, intelligence and ability to `understand the cases that are tried in court'"—as additional qualifications which kept prospective jurors off the list. Ibid. The officials here, to the contrary, accepted as qualified all who asserted understanding of English, and used their discretion only to place additional persons on the list where such persons' self-assertions of lack of understanding of the English language was open to question.

One district court has said of the presumption of regularity which clothes the acts and conduct of jury officials that it is "a rebuttable yet very substantial presumption. It does not easily fall apart when attacked by a shotgun loaded with statistics." United States v. Fujimoto, supra, 102 F.Supp. at 894-895. This Court would add that it also does not easily fall apart when attacked by an extensive and intensive probe of the recesses of jury officials' memories in order to make them justify and correlate for consistency every individual determination which they have made from the commencement of their tenure.

II. SUBSTANTIVE VALIDITY OF THE INDICTMENTS

Defendants' attack upon the substantive validity of their indictments proceeds upon the premise that the Selective Service Act is not intended, and cannot constitutionally, apply to Puerto Ricans because citizens of the Commonwealth lack voting representation in Congress and do not participate in the election of the President.[21] This contention was rejected long ago by the Court of Appeals for this Circuit. Ruiz Alicea v. United States, 180 F.2d 870 (C.A.1, 1950). Defendants have offered nothing to cause this Court to question the authority of that case.

Their contention that the act is not intended to apply to Puerto Ricans is easily disposed of. The act makes "every male citizen of the United States" between the requisite ages liable for training and service in the armed forces. 50 U.S.C. App. § 454(a). Puerto Ricans are citizens of the United States. 8 U.S.C. § 1402. Lest there be any question of Congressional intent, the act defines "United States," when used in "a geographical sense," to include "the several States, the District of Columbia, Puerto Rico, the Virgin Islands, and Guam" (50 U.S.C. App. § 466(b)), and, more importantly, specifies the manner in which quotas are to be determined

"for each State, Territory, possession, and the District of Columbia." 50 U.S.C. App. § 455(b).[22] Moreover, the act applies to permanently resident aliens, regardless of whether they apply for citizenship. 50 U.S.C. App. § 454(a) Congress could hardly have intended to have made aliens subject to military service and at the same time exempted citizens merely because their present place of residence deprives them of the national franchise.

Defendants' constitutional contention causes no greater problem. Citizens of Puerto Rico lack national political participation for the same reason that such participation is withheld from citizens of the territories and (with the limited exception provided by the Twenty-third Amendment) the District of Columbia: the Constitution provides for participation in the national
980 political *980 process only through the states. Art. I, §§ 2, 3, & 4, cl. 1; Art. II, § 1, cls. 2 & 3; Twelfth Amendment; Seventeenth Amendment. These constitutional provisions cannot be said, in contemplation of law, to diminish the national citizenship status of citizens of the Commonwealth, the District of Columbia, or the territories. The Constitution recognizes no "second-class citizenship." Schneider v. Rusk, 377 **U.S.** 163, 169, 84 S.Ct. 1187, 12 L.Ed.2d 218.

Defendants' error lies in assuming that the right to vote is an essential right of citizenship. The proposition is beguiling, but it will not stand analysis. The only absolute and unqualified right of citizenship is to residence within the territorial boundaries of the United States; a citizen cannot be either deported or denied reentry. The Supreme Court explained in Balzac v. People of Porto Rico, 258 **U.S.** 298, 42 S.Ct. 343, 66 L.Ed. 627, that the major advantage (aside from "more certain protection against the world," id. at 311, 42 S.Ct. at 348) which Puerto Ricans acquired when they were made United States citizens while Filipinos were not was that they, as individuals, obtained the absolute right to enter continental United States and become citizens of any state while Filipinos could do so only by going through the process of naturalization. See id. at 308, 42 S.Ct. 343. The right to vote is not in terms granted to citizens by the Constitution; to the contrary, the matter is left to the states. Art. I, § 2; Seventeenth Amendment. Citizenship may be made a qualification for voting, as it is, e. g., for holding office or being a juror (but not necessarily so, since the Constitution does not enjoin the states to limit the franchise to citizens). Citizens who are otherwise qualified cannot be discriminatorily denied the franchise because of race, sex, or ability to pay a fee. Fifteenth Amendment; Nineteenth Amendment; Twenty-fourth Amendment; Harper v. Virginia State Bd. of Elections, 383 **U.S.** 663, 86 S.Ct. 1079, 16 L.Ed.2d 169. The reapportionment cases have established that the Constitution forbids a state to "debase" either the national or the local vote of a portion of its qualified citizenry by malapportionment. See, e. g., Wesberry v. Sanders, 376 **U.S.** 1, 5-6, 84 S.Ct. 526, 11 L.Ed.2d 481. But the Constitution does not make the franchise *per se* a right of citizenship. Minor v. Happersett, 21 Wall. 162, 22 L.Ed. 627. If it did, minors, Americans residing abroad (who may vote only if the state of which they are concurrently citizens permits absentee ballots) and, as in *Minor,* women prior to the adoption of the Nineteenth Amendment could not be considered citizens, and those who have changed their residence would have to be deemed to have lost their citizenship until such time as they acquired the requisite residence tenure in their new place of domicile

Since the franchise is not *per se* a right of citizenship, it follows that it is not a precondition to imposition of duties of citizenship. It has, in fact, been specifically held that the denial to minors of the franchise does not free them of their obligation for military service or bar their prosecution when they refuse to serve. George v. United States, 196 F.2d 445, 446, 454-455 (C.A.9, 1952), certiorari denied, 344 **U.S.** 843, 73 S.Ct. 58, 97 L.Ed. 656. If minors, who cannot vote at all (except in certain states), are constitutionally subject to military service, it follows even more clearly that the Constitution is no bar to imposing military service upon Puerto Ricans, who have full local self-governing and lack national political participation only because the Constitution makes no provision for them to have it[23] unless they move to the Mainland and establish residence there.

