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[G.R. No. 2808. September 30, 1905]

FELIX BARCELON, PETITIONER, VS., DAVID J. BAKER, JR., AND JOHN DOE THOMPSON, RESPONDENTS.

D E C I S I O N

JOHNSON, J.:

This was an application by Fred C. Fisher and Charles C. Cohn, attorneys at law, on behalf of the plaintiff, Felix Barcelon, for a writ of *habeas corpus*. The said application alleges, among other things, the following:

> "(1) That the said applicant is detained and restrained of his liberty at the town of Batangas, in the Province of Batangas,. Philippine Islands.
>
> "(2) That the person who detained and restrained the said applicant of his liberty is John Doe Thompson, captain of the Philippines Constabulary, acting under and in pursuance of the orders of David J. Baker, jr., colonel of the Philippines Constabulary.
>
> "(3) That the detention and restraint of the said applicant is wholly without legal authority therefor. [Here follows a statement of the alleged causes of arrest and detention of the said applicant by the said defendants.]
>
> "(4) That the detention and restraint of the said applicant is not under or by virtue of any process issued by any court or magistrate, nor by virtue of any judgment or order of any court of record, nor of any

court nor of any magistrate whatsoever.

" (5) That there has not existed during any of the times in this petition mentioned, and there does not now exist, in said Province of Batangas, Philippine Islands, nor in any part thereof, rebellion, insurrection, or invasion, nor any of them, in any form or degree; and that all the courts of law, organized and provided by law for the Province of Batangas, have been at all of the times hereinbefore mentioned in the full and complete exercise of their functions, without interruption of any nature or kind.

"Wherefore your petitioners pray that a writ of *habeas corpus* be issued, requiring the said John Doe Thompson, captain of the Philippines Constabulary, and David J. Baker, jr., colonel of the Philippines Constabulary, to bring before this honorable court the person of the said Felix Barcelon, and that after a full hearing in accordance with law the said Felix Barcelon be liberated and released from all restraint and detention, and that respondents be enjoined from any and all interference with the personal liberty of said Felix Barcelon, and to pay the costs of this proceeding. (Signed) Fred C. Fisher. Charles C. Cohn." (The foregoing facts were duly sworn to by the said applicants.)

The court, after considering the foregoing petition, made an order on the 3d day of August, 1905, directing the said David J. Baker, jr., and the said John Doe Thompson to appear before this court on the 4th day of August, 1905, at 9 o'clock a.m., to show cause why the writ of *habeas corpus* should not be granted in accordance with the prayer of said petition.

At 9 o'clock a.m. on the 4th day of August the respondents, by the Attorney-General of the Philippine Islands, through George R. Harvey, representing the latter, filed their answer to the foregoing petition. By reason of the fact that the said answer failed to disclose whether or not the said Felix Barcelon was actually detained and deprived of his liberty by the said respondents, the court directed that said answer be amended, stating without equivocation whether or not Felix

Barcelon was actually detained by the said respondents, which amended answer, among other things, contained the following allegations:

> "(1) That the writ of *habeas corpus* should not issue on the application filed herein, because the court is without jurisdiction or authority to grant the privilege of the writ of *habeas corpus* in the Province of Batangas, for the reason that on January 31, 1905, the Governor-General, pursuant to a resolution and request of the Philippine Commission, suspended said writ in the Provinces of Cavite and Batangas, in accordance with the provisions of section 5 of the act of Congress known as "The Philippine Bill," the Philippine Commission and the Governor-General basing such suspension upon the fact that certain organized bands of ladrones in said provinces were in open insurrection against the constituted authorities; and the said bands, or parts of them, and some of their leaders, were still in open resistance to the constituted authorities. The said resolution of the Commission and the said proclamation of the Governor-General are in the words following:
>
> **" 'RESOLUTION OF THE PHILIPPINE COMMISSION DATED JANUARY. 31, 1905.**
>
> "
>
> 'Whereas certain organized bands of ladrones exist in the Provinces of Cavite and Batangas who are levying forced contributions upon the people, who frequently require them, under compulsion, to join their bands, and who kill or maim in the most barbarous manner those who fail to respond to their unlawful demands, and are therefore terrifying the law-abiding and inoffensive people of those provinces; and
>
> "
>
> 'Whereas these bands have in several instances attacked police and Constabulary detachments, and are in open insurrection against the constituted authorities; and
>
> " 'Whereas it is believed that these bands have numerous agents and confederates living within the

municipalities of the said provinces; and

” ‘Whereas, because
of the foregoing conditions, there exists a state of insecurity and terrorism among the people which makes it impossible in the ordinary way to conduct preliminary investigations before justices of the peace and other judicial officers: Now, therefore,

” ‘Be *it resolved*, That, the public safety requiring it, the Governor-General is hereby authorized and requested to suspend the writ of *habeas corpus* in the Provinces of Cavite and Batangas.

“Executive Order
“No. 6.

“MANILA, January 31, 1905.

”

‘Whereas certain organized bands of ladrones exist in the Provinces of Cavite and Batangas who are levying forced contributions upon the people, who frequently require them, under compulsion, to join their bands, and who kill or maim in the most barbarous manner those who fail to respond to their unlawful demands, and are therefore terrifying the law-abiding and inoffensive people of those provinces; and

”

‘Whereas these bands have in several instances attacked police and Constabulary detachments, and are in open insurrection against the constituted authorities, and it is believed that the said bands have numerous agents and confederates living within the municipalities of the said provinces; and

” ‘Whereas, because of the foregoing
conditions there exists a state of insecurity and terrorism among the people which makes it impossible in the ordinary way to conduct preliminary investigations before the justices of the peace and other judicial officers:

” ‘In the interest of public safety, it is hereby ordered that the writ of *habeas corpus* is from this date suspended in the Provinces of Cavite and Batangas.

(Signed) LUKE E. WRIGHT,

” ‘ *Governor-General*.'”

> “(2)
> Not waiving the question of jurisdiction, the respondents state that it is true that Felix Barcelon was detained in the month of April, 1905, by order of Colonel David J. Baker, jr., assistant chief of the Philippines Constabulary, and that the said Barcelon is now detained under the surveillance of Captain W. E. Thompson, senior inspector of Constabulary, in the Province of Batangas.”

By this answer the respondents admit that they are detaining the body of the said Felix Barcelon, and deny the right of this court to inquire into the reasons therefor by virtue of the said resolution of the Philippine Commission and the executive order of the Governor-General, issued by authority of the same, suspending the privilege of the writ of *habeas corpus* in the said Provinces of Cavite and Batangas.

