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HOUSE OF REPRESENTATIVES.

DEBATE on the passage of the bill concerning courts martial and courts of enquiry.

WEDNESDAY, MARCH 9.
(CONTINUED.)

Mr. JOHNSON said, that he meant to make a few very few observations why he thought this bill should pass. The objections which some gentlemen had made to the detail of the bill when first introduced, had struck him with considerable force, although from the first moment he had thought that something ought to be done. On the passage of this bill, said he, although its details may not exactly meet my mind, as gentlemen on neither side could make it more perfect, and I will not entertain a doubt that they would have done it if they could, I must give my vote in its favor.

It would seem that gentlemen who oppose this bill feel the same sentiments as myself. If I could believe that the construction of the bill would cause military predominance and civil subservience, unquestionably I should give my negative to the passage of this bill. But if I understand the clause alluded to, an application is first to be made to the clerks of civil tribunals. I cannot be induced to believe, when we make application to a civil tribunal for process, that the military preponderates. Did the bill provide that the civil magistrate should make application to the military, and be dependent on it, I should certainly think the objection forcible. But can I say, when discretion does rest with the civil authority, that the civil authority subserves the military? Which power is subservient? That which has the power of controlling process or that which makes application for it? I have always thought that the power which can control another is superior, and the power controlled subservient.

It is said likewise, and if that were the construction, I would certainly oppose the passage of the bill, that we are about to give power to the military to create offences, the punishment of which is vested with the civil authority, and to create a jurisdiction in military tribunals to inflict a punishment on the citizen. Does this bill contemplate the giving any jurisdiction not heretofore given? If so, I am mistaken. If I understand the object of the bill, it is to give power to the government to prosecute, and the individual to defend himself by coersion. I have not understood that any jurisdiction is given to military courts; I have taken up an idea that the grand object of the bill is to coerce the evidence of witnesses in cases of crimes already designated, and of which the punishment is also pointed out.

The gentleman last up has made an objection to the issuing a subpoena without shewing cause to the civil authority for it. Do you not in civil cases always obtain subpoenas on application to the clerk, without shewing cause, except in case of subpoena, duces tecum? Do you ever make application to the Judge in the first instance for civil process? Do you for a *capias ad satisfaciendum*? You direct the clerk to issue it and endorse on it no bail to be taken; the person against whom it is issued is thrown into jail, and cause is not required to be shewn. But if we make application for papers to a civil tribunal, reason must be shewn; if to a military court, this bill provides the same. If I were mistaken in this, in this also I should also be opposed to the provisions of the bill.

It is also said by some who are opposed to the bill, that military despotism will be extended by it. I have no doubt that gentlemen do conscientiously believe it, and I do as much believe that it will abridge military despotism, if despotism indeed exists. The only objection to this bill is that despotism may be exercised by the military over the citizen. If one of your soldiers should be marked out for the vengeance of a superior officer, does this bill deprive him of his means of defence or of the power of coercing witnesses? Does it abridge or extend military despotism to say that a man with a budget on his back and a firelock on his shoulder has an equal right with his superior officer to compulsory process? Surely not. Does this bill apply exclusively to the commander in chief? I would spurn the idea of giving this privilege to the commander in chief, were we to leave the poor soldier in the ranks without the power of coercing evidence. I would say, here is the same law to apply to all; and if exculpatory evidence can be procured, the law has said that citizens shall be confronted with their accusers, and have the benefit of compulsory process. We say, as far as we can go, we will grant coercion, and where this cannot be done, we will give you an opportunity to procure testimony in writing.

It has been said that a particular case which is known to us all, has given rise to this law. I disclaim the idea of that case operating upon myself. I agree with gentlemen that it is improper to legislate upon particular cases; but if a particular case should occur which shews a defect in our laws; although the particular case suggest the propriety of the law, I consider it important to make a provision which shall not only include that, but a thousand possible cases which might happen in the course of human events.