981 *981 Apparently misunderstanding the relationship of the compact to the Selective Service Act's applicability to Puerto Rico, defendants argue that there is no compact; that if the compact exists it has no relevance to selective service; and that applying selective service to Puerto Rico violates the compact, if it exists. Even if they were correct in their initial assertion,

their argument against the indictments would not be advanced. The liability of Puerto Ricans for military service arises not from the compact but from their United States citizenship, which antedates the compact (although it was specifically reaffirmed and made unilaterally irrevocable by that document). If defendants were correct and there were no compact, which is not true, Puerto Ricans would nevertheless remain American citizens and hence subject to military service.

It is clear, however, that the compact does exist as a binding agreement, irrevocable unilaterally between the people of Puerto Rico and the Congress of the United States, transforming Puerto Rico's status from territory to commonwealth, or *Estado Libre Asociado.*[24] The best evidence that this is so lies in the Commonwealth Constitution. Territories are governed by organic acts, enacted by Congress, unilaterally amendable by Congress, unilaterally revocable by Congress. Puerto Rico, however, is governed by a constitution adopted by the vote of its people. While the constitution was submitted initially to Congress for approval (as in the case of the initial constitutions of new states) a proposal that subsequent amendments thereto must be approved by Congress was deleted from the enabling resolution (S. J. Res. 151) at the insistence of the government of Puerto Rico. 98 Cong.Rec. 7840 et seq., 8306-07, 8618-19. A proposal that the enabling resolution state that Congress retained its powers over Puerto Rico under the Territorial Clause of the Constitution was also rejected. Id. at 6183 et seq. In short, in respect to domestic authority, the status of the Commonwealth essentially parallels that of the states. It is only in regard to national political participation, voluntarily waived by the Puerto Rican people, that the status is different.

Since the people of Puerto Rico, in accepting the compact, rejected both independence and statehood (and reaffirmed their choice in the 1967 plebiscite, where the independence and statehood alternatives, being specifically presented, were specifically rejected), it cannot be said that the imposition of military service without national political participation comprises an invidious discrimination forbidden by the Fifth Amendment. By rejecting independence and accepting a free association with the United States and the United States citizenship, the people of Puerto Rico accepted the duties of citizenship, including liability for military service. By rejecting statehood and accepting the commonwealth status, they disclaimed any
982 counterdemand for participation *982 in the national political process. Rather, they determine that at this stage in Puerto Rico's development, commonwealth status, with its attendant fiscal autonomy, would serve their interests better than the national political participation they would gain by statehood.[25]

Defendants argue, however, that the preamble to P.L. 600 recognizes "the right of self-government of the people of Puerto Rico," and that under the circumstances the Selective Service Act is inconsistent with that right and thus was repealed, in respect to Puerto Rico, by its section 6. They confuse self-government with either statehood or independence. "Self-government," in the context used, means plenary domestic political authority as a matter of right, rather than grace. This the Compact establishes. It is only statehood, however, which permits full participation in the process by which uniform national laws are enacted, and only independence which would allow Puerto Rico to determine for itself, with the exclusion of all other, whether compulsory military service would be imposed upon its citizens. By consenting to the Compact, the people of Puerto Rico have rejected both alternatives. It follows that the application here of the Selective Service Act is thoroughly consistent with the Compact and the will of the people of Puerto Rico.

983 Defendants also argue that the cession of Puerto Rico to the United States by the Treaty of Paris (30 Stat. 1754) was illegal under Spanish law. They do not ask this Court to declare that the cession was unlawful *in toto* and that Puerto Rico is therefore still a possession of Spain. Rather, they ask a declaration that, because of its illegality, the Selective Service Act can have no application here. It is difficult, however, to perceive how the cession could be void for one limited purpose without being void for all purposes. In any event, their contention was fully canvassed and specifically and correctly rejected in Ruiz Alicea, 180 F.2d at 871. See also DeLima v. Bidwell, 182 **U.S.** 1, 195-196, 21 S.Ct. 743, 45 L.Ed. 1041; Dooley v. United States, 182 **U.S.** 222, 234, 21 S.Ct. 762, 45 L.Ed. 1074. The Supreme Court explained long ago that questions concerning the power of a sovereign to annul by treaty a prior grant to his

subjects "are political questions and not judicial" which "belong exclusively to the political department of government." Doe ex dem Clark v. Braden, 16 How. 635, 656, 14 L.Ed. 1090. Nor is defendants' contention aided by the argument that, since Spain had no legal right to impose compulsory military service upon the citizens of Puerto Rico, the United States could not have acquired that right by cession. To the contrary, the cession resulted, in the long run, in Puerto Ricans becoming citizens of the United States. Whatever limitations there were upon their duties as subjects of the King of Spain, it can hardly be thought that they now have less duties than do other citizens of this country. Compare Vilas v. City of Manila, 220 **U.S.** *983 345, 357, 31 S.Ct. 416, 55 L.Ed. 491; Chicago, Rock Island & Pacific Railway Co. v. McGlinn, 114 **U.S.** 542, 546, 5 S.Ct. 1005, 29 L.Ed. 270; Downes v. Bidwell, 182 **U.S.** 244, 298, 21 S.Ct. 770, 45 L.Ed. 1088 (White, J., concurring).