Thus the question is squarely presented whether or not the judicial department of the Government may investigate the facts upon which the legislative and executive branches of the Government acted in providing for the suspension and in actually suspending the privilege of the writ of *habeas corpus* in said provinces. Has the Governor-General, with the consent of the Commission, the right to suspend the privilege of the writ of *habeas corpus*? If so, did the Governor-General suspend the writ of *habeas corpus* in the Provinces of Cavite and Batangas in accordance with such authority?’

A paragraph of section 5 of the act of Congress of July 1,1902, provides:

“That the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the Governor-General with the approval of the Philippine Commission, whenever during such period the necessity for such suspension shall exist.”

This provision of the act of Congress is the only provision giving the Governor-General and the Philippine Commission authority to suspend the privilege of the writ of *habeas corpus*. No question has been raised with reference to the authority of Congress to confer this authority upon the President or the Governor-General of these Islands, with the approval of the Philippine Commission.

This provision of the act of Congress makes two conditions necessary in order that the President or the Governor-General with the approval of the Philippine Commission may suspend the privilege of the writ of *habeas corpus*. They are as follows:

> (1) When there exists rebellion, insurrection, or invasion ; and
>
> (2) When public safety may require it. In other words, in order that the privilege of the writ of *habeas corpus* may be suspended, there must exist rebellion, insurrection, or invasion, and the public safety must require it. This fact is admitted, but the question is, Who shall determine whether there exists a state of rebellion, insurrection, or invasion, and that by reason thereof the public safety requires the suspension of the privilege of the writ of *habeas corpus*?

It has been argued and admitted that the Governor-General, with the approval of the Philippine Commission, has discretion, when insurrection, rebellion, or invasion actually exist, to decide whether the public safety requires the suspension of the privilege of the writ of *habeas corpus;* but the fact whether insurrection, rebellion, or invasion does actually exist is an open question, which the judicial department of the Government may inquire into and that the conclusions of the legislative and executive departments (the Philippine Commission and the Governor-General) of the Government are not conclusive upon that question.

In other words, it is contended that the judicial department of the Government may consider an application for the writ of *habeas corpus*

even though the privileges of the same have been suspended, in the manner provided by law, for the purposes of taking proof upon the question whether there actually exists a state of insurrection, rebellion, or invasion.

The applicants here admit that if a state of rebellion, insurrection, or invasion exists, and the public safety is in danger, then the President, or Governor-General with the approval of the Philippine Commission, may suspend the privilege of the writ of *habeas corpus*.

Inasmuch as the President, or Governor-General with the approval of the Philippine Commission, can suspend the privilege of the writ of *habeas corpus* only under the conditions mentioned in the said statute, it becomes their duty to make an investigation of the existing conditions in the Archipelago, or any part thereof, to ascertain whether there actually exists a state of rebellion, insurrection, or invasion, and that the public safety requires the suspension of the privilege of the writ of *habeas corpus*. When this investigation is concluded, the President, or the Governor-General with the consent of the Philippine Commission, declares that there exist these conditions, and that the public safety requires the suspension of the privilege of the writ of *habeas corpus*, can the judicial department of the Government investigate the same facts and declare that no such conditions exist?

The act of Congress, above quoted, wisely provides for the investigation by two departments of the Government- the legislative and executive-of the existing conditions, and joint action by the two before the privilege of the writ of *habeas corpus* can be suspended in these Islands.

If the investigation and findings of the President, or the Governor-General with the approval of the Philippine Commission, are not conclusive and final as against the judicial department of the Government, then every officer whose duty it is to maintain order and protect the lives and property of the people may refuse to act, and apply to the judicial department of the Government for another investigation and conclusion concerning the same conditions, to the end that they may be protected against civil actions resulting from illegal

acts.

Owing to conditions at times, a state of insurrection, rebellion, or invasion may arise suddenly and may jeopardize the very existence of the State. Suppose, for example, that one of the thickly populated Governments situated near this Archipelago, anxious to extend its power and territory, should suddenly decide to invade these Islands, and should, without warning, appear in one of the remote harbors with a powerful fleet and at once begin to land troops. The governor or military commander of the particular district or province notifies the Governor-General by telegraph of this landing of troops and that the people of the district are in collusion with such invasion. Might not the Governor-General and the Commission accept this telegram as sufficient evidence and proof of the facts communicated and at once take steps, even to the extent of suspending the privilege of the writ of *habeas corpus*, as might appear to them to be necessary to repel such invasion? It seems that all men interested in the maintenance and stability of the Government would answer this question in the affirmative.

But suppose some one, who has been arrested in the district upon the ground that his detention would assist in restoring order and in repelling the invasion, applies for the writ of *habeas corpus*, alleging that no invasion actually exists; may the judicial department of the Government call the officers actually engaged in the field before it and away from their posts of duty for the purpose of explaining and furnishing proof to it concerning the existence or nonexistence of the facts proclaimed to exist by the legislative and executive branches of the State? If so, then the courts may effectually tie the hands of the executive, whose special duty it is to enforce the laws and maintain order, until the invaders have actually accomplished their purpose. The interpretation contended for here by the applicants, so pregnant with detrimental results, could not have been intended by the Congress of the United States when it enacted the law.

It is the duty of the legislative branch of the Government to make such laws and regulations as will effectually conserve peace and good

order and protect the lives and property of the citizens of the State. It is the duty of the Governor-General to take such steps as he deems wise and necessary for the purpose of enforcing such laws. Every delay and hindrance and obstacle which prevents a strict enforcement of laws under the conditions mentioned necessarily tends to jeopardize public interests and the safety of the whole people. If the judicial department of the Government, or any officer in the Government, has a right to contest the orders of the President or of the Governor-General under the conditions above supposed, before complying with such orders, then the hands of the President or the Governor-General may be tied until the very object of the rebels or *insurrectos* or invaders has been accomplished. But it is urged that the President, or the Governor-General with the approval of the Philippine Commission, might be mistaken as to the actual conditions; that the legislative department-the Philippine Commission-might, by resolution, declare after investigation, that a state of rebellion, insurrection, or invasion exists, and that the public safety requires the suspension of the privilege of the writ of *habeas corpus*, when, as a matter of fact, no such conditions actually existed; that the President, or Governor-General acting upon the authority of the Philippine Commission, might by proclamation suspend the privilege of the writ of *habeas corpus* without there actually existing the conditions mentioned in the act of Congress. In other words, the applicants allege in their argument in support of their application for the writ of *habeas corpus*, that the legislative and executive branches of the Government might reach a wrong conclusion from their investigations of the actual conditions, or might, through a desire to oppress and harass the people, declare that a state of rebellion, insurrection, or invasion existed and that public safety required the suspension of the privilege of the writ of *habeas corpus* when actually and in fact no such conditions did exist. We can not assume that the legislative and executive branches will act or take any action based upon such motives.