The gentleman from Vermont (Mr. Elliot) has also stated that this is a subject recommended by the President of the U. S. and that it is made a question of confidence. It is not a subject of confidence, or of distrust, which is its opposite. If we look at the message of the President, we shall find that no particular course is pointed out. Our attention is called to this particular situation of our laws on this subject. We are not requested to do this or that. I was one who voted for the enquiry; the only constitutional tribunal which ought make that enquiry, has not efficient powers to compel the attendance of witnesses: we have in consequence of the defect in our laws which this case has discovered, thought proper to attempt an amendment of them. What then has this to do with confidence or distrust? So long, sir, as I have a rational confidence in what comes from the President or from any member of this House, so long also I will act in such a way as shall manifest to the world that I do not possess a blind confidence which would induce me to do an act injurious to my country or contrary to my own sentiments.

We are told that this law will harrass the citizen, and as a reason for this belief, we are told that it is inconvenient to attend courts martial or courts of enquiry! Granted: it results from human institutions. So long as controversy exists, so long will witnesses suffer inconvenience. Will you, because it is inconvenient, withhold compulsory process? Would not this prostrate every institution in your country? Do we require more by this law than is already in the power of our civil institutions? No. In cases of life or death and affecting reputation, we award compulsory process. It is all important, that the power should be vested somewhere, and where better than in the civil authority, to coerce attendance in cases of this kind.

It has been said, that we cannot extend all the privileges of the citizen in civil life to the soldier. I regret that we cannot extend them as far as I could wish, and as far as those gentlemen who opposed the bill must certainly wish. But shall that induce us to withhold the hand from ministering to their rights as far as in us lies? Have gentlemen taken into consideration that the militia also are subject to military law in time of war, and shall they be deprived of the testimony of their fellow-citizens, or shall government be deprived of testimony against them? This bill is not particularly calculated for the man accused, but upon the reciprocal principle, that government also should have the power of coercion.

I confess that I can see no occasion nor any reason for this alarm on the subject. If I could see the same evils resulting from the passage of this bill as are mentioned by some gentlemen in opposition to the bill, I should be one of the last to vote for it, and this House would immediately reject it.

I have endeavored to shew that the jurisdiction of courts martial and courts of enquiry is not to be extended by this bill; that the only grand object is to give power of prosecution and defence to the government and individuals; and that it is not a subject of confidence or distrust, but a subject on which every one should be guided by his own judgment. And so I have no doubt every gentleman in the House will vote.

Mr. RANDOLPH said that an observation of the gentleman who had just sate down, not indeed an original one, for it had been repeatedly pressed upon the House, induced him now to rise; not that he could have reconciled it with his feelings or principles, to give a silent vote on such a bill as that now before them, but the remark of the gentleman from Kentucky had caused him to throw himself upon the patience and mercy of the House earlier than he had intended. It was a remark calculated he would not say *ad captandum vulgus*, but to catch every class of citizens in the community, and particularly that most meritorious class, the middle class, who must unquestionably be relied upon for the ultimate safety of the country, whether from internal danger, or foreign assault. It had accordingly been reiterated again and again, by the advocates of the bill, who seemed to regard it as their favorite and most unanswerable argument. The position was this:—"That the bill on your table is calculated to favor the militia, inasmuch as men serving in the militia are liable to be tried by courts martial as well as soldiers in the regular army." But if the bill be examined with only one half of the attention which it behoved every member to bestow upon it, the advantage ascribed to it would be found altogether illusory. As the bill had grown out of a case arising in the standing army, so it was calculated for the benefit of that army, if not of a single officer of that army. Its application to the militia had been gladly seized upon to give an air of popularity to the measure, and make it go down. The militia might have existed till doomsday, and such a provision be never dreamt of on their account. In fact they could derive no advantage from it, and had merely been pressed into the service to furnish some plausibility to the bill.