III. MOTIONS FOR OVERSEAS DEPOSITIONS AND DISCOVERY

The seven defendants in United States v. García Miranda, et al, Criminal Nos. 73-67, 67-67, 74-67, 75-67, 77-67, 80-67, 81-67, have moved under Rule 17(c) F.R. Crim.P., for an order directing the Secretary of Defense to produce certain documents for their inspection, and under Rule 15(a) for an order authorizing them to take the depositions of certain persons residing abroad. The documents which they seek to inspect consist essentially of orders and reports pertaining to the United States military activities in Vietnam. The depositions are sought from persons who, defendants aver, will testify that the United States troops' presence in Vietnam and their activities there are violative of settled international law.

The indictments in each of the cases here charge that the defendant "did knowingly fail, neglect and refuse to submit to induction and to be inducted into the Armed Forces of the United States as directed and ordered to do so by [his local selective service board], which was a duty required of him under and in the execution of the Universal Military Training and Service Act and the rules and regulations issued thereunder." Thus, in each case, only a narrow factual issue is presented: viz., whether "there was deliberate purpose on the part of [each defendant] not to comply with the Selective Service Act or the regulation[s] issued thereunder." Ward v. United States, 344 **U.S.** 924, 73 S.Ct. 494, 97 L.Ed. 711; see also United States v. Henderson, 180 F.2d 711, 716 (C.A.7, 1950), certiorari denied, 339 **U.S.** 963, 70 S.Ct. 997, 94 L.Ed. 1372. The only evidence which may properly be submitted to the jury is that which pertains, not only to each defendant's failure to submit to induction on the date ordered, but of his knowledge of his duty to submit to such induction and whether his refusal to do so was deliberate or inadvertent. Cf. Graves v. United States, 252 F.2d 878, 882 (C.A.9, 1958); Pardo v. United States, 369 F.2d 922, 926 (C.A.5, 1966); Silverman v. United States, 220 F.2d 36, 39-40 (C.A.8, 1955); United States v. Weiss, 162 F.2d 447, 448 (C.A.2, 1947), certiorari denied, 332 **U.S.** 767, 68 S.Ct. 76, 92 L.Ed. 352; United States v. Hoffman, 137 F.2d 416, 419 (C.A.2, 1943); United States v. Trypuc, 136 F.2d 900, 901-902 (C.A.2, 1943). The nature and legality of American military activities in Vietnam are clearly irrelevant and immaterial to the narrow issue presented by the indictments. Discovery under Rule 17(c) is limited to items which are "admissible in evidence" (Bowman Dairy Co. v. United States, 341 **U.S.** 214, 221, 71 S. Ct. 675, 95 L.Ed. 879), and depositions under Rule 15(a) may be taken only if the defendant carries the burden of establishing that the prospective witness' testimony will be material. United States v. Steel, 359 F.2d 381, 382 (C.A. 2, 1966); United States v. Broker, 246 F.2d 328, 329 (C.A.2, 1957), certiorari denied, 355 **U.S.** 837, 78 S.Ct. 63, 2 L.Ed. 2d 49; United States v. Glessing, 11 F. R.D. 501, 502 (D.Minn., 1951); see In re United States, 348 F.2d 624, 626 (C.A.1, 1965). The motions must therefore, of necessity, be denied.[26]

984 *984 Defendants have offered various arguments for expanding the factual issue presented by these cases and thereby attaching relevance and materiality to the evidence which they seek, but none of the arguments have merit. Contrary to their suggestion, the authority of the government to impose the duty of military service upon its citizens does not depend upon a judicial determination that American activities in Vietnam accord with international law and treaty obligations. In the first place, defendants have no standing to raise the issue, since they

are charged only with refusing induction, not with refusing to obey an order assigning them to Vietnam, and it is entirely a matter of conjecture whether their induction ever would have led to their receiving such an order. United States v. Bolton, 192 F.2d 805, 806 (C.A. 2, 1951); see also United States v. Mitchell, 369 F.2d 323, 324 (C.A.2, 1966), certiorari denied, 386 **U.S.** 972, 87 S.Ct. 1162, 18 L.Ed.2d 132. More importantly, a judicial inquiry into the conduct of foreign policy or the use and disposition of military forces by the executive branch would violate the doctrine of separation of powers which is at the heart of our constitutional system of government. Luftig v. McNamara, 126 **U.S.**App.D.C. 4, 373 F.2d 664, 665-666 (1967), certiorari denied, 387 **U.S.** 945, 87 S.Ct. 2078, 18 L.Ed.2d 1332; see also Marbury v. Madison, 1 Cranch 137, 165-166, 169-170, 2 L.Ed. 60; Williams v. Suffolk Insurance Co., 13 Pet. 415, 420, 10 L.Ed. 226; Chicago & Southern Air Lines v. Waterman SS Corp., 333 **U.S.** 103, 108, 111, 68 S.Ct. 431, 92 L.Ed. 568; Baker v. Carr, 369 **U.S.** 186, 211-212, 217, 82 S.Ct. 691, 7 L.Ed.2d 663.

In Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60, the case that first established the principle of judicial review over the acts of the executive and legislative branches, Chief Justice Marshall very carefully circumscribed the area of that review, saying (id. at 165-166, 2 L.Ed. 60):

> It follows then, that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act. If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction. In some instances, there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule. *By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.* To aid him in the performance of these duties, he is authorized to appoint certain officers who act by his authority, and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. *The subjects are political: they respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.* The application of this remark will be perceived, by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president: he is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts. (Emphasis added);

985 *985 and again (id. at 169-170, 2 L.Ed. 60):

> The intimate political relation subsisting between the President of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received, without much reflection or examination, and it is not wonderful, that in such a case as this, the assertion, by an individual, of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should at first view be considered by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive. It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. *The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are by the constitution and laws, submitted to the executive, can never be made in this court. (Emphasis added.)*

Shortly thereafter, the Supreme Court, in Williams v. Suffolk Insurance Co., 13 Pet. 415, 10 L.Ed. 226, applied these principles to hold that, where the executive branch had taken the position that a foreign government did not have title to certain territory, a court, despite the relevancy of the matter to the case at hand, had no competence to inquire further into the question. The Court explained (id. at 420, 10 L.Ed. 226):

> And can there be any doubt, that when the executive branch of the government, which is charged with our foreign relations, shall, in its correspondence with a foreign nation, assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view, it is not material to inquire, *nor is it the province of the court to determine whether the executive be right or wrong.* It is enough to know, that in the *exercise of his constitutional functions,* he had decided the question. *Having done this, under the responsibilities which belong to him it is obligatory on the people and government of the Union.* If this were not not the rule, cases might often arise, in which, on the most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of these departments, a foreign island or country might be considered as at peace with the United States; whilst the other would consider it in a state of war. *No well-regulated government has even sanctioned a principle so unwise, and so destructive of national character.* (Emphasis added.)

More recently, the Court, in Chicago & Southern Air Lines v. Waterman SS Corp., 333 **U.S.** 103, 68 S.Ct. 431, 92 L.Ed. 568, held that the grant of an overseas air route by the Civil Aeronautics Board, approved by the President, was—unlike the grant of a domestic route which did not require presidential approval—not judicially reviewable, because the former action involved considerations of national defense and foreign relations (id. at 108), and (id. at 111, 68 S.Ct. at 436):

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world. *It would be intolerable that courts, without the relevant information should review and perhaps nullify actions of the Executive taken on information properly held secret.* Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, *the very nature of executive decisions as to foreign*
> 986 *policy is political, not judicial. Such decisions are* *986 *wholly confided by our Constitution to the political departments of the government, Executive and Legislative.* They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry. (Emphasis added.)

Most recently, the Court undertook in Baker v. Carr, 369 **U.S.** 186, 82 S.Ct. 691, 7 L.Ed.2d 663, to survey all facets of the "political question" subject. While cautioning that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance," it found that those questions do which "turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature * * * [or] uniquely demand single-voiced statement of the Government's views." Id. at 211, 82 S.Ct. at 707. Thus, it noted, for example, that courts will construe treaties only if the executive has not done so, and that while, once sovereignty over an area is politically determined, courts will examine the resulting status and decide independently whether a statute (such as the Fair Labor Standards Act or tariff legislation) applies to the area, "recognition of foreign governments * * * strongly defies judicial treatment * * and the judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory." Id. at 212, 82 S.Ct. at 707. Finally, summing up the whole matter of "political questions," the Court held (id. at 217, 82 S.Ct. at 710):

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Defendants' contention that this Court must decide the legality of the United States military forces' activities in Vietnam in order to determine whether they were under a duty to submit to induction flies directly in the face of these principles. Clearly, it may be said in this case—where the order defendants are charged with disobeying required merely their induction into the armed forces—what was said in Luftig v. McNamara, 126 **U.S.**App.D.C. 4, 373 F.2d 664, 665-666 (1967), certiorari denied, 387 **U.S.** 945, 87 S.Ct. 2078, 18 L.Ed.2d 1332, where a person already a member of the armed forces sought an injunction against his being assigned to Vietnam on the grounds that the presence of the United States military forces there was unlawful:

> It is difficult to think of an area less suited for judicial action than that into which Appellant would have **us** intrude. The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive.

No treaty can authorize the judiciary to undertake an inquiry forbidden to it by the Constitution. Compare Geofroy v. Riggs, 133 **U.S.** 258, 267, 10 S.Ct. 295, 33 L.Ed. 642; Reid v. Covert, 354 **U.S.** 1, 15-18, 77 S.Ct. 1222, 1 L.Ed.2d 1148, (plurality opinion). Nor would this court or
987 the jury be authorized to undertake *987 such an inquiry on the basis of defendants' contention that they would have risked criminal liability under the Charter of the International Military Tribunal (59 Stat. 1546) and the Nuremberg judgments arising therefrom had they permitted themselves to be inducted. Mere membership in the armed forces could not under any circumstances create criminal liability. Compare Ford v. Surget, 97 **U.S.** 594, 605-606, 24 L.Ed. 1018. Our domestic law on conspiracy does not extend that far (see Ingram v. United States, 360 **U.S.** 672, 678, 79 S.Ct. 1314, 3 L.Ed.2d 1503; Direct Sales Co. v. United States, 319 **U.S.** 703, 713, 63 S.Ct. 1265, 87 L.Ed. 1674; United States v. Falcone, 311 **U.S.** 205, 61 S.Ct. 204, 85 L.Ed. 128), and neither did the Nuremberg judgments. Cf. Case No. 12, United States v. von Leeb (the High Command Case), 10 & 11 Trials of War Criminals Before the Nuremberg Military Tribunals, at 11 Tr.W.Crim. 488-489; Case No. 9, Trial of Tesch (the Zyklon B Case), 1 Law Rep. of Tr. of W. Crim. 93, 102.