Moreover it can not be assumed that the legislative and executive branches of the Government, with all the machinery which those branches have at their command for examining into the conditions in any part of

the Archipelago, will fail to obtain all existing information concerning actual conditions. It is the duty of the executive branch of the Government to constantly inform the legislative branch of the Government of the condition of the Union as to the prevalence of peace or disorder. The executive branch of the Government, through its numerous branches of the civil and military, ramifies every portion of the Archipelago, and is enabled thereby to obtain information from every quarter and corner of the State. Can the judicial department of the Government, with its very limited machinery for the purpose of investigating general conditions, be any more sure of ascertaining the true conditions throughout the Archipelago, or in any particular district, than the other branches of the Government? We think not.

We are of the opinion that the only question which this department of the Government can go into with reference to the particular questions submitted here are as follows:

> (1) Admitting the fact that Congress had authority to confer upon the President or the Governor-General and the Philippine Commission authority to suspend the privilege of the writ of *habeas corpus* was such authority actually conferred? and
>
> (2) Did the Governor-General and the Philippine Commission, acting under such authority, act in conformance with such authority?

If we find that Congress did confer such authority and that the Governor-General and the Philippine Commission acted in conformance with such authority, then this branch of the Government is excluded from an investigation of the facts upon which the Governor-General and the Philippine Commission acted, and upon which they based the resolution of January 31, 1905, and the executive order of the Governor-General of the same date. *Under the form of government established in the Philippine Islands, one department of the Government has no potcer or authority to inquire into the acts of another, which acts are performed within the discretion of the other department.*

Upon an examination of the law we conclude;

First. That the paragraph of section 5, above quoted, of the act of Congress of July 1, 1902, confers upon the Governor-General and the Philippine Commission the right to suspend the privilege of the writ of *habeas corpus* under the conditions therein named.

Second. That the Philippine Commission, acting within the discretion which such act of Congress confers upon them, did authorize the Governor-General, by its resolution of January 31,1905, to suspend the privilege of the writ of *habeas corpus* in the manner and form indicated in the said executive order of the Governor-General of January 31,1905.

The said resolution of the Philippine Commission has the effect of law for the purposes for which it was enacted. The judicial department of the Government may examine every law enacted by the legislative branch of the Government for the purpose of ascertaining:

> (a) Whether or not such law came within the subject-matter upon which the legislative branch of the Government might legislate; and
>
> (b) Whether the provisions of such law were in harmony with the authority given the legislature.

If the judicial branch of the Government finds—

> (a) That the legislative branch of the Government had authority to legislate upon the particular subject; and
>
> (b)
> That the particular law contained no provisions in excess of such department, then that investigation, or that conclusion, conclusively terminates the investigation by this department of the Government.

We base our conclusions that this application should be denied upon the following facts :

First. Congress had authority to provide that the President, or the Governor-General, with the approval of the Philippine Commission, might suspend the privilege of the writ of *habeas corpus* in cases of rebellion, insurrection, or invasion, when the public safety might require it.

Second. That the Philippine Commission, acting within this power, had authority to pass the resolution above quoted, of January 31, 1905, after an investigation of the conditions.

Third. That by virtue of said act of Congress, together with said resolution of the Philippine Commission, the Governor-Getieral had authority to issue the said executive order of January 31, 1905, suspending the privilege of the writ of *habeas corpus*.

Fourth. That the conclusion set forth in the said resolution and the said executive order, as to the fact that there existed in the Provinces of Cavite and Batangas open insurrection against the constituted authorities, was a conclusion entirely within the discretion of the legislative and executive branches of the Government, after an investigation of the facts.

Fifth. That one branch of the United States Government in the Philippine Islands has no right to interfere or inquire into, for the purpose of nullifying the same, the discretionary acts of another independent department of the Government.

Sixth. Whenever a statute gives to a person or a department of the Government discretionary power, to be exercised by him or it, upon his or its opinion of certain facts, such statute constitutes him or it the sole and exclusive judge of the existence of those facts.

Seventh. The act of Congress gave to the President, or the Governor-General with the approval of the Philippine Commission, the sole power to decide whether a state of rebellion, insurrection, or invasion existed in the Philippine Archipelago, and whether or not the public safety required the suspension of the privilege of the writ of *habeas corpus*.

Eighth. This power having been given and exercised in the manner

above indicated, we hold that such authority is exclusively vested in the legislative and executive branches of the Government and their decision is final and conclusive upon this department of the Government and upon all persons.

Happily we are not without high authority to support the foregoing conclusions. This is not the first time this same question has been presented in one form or another to the judicial department of the Government of the United States, as well as to the Government of the various States of the Union.

The same general question presented here was presented to the Supreme Court of the United States in the case of Martin *vs*. Mott, in January, 1827. An act of Congress of 1795 provided—

> "That whenever the United States shall be invaded or be in imminent danger of invasion from any foreign nation ar Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the State or States most convenient to the place of danger or scene of action, as he may judge necessary to repel such invasion, and to issue his orders for that purpose to such officer or officers of the militia as he shall think proper." In this, case (Martin *vs*. Mott) the question was presented to the court whether or not the President's action in calling out the militia was conclusive against the courts. The Supreme Court of the United States, in answering this question, said:
>
> "The power thus confided by Congress to the President is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without corresponding responsibility. It is, in its terms, a limited power, confined to *cases of actual invasion*, or *of imminent danger of invasion*.
> If it be a limited power, the question arises, By whom is the exigency

to be adjudged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed, may decide for himself, and equally open to be contested by every militiaman who shall refuse to obey the orders of the President? *We are all of the opinion that the authority to decide whether the exigency has arisen belongs exclusively to the President and his decision is conclusive upon all other persons*. We think that this construction necessarily results from the nature of the power itself and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state and under circumstances which may be vital to the existence of the Union. * * * If a superior officer has a right to contest the orders of the President upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and soldier * * * . Such a course would be subversive of all discipline and expose the best disposed officer to the chances of erroneous litigation. Besides, in many instances, the evidence upon which the President might decide that there is imminent danger of invasion might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of state which the public interest and even safety might imperiously demand to be kept in concealment.