It is (said Mr. R.) of the very essence of courts martial, in time of war more especially, when alone the militia can be called into actual service, that their proceedings should be summary, prompt and energetic. What sort of discipline will that be in an army, in time of actual war; perhaps in sight of the enemy; in which is permitted this slow process of sending men to Georgia, New-Hampshire, or Detroit, to take depositions? This bill is equivalent to a repeal of all military law; for in time of war, if it have any operation at all, it must operate a dissolution of your army. I repeat it, that if, in time of war, a soldier cannot be punished, until the dilatory process pointed out by this bill is complied with, your army is virtually dissolved. It will be seen then on examination that the bill is calculated not for time of war, and consequently not for the benefit of the militia. On the contrary it goes to violate the rights of those very men, in their civil capacities, whom, in their military garb, it professes to protect. I lay it down as an immutable principle which cannot be controverted; which no man will pretend to deny, and much less the gentleman just sate down, that the citizen is constitutionally exempt from all military service whatever, except he subject himself to that military service by voluntary enlistment. I speak of service in connection with the standing army, and not of the duty which, as a militia man, he is bound to perform. He stands severed from this class of men by the great, broad land-marks of the constitution. He owes them no service, there is none, which, in their military capacity, they can demand at his hands. They are to him a distinct cast, whom he looks upon with suspicion at least: whose movements it behoves him at all times to watch; whose force it is his duty to keep within the smallest possible number, capable of garrisoning the posts on the frontier; in other words, within the pale of the public good. A jealousy of that force and of Executive influence, and they are one and the same thing, for every augmentation of the army is but an increase of Executive power, has ever been deemed the great criterion, the infallible touchstone of every republican's, of every whig's political principles.

It is an objection to this bill, not only (as has been very forcibly and ably demonstrated to this House) that it tends to exalt the military at the expence of the civil authority, but that under the garb and color of civil jurisdiction the person of the citizen is laid at the mercy of a military tribunal; for, as has been said, over and over again, the party suing out the writ applies to the clerk of the court, who, on application is bound to issue it. Why then this parade of calling in the civil authority, when no discretion is lodged with that authority to give or with-hold its aid? The process is in fact as much military as if issued by the court-martial, in the first instance, with this additional and fatal objection, that to mask the deformity of naked military despotism the civil power is surrendered a passive victim into its hands. It is this hideous feature which most of all excites my antipathy to the bill. The power which it confers is odious, but the manner of conferring it worse.

I have said that every free-man of the U. S. stands constitutionally exempt from being called upon to perform any service in relation to, or connection with a standing army; unless he subject himself to that obligation by his own voluntary act. Yet this bill does subject the citizen not merely to perform expensive and arduous service, but to have every thing that man can hold dear, placed in a situation, the very idea of which it is impossible to contemplate without abhorrence. The personal liberty of the citizen is, in principle, as much violated by compelling him to go one hundred miles as five thousand. This provision must be regarded as a mere entering wedge. It prostrates the rights of every freeman in the first instance, leaving the details to future commentators on the new military code, who will of course accommodate them to their own purposes. But this is nothing in comparison. What would any man among us say at seeing his sister, his daughter or his wife summoned to give evidence in a fortified town, on the eve of a seige, or brought to head quarters, through the tumultuous, profligate and flagitious scenes of a camp, perhaps hourly expecting the enemy's attack? Where is the screen to protect female delicacy, I might almost say female virtue? None. This case is not merely supposable but in time of war, when courts martial are most frequent, must happen, unless indeed gentlemen are ready to allow the utter impossibility of executing the bill, and to confess that as it has been brought forward to suit a particular purpose, so when that purpose shall have been answered, it will be laid aside. Allow it efficacy, and there is not a man, or woman, in the United States who may not by its express provisions, at the bare instigation of a judge advocate, or any party accused, be dragged into the tumultuous scenes of military licentiousness.