988 Nor is the evidence which defendants seek relevant and material on the theory that it will support either their claim to a right of conscience not to enter the armed forces or their contention that their refusal to be inducted lacked criminal intent because they did not act with "bad purpose or evil motive." The exemption for conscience contained in the Selective Service Act (50 U.S.C. App. § 456(j) does not extend to those who, like defendants, assert only selective scruples against a particular war, even if such scruples are grounded upon religious beliefs arising from adherence to an organized church. United States v. Spiro, 384 F.2d 159, 160-161 (C.A.3, 1967), certiorari denied, 390 **U.S.** 956, 88 S.Ct. 1028, 19 L.Ed.2d 1151. Moreover, since defendants have made no showing that they claimed an exemption for conscience from their local boards, they are precluded from raising the issue for the first time at trial. Falbo v. United States, 320 **U.S.** 549, 552-553, 64 S.Ct. 346, 88 L.Ed. 305; Estep v. United States, 327 **U.S.** 114, 123, 66 S.Ct. 423, 90 L.Ed. 567; United States v. Irons, 369 F. 2d 557, 559 (C.A.6, 1966); United States v. Schoebel, 201 F.2d 31, 32 (C.A.7, 1953); compare United States v. Rubinstein, 166 F.2d 249, 257-258 (C.A.2, 1948), certiorari denied, 333 **U.S.** 868, 68 S.Ct. 791, 92 L.Ed. 1146. The "bad purpose or evil motive" requisite to criminal intent means no more than an intent to defeat the objective for which a legal duty is imposed or a legal prohibition is erected. Silverman v. United States, supra, 220 F.2d at 40;

compare Heikkinen v. United States, 355 **U.S.** 273, 279-280, 78 S.Ct. 299, 2 L.Ed.2d 264; Screws v. United States, 325 **U.S.** 91, 101-107, 65 S.Ct. 1031, 89 L.Ed. 1495 (plurality opinion); Spies v. United States, 317 **U.S.** 492, 499-500, 63 S.Ct. 364, 87 L.Ed. 418. It does not require that the actor be motivated by ignoble or venal considerations. See Hamilton v. Regents of University of California, 293 **U.S.** 245, 268, 55 S.Ct. 197, 79 L.Ed. 343 (Cardozo, J., concurring); Cannon v. United States, 181 F.2d 354, 356 (C.A.9, 1950), certiorari denied, 340 **U.S.** 892, 71 S.Ct. 199, 95 L.Ed. 647; Warren v. United States, 177 F.2d 596, 600 (C.A.10, 1949), certiorari denied, 338 **U.S.** 947, 70 S.Ct. 485, 94 L.Ed. 584; United States v. Miller, 233 F.2d 171, 172 (C.A.2, 1956); United States v. Madole, 145 F.2d 466, 468 (C.A.2, 1944); United States v. Mroz, 136 F.2d 221, 226 (C.A.7, 1943), petition for certiorari dismissed, 320 **U.S.** 805, 64 S.Ct. 23, 88 L.Ed. 487. Defendants are not within the narrow exception to the usual meaning of "bad purpose or evil motive" illustrated by United States v. Murdock, 290 **U.S.** 389, 54 S.Ct. 223, 78 L.Ed. 381 and Okamoto v. United States, 152 F.2d 905 (C.A.10, 1946). Their asserted belief that they were constitutionally excused from submitting to induction because of the unlawfulness of American activities in Vietnam (as well as because of the constitutional inapplicability of the Selective Service Act to Puerto Rico) is not bottomed upon a claim, as in *Murdock,* that the Constitution in terms excuses them from the performance *988 of their statutorily compelled duty, or, as in *Okamoto,* that they have *personally* been subjected to invidious discrimination. Moreover, there is no constitutional provision which is "capable of being honestly and reasonably understood" to support their position on either ground. Compare Rainbow Dyeing & Cleaning Co. v. Bowles, 80 **U.S.**App.D.C. 137, 150 F.2d 273, 279 (1945). To the contrary, the lack of constitutional merit in both of the excuses which they offer has been long settled. Compare Browder v. United States, 312 **U.S.** 335, 341, 61 S.Ct. 599, 85 L.Ed. 862; United States v. Kahriger, 210 F.2d 565, 569 (C.A.3, 1954). There is, therefore, nothing in these cases which requires evidence on any question other than each defendant's awareness of his statutory duty and the deliberateness of his refusal to perform it.

ORDER

For the foregoing reasons, it is ordered that all defendants' motions, and each of them, be, as they are hereby, denied.

[*] Judge J. B. Fernández—Badillo of this Court has read this opinion and agrees with it.

[1] Certain of the defendants are also charged with the related offenses of failing to have their registration certificates and/or their notices of classification in their personal possession (Selective Service Regulations, §§ 1617.1 and 1623.5).

[2] The defendants in the four cases designated herein as United States v. Amy **Valentine**, et al., Criminal Nos. 6-67, 8-67, 15-67, 16-67, have severally filed:

1. Identical motions to dismiss their indictments on the grounds that the grand jury which indicted them was unlawfully and unconstitutionally convened, by reason of the English language requirement for jurors of 48 U.S.C. 867, and otherwise.

2. Identical motions to dismiss their indictments on the grounds that (a) they do not state facts sufficient to constitute an offense, (b) application of the Selective Service Act to Puerto Ricans is unconstitutional, (c) the Act is not intended to apply to Puerto Rico, and (d) the government does not have the constitutional power to induct Puerto Ricans who reside in the Commonwealth of Puerto Rico into the armed forces for the purpose of military service abroad.