"Whenever the statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. And in the present case we are all of opinion that such is the true construction of the act of 1795. It is no answer that such power may be abused, for there is no power which is not susceptible of abuse" (Martin *vs*. Mott, 12 Wheat,. 19 (25 U. S.) ; Vanderhey-den *vs*. Young, 11 Johns., N. Y., 150.)

Justice Joseph Story, for many years a member of the Supreme Court of the United States, in discussing the question who may suspend the

privilege of the writ of *habeas corpus*, under the Constitution of the United States, said:

> "It would seem, as the power is given to Congress to suspend the writ of *habeas corpus*
> in cases of rebellion, insurrection, or invasion, that the right to
> judge whether the exigency has arisen must conclusively belong to that
> body." (Story on the Constitution, 5th ed., sec. 1342.)

Justice James Kent, for many years a justice of the supreme court of the State of New York, in discussing the same question, cites the case of Martin *vs*. Mott, and says:

> "In that case it was decided and settled by the
> Supreme Court of the United States that it belonged exclusively to the
> President to judge when the exigency arises in which he had authority,
> under the Constitution, to call forth the militia, and that his
> decision was conclusive upon all other persons." (Kent's Commentaries,
> 14th ed., vol. 1, bottom p. 323.)

John Randolph Tucker, for many years a professor of constitutional and international law in Washington and Lee University, in discussing this question, said:

> "By an act passed in 1795 Congress gave to the
> President power to call out the militia for certain purposes, and by
> subsequent acts, in 1807, power was given to him to be exercised
> whenever he should deem it necessary, for the purposes stated in the
> Constitution; and the Supreme Court (United States) has decided that
> this executive discretion in making the call (for State militia) could
> not be judicially questioned.' (Tucker on the Constitution, Vol. II, p.
> 581.)

John Norton Pomeroy, an eminent law writer upon constitutional questions, said:

> "In Martin *vs*. Mott it was decided that under the authority given to the President by the statute of 1795, calling forth the militia under certain circumstances, the power is exclusively vested in him to determine whether those circumstances exist; *and when he has determined by issuing his call, no court can question his decision*." (Pomeroy's Constitutional Law, sec. 476.)

Henry Campbell Black, a well-known writer on the Constitution, says:

> "By an early act of Congress it was provided that in case of an insurrection in any State against the government thereof it shall be lawful for the President of the United States, on application of the legislature of such State, or of the executive (when the legislature can not be convened), to call forth such a number of the militia of any other State or States as may be applied for, as he may judge sufficient to suppress such insurrection. By this act the power of deciding whether the exigency has arisen upon which the Government of the United States is bound to interfere is given to the President." (Black's Constitutional Law, p. 102.)

Judge Thomas M. Cooley, in discussing the right of the judicial department of the Government to interfere with the discretionary action of the other departments of the Government, in his work on constitutional law, said:

> "Congress may confer upon the President the power to call them (the militia) forth, and this makes him the exclusive judge whether the exigency has arisen for the exercise of the authority and renders one who refuses to obey the call liable to punishment under military law." (Cooley's Principles of Constitutional Law, p. 100.)

But it may be argued by those who contend for the contrary doctrine, to wit, that the acts of the Governor-General, with the approval of the Philippine Commission, are not conclusive upon the courts and that none

of the foregoing citations are exactly in point, that none of these cases or authors treat of a case exactly like the one presented. We are fortunate, however, in being able to cite, in answer to that contention, the case of Henry William Boyle, where exactly the same question was presented to the supreme court of the State of Idaho, which the applicants present here and where the courts held the doctrine of the cases applied. In the case of Boyle, he had been arrested after the privilege of the writ of *habeas corpus* had been suspended. He applied for a writ of *habeas corpus* to the supreme court of Idaho, alleging, among other things, in his application:

First. That "no insurrection, riot, or rebellion now exists in Shoshone County;" and

Second. That "the Governor has no authority to proclaim martial law or suspend the writ of *habeas corpus*."

In reply to this contention on the part of the applicant, Boyle, the court said:

> "Counsel have argued ably and ingeniously upon the question as to whether the authority to suspend the writ of *habeas corpus* rests with the legislative and executive powers of the Government, but, from our views of this case, that question cuts no figure. We are of the opinion that whenever, for the purpose of putting down insurrection or rebellion, the exigencies of the case demand it, with the successful accomplishment of this end in view, it is entirely competent for the executive or for the military officer in command, if there be such, either to suspend the writ or disregard it if issued. The statutes of this State (Idaho) make it the duty of the governor, whenever such a state or condition exists as the proclamation of the governor shows does exist in Shoshone County, to proclaim such locality in a state of insurrection and to call in the aid of the military of the State or of the Federal Government to suppress such insurrection and reestablish permanently the ascendency of the law. It would be an absurdity to say that the action of the excutive, under such circumstances, may be negatived and set at naught by the judiciary, or that the action of the executive may be interfered with or impugned by the judiciary. If the

courts are to be made a sanctuary, a seat of refuge whereunto male-factors may fall for protection from punishment justly due for the commission of crime they will soon cease to be that palladium of the rights of the citizen so ably described by counsel.

"On application for a writ of *habeas corpus*, the truth of recitals of alleged facts in a proclamation issued by the governor proclaiming a certain county to be in a state of insurrection and rebellion will not be inquired into or reviewed. The action of the governor in declaring Shoshone County to be in state of insurrection and rebellion, and his action in calling to his aid the military forces of the United States for the purpose of restoring good order and the supremacy of the law, has the effect to put in force, to a limited extent, martial law in said county. Such action is not in violation of the Constitution, but in harmony with it, being necessary for the preservation of government. In such case the Government may, like an individual acting in self-defense, take those steps necessary to preserve its existence. If hundreds of men can assemble themselves and destroy property and kill and injure citizens, thus defeating the ends of government, and the Government is unable to take all lawful and necessary steps to restore law and maintain order, the State will then be impotent if not entirely destroyed, and anarchy placed in its stead.

"It having been demonstrated to the satisfaction of the governor, after some six or seven years of experience, that the execution of the laws in Shoshone County through the ordinary and established means and methods was rendered practicably impossible, it became his duty to adopt the means prescribed by the statute for establishing in said county the supremacy of the law and insuring the punishment of those by whose unlawful and criminal acts such a condition of things has been brought about; and it is not the province of the courts to interfere, delay, or place obstructions in the path of duty prescribed by law for the executive, but rather to render him all the aid and assistance in their power, in his efforts to bring about the consummation most devoutly prayed for by every good, law abiding citizen in the State." (In, re Boyle, 45 L. R. A., 1899, 832.)

The doctrine that whenever the Constitution or a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, such person is to be considered the sole and exclusive judge of the existence of those facts, has been recognized, not only by the Supreme Court of the United States but by practically all of the supreme courts of the different States, and has never been disputed by any respectable authority. The following cases are cited in support of this doctrine:

Martin *vs*. Mott (1827), 12 Wheat, 19 (25 U. S. Rep.).
Luther vs. Borden (1849), 7 How., 44, 77.
Wilkes vs. Dinsman (1849), 7 How., 130, 131.
Murray vs. Hoboken, etc., Co. (1855), 18 How., 280.
United States vs. Speed (1868), 8 Wall., 83.
Mullan vs. United States (1890), 140 U. S., 245.
Nishimura Ekiu vs. United States (1891), 142 U. S., 660.
Lem Moon Sing vs. United States (1894), 158 U. S., 538.
Ex parte Field (1862), 5 Blatch., 77, 81 (Fed. Case No. 4761).
Allen vs. Blunt, 3 Story, 745 (Fed. Case No. 216).
Gould vs. Hammond, 1 McAll., 237, 239 (Fed. Case 5638).
United States vs. Packages (1862), 27 Fed, Case, 288, 289.
United States vs. Cement (1862), 27 Fed. Case, 293.
United States vs. Cotton, (1872), 27 Fed. Case, 325, 328.
United States vs. Tropic Wind, 28 Fed. Case, 221.
In re Day, 27 Fed. Rep., 680.
Hammer vs. Mason, 24 Ala., 485.
People vs. Pacheco (1865), 27 Cal., 223.
Porter vs. Haight (1873), 45 Cal., 639.
Evansville and C. By. Co. vs. Evansville, 15 Ind., 421.
Koehler vs. Hill, 60 la., 566. Peoples. Wayne (1878), 39 Mich., 20.
State vs. Town of Lime (1877), 23 Minn., 526.
People vs. Parker, 3 Nebraska, 432.
Kneedler vs. Lane (1863), 45 Penn. St., 292.
In re Legislative Adjournment (1893), 18 Rhode Island, 834; 22 L. R. A., 716.
Chapin vs. Ferry (1891), 3 Washington, 396; 28 Pac. Rep., 758; 15 L. R. A., 120.
Druecker vs. Solomon, 21 Wis., 621; 94 Am. Dec, 571.

People vs. Bissell (1857), 19 111., 229, 232, 233.
Sutherland vs. Governor (1874) 29 Mich., 320, 330.
Ambler vs. Auditor-General (1878), 38 Mich., 746, 751.
State vs. Warmoth (1870), 22 La. An. Rep., 1; 13 Am. Rep., 126.
Jonesboro, etc., Co. vs. Brown (1875), 8 Baxter (Tenn.) 490; 35 Am. Rep., 713.

In the case of the United States vs. Packages, above cited, the court, in discussing the authority of the judicial department of the Government to interfere with the discretionary powers of the executive and legislative, said:

> "The doctrine involved has been fully discussed in several cases decided by this court during the last fifteen months, and was virtually settled long ago by the United States Supreme Court. The judiciary, under the Constitution, can not declare war or make peace. It is clothed with no such power, and can not be clothed with it. Whatever power is vested by the Constitution in one department of the Government can not be usurped by another. If one should wholly refuse to act, or should undertake to divest itself, or abdicate its legitimate functions, it would by no means follow that another department, expressly limited to specific duties, would thereby acquire ungranted powers. The abdication of executive functions by the executive, for instance, would not constitute the judicial the executive department of the country; nor would a failure or refusal of the legislative to pass needed statutes constitute the executive the law-making power. Each department has its true boundaries prescribed by the Constitution, and it can not travel beyond them. (United States vs. Ferreira (1851), 13 How., 40; Little vs. Barreme (1804),2Cranch, 170.)
>
> "The condition of peace or war, public or civil, in a legal sense, must be determined by the political department, not the judicial. The latter is bound by the decision thus made. The act of 1795 and the act of July 13, 1861, vests the President with the power to determine when insurrection exists, and to what extent it exists. The United States

> Constitution vests Congress with the power to provide for calling forth the militia to execute the laws of the Union, to suppress insurrection, and repel invasion; to declare war * * * and make rules concerning captures on land and water.'In the execution of that power, Congress passed the act cited above.
>
> "By the act of 1795 the Supreme
> Court says: 'The power of deciding whether the exigency had arisen upon which the Government of the United States is bound to interfere, is given to the President.' * * * After the President has acted, is a circuit court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the people? * * * If the judicial power extends so far, the guaranty contained in the Constitution of the United States is a guaranty of anarchy, and not of order. Yet if this right does not reside in the courts when the conflict is raging; if the judicial power is at that time bound to follow the decision of the political (department of the Government), it must be equally bound when the contest is over. At all events, it (the power to decide) is conferred upon him (the President) by the Constitution and laws of the United States, and must therefore be respected and enforced in its judicial tribunals." (Luther vs. Borden (1849), 7 How., 43, 44; Martin vs. Mott (1827), 12 Wheat, 29-31.)

The same doctrine has been uniformly maintained from the commencement of the Government. The absurdity of any other rule is manifest. If during the actual clash of arms the courts were rightfully hearing evidence as to the fact of war, and, either with or without the said juries, determining the question, they should have power to enforce their decisions. In case of foreign conflicts neither belligerent would be likely to yield to the decision; and, in case of insurrection, the insurgents would not cease their rebellion in obedience to a judicial decree. In short, the status of the country as to peace or war is legally determined by the political (department of the Government) and not by the judicial department. When the decision

is made the courts are concluded thereby, and bound to apply the legal rules which belong to that condition. The same power which determines the existence of war or insurrection must also decide when hostilities have ceased- that is, when peace is restored. In a legal sense the state of war or peace is not a question *in pais* for courts to determine. It is a legal fact, ascertainable only from the decision of the political department. (The Fortuna (1818), 3 Wheat., 236; United States vs. Palmer (1818), 3 Wheat, 610; Nuestra Senora, etc. (1819), 4 Wheat, 497; Santissima Trinidad (1822), 7 Wheat, 283; Eose vs. Himely (1806), 4 Cranch, 241; Foster vs. Neilson (1829), 2 Peters, 253.)