The defendants in the seven cases designated herein as United States v. Garcia Miranda, et al., Criminal Nos. 73-67, 67-67, 74-67, 75-67, 77-67, 80-67, 81-67, have jointly filed:

1. An omnibus motion to dismiss their indictments on the grounds that:

a. The grand jury which indicted them was unlawfully and unconstitutionally convened, and was selected pursuant to 48 U.S.C. 867 which is unconstitutional.

b. The indictments do not state facts sufficient to constitute an offense.

c. Application of the Selective Service Act to Puerto Ricans is unconstitutional.

d. The Act is not intended to apply to Puerto Rico and, alternatively, the government does not have the constitutional power to induct Puerto Ricans who reside in the Commonwealth of Puerto Rico into the armed forces for the purpose of military service abroad.

e. The requirement of 48 U.S.C. 864 that proceedings in this court be conducted in English is unconstitutional.

2. A motion to dismiss the petit jury array on the grounds that:

a. The jury list from which the array will be drawn was unconstitutionally compiled, by reason of the English language

requirement of 48 U.S.C. 867 and otherwise.

b. The requirement of 48 U.S.C. 864 that proceedings in this Court be conducted in English is unconstitutional.

3. A motion for discovery under Rule 17(c), F.R.Crim.P., seeking an order directing the Secretary of Defense to produce certain documents.

4. A motion for leave to take depositions abroad pursuant to Rule 15(a), F.R. Crim.P.

Motions were also filed by all defendants for bills of particulars, but these motions have already been disposed of.

[3] The second paragraph of 48 U.S.C. 864 provides: "All pleadings and proceedings in the District Court of the United States for Puerto Rico shall be conducted in the English language."

[4] The present 28 U.S.C. § 1861 provides, in pertinent part: "Any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless * * * (2) he is unable to read, write, speak, and understand the English language." The present 48 U.S.C. § 867 provides, in pertinent part: "* * * the qualifications required of jurors in [this] court shall be that each shall * * * have a sufficient knowledge of the English language to enable him to serve as a juror * * *."

Section 867 was first enacted in 1906, at a time when federal jurors were required to have the same qualifications as jurors in the highest court of the state in which the federal court was located. Since jurors in Puerto Rican courts were required to be literate in Spanish, but not necessarily in English, a special provision was needed for this court. The statute will be repealed on December 22, 1968, when the newly enacted Jury Selection and Service Act of 1968 (P.L. 90-274, 82 Stat. 53) goes into effect. After that time, jurors in all federal courts, including this one, will be subject to the qualifications set forth in the new 28 U.S.C. § 1865(b), which provides, *inter alia,* that a prospective juror is qualified "unless he * * * (2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form; (3) is unable to speak the English language."

[5] It should be noted at the outset that this case is not in any manner governed by Katzenbach v. Morgan, 384 **U.S.** 641, 86 S.Ct. 1717, 16 L.Ed.2d 828, which upheld the constitutionality of 42 U.S.C. § 1973b(e), under which Puerto Rican residents of continental United States who are literate in Spanish but cannot speak or understand English are permitted to vote in elections there. *Katzenbach* did not hold that the "equal protection" clause of the Fourteenth Amendment, of its own weight, forbids a state to deny the franchise to a Puerto Rican who is literate in Spanish but not in English, but rather that the "appropriate legislation" clause (§ 5 of the Amendment) empowers Congress to outlaw the denial legislatively. 384 **U.S.** at 648 et seq., 86 S.Ct. 1717. Moreover, as the Court pointed out (id. at 655, 86 S.Ct. 1717), knowledge of English is unnecessary for an elector to exercise his franchise effectively. Manifestly, however, effective jury service requires knowledge of the language in which the proceedings are conducted.

[6] Both § 864 and § 867 were originally Congressional enactments only. In their present status, as § 42 and § 44 of the Federal Relations Act, they were continued in force and effect by P.L. 600, 81st Cong., 64 Stat. 319, § 4, and hence were ratified by the people of Puerto Rico by the vote which accepted the compact.

[7] For example, Louisiana once permitted members of its state senate and house of representatives to address those bodies in either French or English, and required the secretary of the senate and clerk of the house to be conversant in both languages. Constitution of 1845, Art. 104. The provision was left out of succeeding constitutions, however, and the Constitution of 1864 specifically forbade exclusion from office because of not being conversant with any language other than English. Art. 128. There were also early requirements that the state constitution and laws be promulgated in both French and English (Constitution of 1845, Art. 132; Constitution of 1852, Art. 129), but thereafter promulgation was limited to English, with the legislature merely given discretion to provide for publication of the laws in French and to prescribe that judicial advertisements in certain designated cities and parishes be made in that language. Constitution of 1879, Art. 154; Constitution of 1898, Art. 165; Constitution of 1913, Art. 165. The only language provision in Louisiana law today is one which provides that statutes and the legislative journal are to be printed in English only. La.Rev.Stat. (1950), §§ 43:18, 43:19. Similarly, when California first entered the union, all state laws, decrees and regulations were required to be published in both English and Spanish (Constitution of 1849, Art. II, § 21), and the Kearney Code, promulgated in 1846 by Brig. Gen. S. W. Kearney for the government of the newly conquered territory of New Mexico, contained a provision requiring courts to keep records of their proceedings in English and Spanish. The latter provision was not continued in the New Mexico Organic Act of 1850, and the subsequent California constitution specifically limited publication of official proceedings to the English language. Constitution of 1879, Art. 4 § 24. Finally, the Organic Act of Hawaii permitted territorial electors to qualify if they could speak, read and write either English or Hawaiian (§ 60; 48 U.S.C. § 617), but required all legislative proceedings to be conducted in English. § 44; 48 U.S.C. § 577.