Under the act of Congress of July 13, 1861, the President of the United States, on the 16th day of August, 1861, proclaimed that the State of Tennessee was in a state of insurrection. The courts, in discussing the right of the President to decide upon the necessities of such proclamation and the period within which it should continue, said:

> "The legal status thus determined must remain so long as the condition of hostilities continues. He (the President) has never made a counter proclamation, nor has peace been officially announced. As a legal condition that status (of insurrection) is independent of actual daily strife in arms. A legal condition of hostilities may exist long after the last battle has been fought between the opposing armies. That condition (of insurrection or rebellion) ceases when peace is concluded through competent authority; not before. * * * Within any construction which could be very well given to the President's proclamation, no part of that State (Tennessee) maintains as yet a loyal adhesion to the Union and Constitution. It is the duty of the President, however, to decide that point. Until he declares to the contrary, the court must hold that the legal condition of hostility continues. The exceptions in the proclamation, so far as made by the President, courts can and must enforce. But if it be correct that by the terms of that proclamation the President intended to devolve on the courts the duty of determining judicially the status of a State or part of a State by an inquiry into its loyalty, or its occupation from time to time by the United States

> forces irrespective of a decision thereon by the executive, still courts could not then acquire the power. The limits upon their constitutional and legal functions could not thus be enlarged. Political power could not be so delegated to the courts. They (the courts) can not be charged with any duties not judicial; 'judicial power' alone is invested in them (the courts) under the Constitution. (United States vs. Packages (1862), 21 Fed. Case, 288, 289.)"

In the case of Druecker vs. Solomon (21 Wis., 621; 94 Am. Dec, 571, 576, 577) the supreme court of Wisconsin, in an action for false imprisonment for the arrest and detention during a state of insurrection, etc., the court cites and approves of the doctrine laid down by the Supreme Court of the United States in the case of Martin vs, Mott (12 Wheat, 19) and holds that the action of the political department of the Government in such cases is final and conclusive against the judicial department.

John Marshall, for many years Chief Justice of the Supreme Court of the United States, in discussing the rights of one department of the Government to interfere with the discretionary powers of another, said, in the case of Marbury vs. Madison ([1803], 1 Cranch., 137, 164) :

> "By the Constitution of the United States the President is invested with certain important political powers, in the exercise of which he has to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. * * * The subjects are political,' they respect the nation, not individual rights, and, being intrusted to the executive, the decision of the executive is conclusive. The application of this remark will be received 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. * * * The conclusion from this reasoning is that where the

> heads of departments are the political or confidential agents of the executive, merely to execute the will of the President or rather to act in cases in which the executive possesses a constitutional or a legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable."

In the case of Rice vs. Austin (19 Minn., 103) the supreme court of Minnesota held that "the judicial and executive departments of the government are distinct and independent and neither is responsible to the other for tire performance of its duties and neither can enforce the performance of the duties of the other." It may be said that in Minnesota this decision was based upon a constitutional provision. This is true, but the fact that the people of the State of Minnesota, by constitutional provision prohibited one independent department of the government from interfering or attempting to administer the duties of another, all the more reenforces the doctrine contended for here. Many of the States do permit the judicial department by mandamus to direct the executive department to perform purely ministerial duties. In Minnesota, however, the judicial department will not attempt to coerce the performance of even ministerial duties on the part of the executive.

In the case of Luther vs. Borden (7 How., 44) it was held that the decision and determination of matters of a purely political character by the executive or legislative department of the Government was binding on every other department of the Government and could not be questioned by a judicial tribunal. The dangers and difficulties which would grow out of the adoption of a contrary rule are by Chief Justice Taney in this case clearly and ably pointed out. Chief Justice Taney, referring to the power given to the President with reference to the right to decide whether it was necessary, on account of a possible invasion, to call out the militia, said:

"By this act (act of Congress of 1795) the power of deciding whether the exigency had arisen upon which the Government of the United States is bound to interfere is given to the President. * * * After the President has acted and called out the militia, is a circuit court of

the United States authorized to inquire whether his decision is right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented the majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States or the government which the President was endeavoring to maintain. If the judicial power extends so far, the guaranty contained in the Constitution of the United States is a guaranty of anarchy and not of *order*. Yet if this right does not reside in the court when the conflict is raging, if the judicial power is at that time bound to follow the decision of the political, it must be equally bound when the contest is over. * * *

"It is said that this power in the President is dangerous. to liberty and may be abused. All power may be abused if placed in unworthy hands; but it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual. When citizens of the same State are in arms against each other, and the constituted authorities unable to execute the laws, the interposition of the United States must be prompt or it is of little value. The ordinary course of proceedings in the courts of justice would be utterly unfit for the crisis, and the elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against the willful abuse of power as human prudence and foresight could well provide. *At all events it is conferred upon him by the Constitution and laws of the United States and must, therefore, be respected and enforced in its judicial tribunals*.'

Chief Justice Taney here cites approvingly the case of Martin vs. Mott.

In the case of Franklin vs. State Board Examiners (23 Cal., 173, 178) the supreme court of California decided—

> "That the political department of a State government is the sole judge of the existence of war or insurrection, and, when it declares either of these emergencies to exist, its action is not subject to review or liable to be controlled by the judicial department of the State."

In this case the court cited the cases of Martin vs. Mott and Luther vs. Borden.

This same doctrine was again recognized by the supreme court of California in the case of the People vs. Pacheco (27 Cal., 175, 223), not only resting its decision upon the case of Franklin vs. State Board of Examiners but also again cited and confirmed the case of Martin vs. Mott, Luther vs. Borden, and Vanderheyden vs. Young (11 Johns (N. Y.),159).

Chief Justice Marshall, in the case of McCullough vs. State of Maryland (4 Wheat, 316), says:

"We think the sound construction of the Constitution must allow the national legislature that discretion with respect to the means by which the powers it confers are carried into execution which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. * * * Such being the case, the determination of these questions by the political department of the Government must also necessarily be conclusive."

Chief Justice Taney, in the case of * * * ex parte Merryman, 17 Federal Cases, 144 (Fed. Case No. 9487), said, in speaking of the power of the courts:

"It is true that in the case mentioned Congress is of necessity the judge of whether the public safety does or does not require it (the suspension of the writ of *habeas corpus*), and their judgment is conclusive,"

Chief Justice Taney, in the same decision, quotes the following language of Mr. Justice Story approvingly:

"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."