[8] The first and most of the subsequent constitutions of Louisiana, for example, required judicial written proceedings to be conducted in English. Constitution of 1812, Art. 6, § 15; Constitution of 1845, Art. 103; Constitution of 1864, Art. 103; Constitution of 1868, Art. 109; Constitution of 1879, Art. 154; Constitution of 1898, Art. 165; Constitution of 1913, Art. 165. Additionally, the Constitution of 1868 forbade any law requiring judicial process to be issued in any language other than English. Art. 109. The California Constitution of 1879 also required that judicial proceedings be conducted only in English (Art. 4, § 24), and the Organic Act of Hawaii expressly repealed the former laws of the Republic of Hawaii which had provided for juries of either aliens or natives, and required instead that territorial jurors be literate in English. § 83; 48 U.S.C. § 635.

[9] The record, of course, has to be translated into English when appeals are taken from the commonwealth courts to federal courts. There is, however, the same narrow jurisdiction for and scope of review in such appeals as obtains in federal appeals from the action of state courts. See 48 U.S.C. § 864. Unlike the final judgments of this court, therefore, which are reviewable in all particulars as of right by the court of appeals, the final judgments of the commonwealth courts are infrequently subject to federal review, and such review rarely involves questions whose resolution necessitates a precise parsing of the language appearing in the record.

[10] English translations of the annotated Laws of Puerto Rico and of the reports of the Supreme Court of Puerto Rico are published and available for use in those cases in this Court where local law is applicable. It is doubtful, however, in view of the prohibitive cost and limited market, if the publishers of the Federal Reports, the United States Code Annotated, and the other lawyers' tools for research into federal law would undertake to publish simultaneously in Spanish as well as English let alone publish translations of all past volumes. This court would have no power to compel them to do so.

[11] Defendants' expert witness did testify that, in his "personal non-expert judgment," he "would like a person to be a native speaker of the language" in order to be a juror. The Court does not deem this statement to be worthy of any weight as evidence. The limitation which the witness proposed, which would preclude jury service throughout the rest of the United States both by

Puerto Ricans and by all naturalized citizens other than those coming from English speaking countries, would clearly be unconstitutional.

[12] Each of the two judges in this district is authorized to have a full time interpreter. The records of the Administrative Office of the United States Courts indicate that one full time interpreter is provided to serve two judges and one retired judge in both the El Paso Division of the Western District of Texas and the San Diego Division of the Southern District of California, and that one per diem interpreter is provided for the San Antonio Division of the Western District of Texas. And, of course, cases arise from time to time in other districts in which the services of an interpreter are required.

[13] In Smith v. State of Texas, 311 **U.S.** 128, 130, 61 S.Ct. 164, 165, 85 L.Ed. 84, the Supreme Court said that "[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." In the very next sentence, however, the Court added that it is "the exclusion from jury service of *otherwise qualified groups"* because of "racial discrimination" which violates the Constitution (emphasis added).

[14] Thiel v. Southern Pacific Company, 328 **U.S.** 217, 66 S.Ct. 984, 90 L.Ed. 1181 and Ballard v. United States, 329 **U.S.** 187, 67 S.Ct. 261, 91 L.Ed. 181 involved exclusions which were held to comprise violations of 28 U.S.C. § 1861 (one of the two statutes which requires the exclusion complained of here) rather than constitutional violations.

[15] It should be noted that while this opinion was in preparation, the Court of Appeals for this Circuit rejected, on the authority of its earlier opinion in Miranda v. United States, supra, 255 F.2d 9, and the earlier opinion of this court in United States v. Mirabal Carrion, 140 F.Supp. 226 (D.P.R., 1956), the contention that "the requirement of English-speaking juries is unconstitutional in that it constitutes improper discrimination." Carpintero v. United States, 1 Cir., 398 F.2d 488, July 16, 1968.

[16] It is well established that a litigant who challenges the regularity of the jury selection process has the burden of establishing, by a "clear showing," all of the elements necessary to sustain his complaint. United States v. Mirabal Carrión, 140 F.Supp. 226 (D.P.R., 1956); see also Glasser v. United States, 315 **U.S.** 60, 87, 62 S.Ct. 457, 86 L.Ed. 680; Frazier v. United States, 335 **U.S.** 497, 503, 69 S.Ct. 201, 93 L.Ed. 187; Fay v. People of State of New York, supra, 332 **U.S.** at 285, 67 S.Ct. 1613; Hernandez v. State of Texas, supra, 347 **U.S.** at 479, 74 S.Ct. 667.

[17] "Functional illiteracy" is defined as less than five years of schooling. Current Population Reports: Estimate of Illiteracy by States, 1960—Series P-23, No. 8, p. 1; see also Rabinowitz v. United States, supra, 366 F.2d at 54-55; id. at 91 (Bell, J., dissenting); United States v. Brown, supra, 281 F.Supp. at 35; United States v. Hunt, supra, 265 F.Supp. at 191; 42 U.S.C. § 1973b(e) (2), which permits Puerto Rican residents of the states to vote in elections there, despite inability to speak or understand English, if they can establish their literacy in Spanish by showing that they have "successfully completed the sixth primary grade in a public school in, or a private school accredited by * * * the Commonwealth of Puerto Rico." The 1960 census disclose that the median years of schooling completed by Puerto Ricans over the age of twenty-five is 4.5. The figure is 4.8 for men and 4.3 for women.