In the case of McCall vs. McDowell, 15 Fed. Cases, 1235 (Fed. Case No. 8673), Judge Deady said:

"When the occasion arises—rebellion or invasion- whether the 'public service' requires the suspension of the writ or not is confided to the judgment of Congress, and their action in the premises is conclusive upon all courts and persons. * * *

"The suspension enables the executive, without interference from the courts or the law, to arrest and imprison persons against whom no legal crime can be proved, but who may, nevertheless, be effectively engaged in forming the rebellion or inviting the invasion, to the imminent danger of the public safety."

In the case of *Ex parte* Field (5 Blatchford, 63) this same question arose in the State of Vermont, and the supreme court of that State, relying upon the decision of Mr. Justice Story in Luther vs. Borden and that of Chief Justice Taney in Martin vs. Mott, decided that the President is the exclusive judge of the existence of the exigency authorizing him to call forth the militia and declare martial law, in pursuance of the power conferred on him by the act of Congress of 1795.

Judge Emmons, in the case of United States vs. 1,500 Bales of Cotton (Fed. Case No. 15958), in discussing this general question, said, quoting from a decision of Chief Justice Chase:

"The belligerent relation having once been recognized by the political power, all the people of each State or district in insurrection must be regarded as enemies until, by the action of the *legislature and executive*, that relation is thoroughly and permanently changed. * * *

"The statute devolved upon the President the political duty of determining whether armed force should be called out to put down insurrection in the States. It was for him to decide when the exigency occurred. The courts had no concern with it. * * * Whether there was

any necessity for the exercise of the power of the President to call out the militia the court could not determine. His decision was final. * * * If the judicial power were thus extended, the guaranty in the Constitution of a republican form of government was a, guaranty of anarchy, not of *order*. Equally incongruous results would follow if the courts instead of the Government, were to decide when hostilities are ended and when trade and intercourse should be resumed."

Not only has it been decided in numerous cases that the power to call out the militia and to suspend the writ of *habeas corpus* is entirely within the discretion of the legislative and executive branches of the Government, but, when the executive and legislative departments have decided that the conditions exist justifying these acts, the courts will presume that such conditions continue to exist until the same authority (legislative, etc.) has decided that such conditions no longer exist.

Judge Dillon, in the case of Philips vs. Hatch (Fed. Case No. 11094, said:

> "From the nature of the question, from the fair implication of the act of July 13, 1861 (an act authorizing the suspension of the writ of *habeas corpu*s), from the confusion that would ensue from any other rule, it is the opinion of the court that the rebellion must be considered as in existence until the President declared it at an end in a proclamation."

Judge Emmons, in the above case, discussing this same question, said:

> "These unquestioned doctrines have not been extemporized for the modern and exceptional exigencies of the late rebellion. They belong to the jurisprudence of all countries and were adopted as part of that of our own from its earliest history. Our most conservative judges, Marshall, Story, and Taney, have been foremost in announcing them. No citizen would challenge the justness and necessity of this rule. Judges have their peculiar duties which, if faithfully

> and learnedly studied, have little tendency to make them familiar with current and rapidly changing conditions upon which depend the important political question of whether it is safe to relax, on the instant, military rule and restore intercourse and trade."

The following cases are also cited :

> Brown vs. Hiatt, Fed. Case No. 2011.
> United States vs. 100 Barrels of Cement, Fed. Case No. 15945.
> Gelston vs. Hoyt, 3 Wheat., 246.
> The Divina Pastora, 4 Wheat., 52.
> The Santissima Trinidad, 7 Wheat., 283.
> Rose vs. Himely, 4 Cranch, 241.
> Garcia vs. Lee, 12 Peters, 511.
> Stewart vs. Kahn, 11 Wallace, 493.
> Mrs. Alexander's Cotton, 2 Wallace, 404.

For a general discussion, see Sixth American Law Register, 766; 4 Chicago Legal News, 245;

No *Government*, past or present, has more carefully and watchfully guarded and protected, by law, the individual rights of life and property of its citizens than the Government of the United States and of the various States of the Union. Each of the three departments of the Government has had, separate and distinct functions to perform in this great labor. The history of the United States, covering more than a century and a quarter, discloses the fact that each department has performed its part well.No one department of the Government can or ever has claimed, within its discretionary power, a greater zeal than the others in its desire to promote the welfare of the individual citizen. They are all joined together in their respective spheres, harmoniously working to maintain good government, peace, and order, to the end that the rights of each citizen be equally protected. No one department can claim that it has a monopoly of these benign purposes of the Government. Each department has an exclusive field within which it

can perform its part, within certain discretionary limits. No other department can claim a right to enter these discretionary limits and assume to act there. No presumption of an abuse of *these discretionary powers* by one department will be considered or entertained by another. Such conduct on the part of one department, instead of tending to conserve the Government and the rights of the people, would directly tend to destroy the confidence of the people in the Government and to undermine the very foundations of the Government itself.

For all of the foregoing reasons, the application for the writ of *habeas corpus* should be denied, and it is so ordered.

Arellano, C. J., Mapa, and *Carson, JJ.*, concur.

CONCURRING

TORRES, J.:

After considering the provisions of the Philippine bill of July 1,1902, contained in paragraph 7, section 5 of said act, I have concluded to concur in the grounds upon which the majority decision of this case is based, and agree that the petition for a writ of *habeas corpus* should be denied. By virtue of the decree of the 31st of January of this year the writ was suspended in the Provinces of Cavite and Batangas. The Governor-General, with the approval of the Commission, had the exclusive power and jurisdiction to suspend the writ, when in their opinion public safety should so require, in cases of rebellion and invasion only. The fact that the writ has been suspended can not, however, be used as a pretext for the commission of crimes defined and punished in the Penal Code now in force in these Islands. The application of said code has not been suspended in said provinces.

Article 200 of the Penal Code now in force provides:

> "The public official who, unless it be by reason of a crime, should detain a person without being duly authorized to do so

> by law or by regulations of a general character in force in the Philippines, shall incur the penalty, etc."

Rules 27, 28, 30, and 34 of the provisional law for the application of the Penal Code in the Philippine Islands give greater force to the above-quoted section of said code. It provides that no person shall be deprived of his liberty, except by reason of the commission of some crime.