[18] Defendants' expert testified that there is not a great deal of occupational mobility in Puerto Rico, and hence that such individuals would be rare. The court does not find this testimony convincing. Census data discloses that between 1950 and 1960 there was almost a sixty percent increase in the number of professional and technical workers while at the same time the number of farm laborers and unpaid family workers decreased by more than eighty percent. See Mintz, Puerto Rico: An Essay in the Definition of a National Culture, Selected Background Studies Prepared for the United States-Puerto Rico Commission on the Status of Puerto (1966), 339, 378-379. The census also shows that less than ten percent of the residents of San Juan were born in that city and that over fifty percent were born in rural areas. The Court from its own experience can also attest to the accuracy of Professor Mintz's conclusion that "[s]ocial and economic change in the past decade has been extremely rapid and throughgoing * * *." Mintz, op. cit., 378.

[19] The defendant for whom the case was named was white, but her indictment resulted from her association with the Negro side of a racial dispute. See 366 F.2d at 37.

[20] There was no requirement that the jury officials obtain information additional to that appearing on the questionnaires in order to evaluate assertions of hardship or illness. See United States v. Henderson, 298 F.2d at 525. Any such requirement would have been impracticable and oppressive. Obtaining names for the jury list is only one of many functions performed by the clerk and her deputies, who are kept so busy with all of their duties that they consistently work overtime and often work weekends.

[21] Defendants also suggested the general unconstitutionality of the Selective Service Act. That contention was laid to rest, however, in United States v. O'Brien, 391 **U.S.** 367, 377, 88 S.Ct. 1673, 20 L. Ed.2d 672, 682.

[22] When § 455(b) was first enacted in 1948, Puerto Rico was still a territory, The fact that the section was not thereafter amended when Puerto Rico became a commonwealth in no way implies a *sub silentio* intent on the part of Congress to relieve Puerto Ricans of a duty imposed on all other citizens. On the contrary, not having expressed in the compact or elsewhere the will to change the existing situation, the intent must have been to maintain the same.

[23] Defendants argue that the principle of "no taxation without representation" implies as well as no military service without representation. They cite only a slogan, however, and not a constitutional principle. Citizens of some territories and the District of Columbia are taxed federally without representation, and at the present moment citizens of the District are taxed locally without representation as well. Puerto Rico's freedom from federal taxation is not constitutionally derived, but arises from the compact agreement that the Commonwealth shall have fiscal autonomy.

[24] To say that the compact is irrevocable unilaterally is not to say that all of its detailed provisions are. It is only the essential provisions which cannot be revoked by one party acting alone: i. e., the provisions which establish Puerto Rico's status as a commonwealth with plenary domestic authority, its association with the United States, the United States citizenship of its people, and such favorable concessions as it fiscal autonomy. There are peripheral provisions, however, which were retained in the Federal Relations Act because there was no place else to put them: e. g., the provisions governing procedures in this court. In regard to the Court, the only essential element of the Compact is that the agreement to associate with the United States provides the present basis for its existence. But since the Court is a federal one, it is properly governed by rules established by Congress alone. Hence, the fact that Congress has repealed 48 U.S.C. § 867 (§ 44 of the Federal Relations Act) in favor of uniform rules for jury selection throughout the federal judicial system does not affect the inviolability of the compact.

[25] Defendants contend that the vote accepting the compact could not have legitimized the application to Puerto Rico of the Selective Service Act, on the grounds that the constitutional rights of an individual are not subject to limitation by majority vote in an election. Compare Lucas v. Forty-Fourth Colorado Gen. Assembly, 377 **U.S.** 713, 736, 84 S.Ct. 1459, 12 L.Ed.2d 632. This argument exposes the essential fallacy of their whole position. An individual need not personally possess the franchise in order to be constitutionally subject to compulsory military service. George v. United States, supra. Defendants recognize this principle,

and hence base their objection to their induction on the ground that the community of which they are members is denied the national franchise. Thus, it is only the *obligation* which they seek to avoid which is personal; the asserted right whose denial they offer as justification for such avoidance is *communal.* A community, however, can waive, barter away, or fail to claim its corporate rights the same as an individual can waive, barter away, or fail to claim his personal rights. Defendants have no standing, as individuals, either to object to the waiver or to assert that their personal obligations as citizens were diminished thereby.

[26] Since the Court finds the subject matter of the proposed depositions irrelevant and immaterial, it is unnecessary to determine whether defendants carried their burden of establishing some irremediable impediment to the personal appearance at the trial by each of the proposed witnesses. The Court expresses grave doubt, however, that the allegations in the moving papers were sufficient to carry this burden. See, generally, In re United States, supra; United States v. Soblen, 203 F.Supp. 542, 568-569 (S.D. N.Y., 1961), affirmed, 301 F.2d 236 (C.A.2, 1962), certiorari denied 370 **U.S.** 944, 82 S.Ct. 1585, 8 L.Ed.2d 810; United States v. Van Allen, 28 F.R.D. 329, 346 (S.D.N.Y., 1961), affirmed, sub nom. United States v. Kelly, 349 F.2d 720, 769, 770 (C.A.2, 1965), certiorari denied, 384 **U.S.** 947, 86 S.Ct. 1467, 16 L.Ed.2d 544; United States v. Bentvena, 319 F.2d 916, 941 (C.A.2, 1963), certiorari denied, sub nom. Ormento v. United States, 375 **U.S.** 940, 84 S.Ct. 345, 11 L.Ed.2d 271; United States v. Grado, 154 F.Supp. 878, 879 (W.D.Mo., 1957); United States v. Rickenbacker, 27 F.R.D. 485, 486 (S.D.N.Y., 1961).