These provisions, although based upon different fundamental principles, are, nevertheless, in perfect harmony with the provisions of section 5, subdivisions 1 and 3 of the said act of July 1, 1902, in that they provide that no law shall be promulgated in these Islands that will deprive persons of their life, liberty, or property without due process of law, and that no person shall be held to answer for the commission of a crime except by due process of law.

Felix Barcelon has been detained for a long time in the town of Lipa, Province of Batangas, not for the commission of any crime and by due process of law, but apparently for the purpose of protecting him. This detention, unless it is shown that some good reason exists therefor, is absolutely illegal, notwithstanding the fact that the writ of *habeas corpus* has been suspended in the Province of Batangas.

The honorable Governor-General, with the approval of the Philippine Commission, decided, upon his own responsibility, that a state of rebellion existed in the Provinces of Cavite and Batangas, and by virtue of his authority suspended the writ of *habeas corpus* for the purpose of reestablishing peace, insuring public safety, and facilitating the prosecution and repression of rebels.

The writ was suspended with a view to averting the commission of crimes, particularly those affecting public peace, by depriving criminals of the privilege of the writ.

It would not be lawful, however, to violate the provisions of the Penal Code under the pretext that the writ has been suspended. It would not be lawful to rob or commit any other trespass upon the person,

rights, or property of citizens. The detention of Felix Barcelon is not due to the commission of any crime. It is an actual trespass upon his liberty and personal safety, committed by the police authorities, which under no circumstances can be excused or justified by the temporary suspension of the writ of *habeas corpus*.

The fundamental laws of Spain, a monarchy, the spirit and principles of which are the basis of our Penal Code, and the provisional law for its application, do not contain any provision in regard to the privilege of *habeas corpus*, but they contain provisions which guarantee to the citizen his individual rights. The supreme court of Spain has held that not even where constitutional guaranties are suspended can the executive authority order that a person be detained, except for crime or for breach of the public peace, (Judgment of the 15th of March, 1877.)

Barcelon, the petitioner in this case, is neither a rebel nor a criminal; therefore his detention is illegal.

For the foregoing reasons I am of the opinion that the petition for *habeas corpus* should be denied, and that criminal proceedings should be instituted for the crime of illegal detention, defined and punished in article 200 of the Penal Code, and that it is the duty of the judge of the Court of First Instance of the Province of Batangas to proceed against those responsible for said crime.

DISSENTING

WILLARD, J.,:

The question in the case is this: Have the Governor-General and the Commission power to suspend the writ of *habeas corpus* when no insurrection in fact exists? If tomorrow they should suspend the writ in Manila, would that suspension be recognized by the courts?

That in such a case they ought not to suspend the writ and that where no insurrection in fact exists they would have no right to do so,

are propositions which have no bearing upon the case. The question is, Have they the power to do it?

Prior to the passage of the act of Congress of July 1, 1902, the Commission had that power. They could suspend the writ, take it away entirely from certain provinces, or repeal entirely the law which authorized it to be issued. They had absolute control over it. (*In re* Calloway, 1 Phil. Rep., 11.)

By the decision of the majority in this case the Governor-General and the Commission still have that power. The effect of this decision is to give them the same power which the Commission exercise, before the passage of the act of Congress of July 1,1902, In other words, that part of the act which relates to the writ of *habeas corpus* has produced no effect. It is repealed by this decision, and Congress accomplished nothing by inserting it in the law. No construction which repeals it should be given to this article. If a given construction leads to that result it seems to me that it must be certain that the construction is wrong. No other argument to prove that it is wrong is needed. Congress must have intended that this provision should produce some effect. To hold that it has produced no effect is to defeat such intention.

But it is said that by the terms of the act, while the Governor-General and the Commissioners have the power to suspend the writ, they should not do it except in cases where insurrection in fact exists, and they, being men of character and integrity, would not do it except in such cases. As the Government is at present constituted, this is undoubtedly true. This argument, however, is fully answered by what was said by the Supreme Court of the United States in the case of *Ex parte* Milligan (4 Wallace 2,125):

> "This nation, as experience has proved, can not always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of

> liberty and contempt of law,may fill the place once occupied by Washington and Lincoln."

With the exception of one case decided by the supreme court of Idaho, no authorities are presented involving directly the construction of the provision of the Constitution of the United States relating to the suspension of the writ of *habeas corpus*, which provision is substantially the same as the one embodied in the act of Congress of July 1,1902.

That the judicial power has no authority to interfere with the executive power in the discharge of the duties imposed upon the latter by law is a proposition that no one denies. The question, however, in this case is, Has the law conferred upon the executive the power to decide conclusively whether a state of insurrection exists or not?

In the case of Martin vs. Mott (12 Wheat, 19, 28) the court said that the construction which it gave to the act of Congress authorizing the President to call out the militia "necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress"-that is to say, in determining what the words of the law meant they relied almost entirely upon the nature of the power given by the law, and the object contemplated by it. Those are the things which should be considered in determining what construction is to be given to the provisions relating to habeas corpus. The power given by an act of Congress to the President, who under the Constitution is the commander in chief of the militia when called into the service of the United States, to call such men into military service upon a sudden emergency, is in my opinion distinctly different from the power given by the Constitution to Congress to suspend the writ of *habeas corpus* so as to prevent a person already in custody from having the cause of his detention inquired into by a court of justice. The reasons which would lead a court to say that the former power had been unreservedly intrusted to the President should not, I think, be considered as controlling, when the extent of the latter power is under discussion.

The effect of the suspension of the writ of *habeas corpus*, and as it seems to me its manifest purpose, is to allow the Government to commit an illegal act. It allows it to imprison a person who has committed no offense, and for whose arrest and detention no warrant has been issued by any competent court, and it leaves that person without redress at the time for this unlawful act. In the case at bar it appears from the return of the respondents that Barcelon is deprived of his liberty without due process of law in violation of a provision of this same act of Congress.

The privilege of the writ of *habeas corpus* was given to protect the citizen from such arbitrary and illegal acts of either the executive or the legislative power; the latter, that department which, according to Madison in No. 47 of The Federalist, "is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."

Is it probable that the people, in adopting the Constitution, intended to give up to these departments of the Government against which they needed protection perhaps the most important right which could furnish that protection?

I do not think that the authors of the Constitution or the authors of the act of Congress intended to so place this right in the hands of these two departments that whether it should or should not be enjoyed by the citizens would depend exclusively upon their will and pleasure.

For the reasons above stated, I dissent from the opinion of the court.

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