In the earlier stages of my political life, a salutary jealousy—as it was then deemed, and as I still deem it to be—was inculcated by the fathers of our political church against the ambition of the federal government, generally, disposed, as it was believed to be, to encroach on the government of the states—of the distribution of power between the several departments of the federal government, where the Executive was equally disposed to encroach on the other departments—and chiefly of systems calculated to favor permanent military institutions in this country. What then shall we say to a bill calculated to exend the power of the federal government, not indeed at the direct expense of the states, but of the citizen—& particularly of that branch of the federal government of which it behoves us to be especially jealous, which exalts the military at the expense of the civil institutions of our country, and and gives to the President, by whom every court martial is *virtually* ordered, power of the most alarming and undefined nature. In whichsoever way this bill be viewed, the impropriety of legislating for a particular case becomes the more manifest and glaring. A proposition was brought forward, by a gentleman from Kentucky (Mr. Rowan) to enquire for ourselves by a known, practicable, constitutional organ, into the conduct of a certain officer. That motion was over-ruled. The House preferred a request to the President of the United States that he would cause an enquiry to be instituted—with which he does not comply. I mean no disrespect to the President of the United States, but merely to state a fact. A military court of enquiry into the conduct of this person had been instituted some time previous to the application of the House of Representatives, of which the President officially notifies them in his answer, and hints a deficiency in its power. For this particular case and on this recommendation you legislate, and every section and line in that bill is a lame attempt to justify the House in refusing the enquiry proposed by the gentleman from Kentucky, which was calculated to probe the matter to the bottom and required the aid of no new law, constitutional or otherwise, to carry it into effect. I will not consent to make amends for having refused that inquiry at the expense of the constitutional rights of our citizens. I will never give this proof of my zeal for investigation, much less of my deference to military power. But this bill, objectionable as it is in principle, is manifestly incompetent to the object, which it professes to attain. Because, in the case in question, if you are desirous to get at the *whole truth* you must obtain possession of other than "public" papers, and other evidence than *exparte* depositions. The bill unquestionably is not calculated to reach its avowed object—further comment on such a production is unnecessary—a bill which deserves much more the name of a contrivance (I do not say an intentional one) to gloss over guilt, than a shield for the protection of innocence. Such an enquiry as this bill is likely to produce, take my word for it, will never satisfy the people of this country.

But with all this tenderness for the rights of the soldier and particularly of the militia man—who never can be benefitted by this bill—because it must be inoperative in the face of an enemy, when your discipline will cease if you have to send the marshal a hundred miles for witnesses to give it efficiency—what becomes of your tenderness to the citizen-witness, for whom, in his capacity of soldier so much regard is felt. In case of his refusal to attend, or to testify when he has attended he is proceeded against—how? In the same manner as if he had refused to attend, or give evidence in a civil court; and the civil court is called upon to inflict the penalties. In case, of contempt to a civil court, the court possesses within itself the higest possible evidence of the fact, and proceeds to punish the offender accordingly. This has been thought, and I believe properly, a necessary sanction to the authority of our courts of law. But here the citizen may be punished by order of court—for a contempt of the civil authority? Not at all! the civil court is made the mere executioner, the drum-major of the military court, to inflict a punishment on the citizen for a military offence, which in his capacity of citizen, he cannot commit, and the evidence of his guilt shall be the record—of what? Of a court martial! This record is to be evidence, conclusive evidence (for how are you to traverse it?) upon which the citizen is to be amerced & incarcerated; and yet he is told that this is a provision for the protection of his liberty! The only case in which our free and manly jurisprudence permits the citizen to be punished in his person, or property, without the intervention of a jury of his peers, is that of a contempt of court, an offence coming within its personal knowledge, and against which it is necessary to proceed in a summary way, to uphold justice herself upon the judgement seat, and yet even this power has been viewed with great jealousy and must be exercised with cautious forbearance. But to give validity in the courts of law to the records of courts martial, to make them evidence, upon which the citizen may be restrained in his liberty and dispossessed of his property, without any security which the trial by jury affords, is a monstrous innovation upon every maxim heretofore held sacred amongst us.

But after having declared that the citizen shall become, without voluntary enlistment, subject to a species of military duty, pertaining to, and connected with the regular army, and that the courts of justice and of law are to become instruments of punishment, in the hands of courts martial for any failure in that duty—why stop here? Why not extend to courts martial of the army of the U. S. power in all cases to command the services of the citizen, where his assistance shall seem to them "*necessary*" to enable them to do military justice. You may as well turn over the convicted soldier to the sheriff, or marshal, and make him executioner; call the citizen from private life, put the instruments of torture or of death, into his hands, and compel him to assist, where his aid may be deemed "*necessary*," in executing the sentence of a court abhorrent to his feelings, and his principles; to give the finishing hand to a process which ought to be summary, but which unites all the delay of a judicial court with the terrors of a military tribunal. But this is necessary to enable innocence to protect itself. Why then is this the only relief extended to the accused? Why not give him all the privileges of a citizen? Why not allow him an impartial jury and counsel for his defence? You do not this; you leave him at the mercy, at the discretion of an arbitrary commission, appointed for the express purpose of trying him—but you extend privileges to him at the expense of the private citizen, who has no concern or connexion, and almost feels himself contaminated at being coupled with him. You take from the citizen his common right, and make the record of a court martial the evidence upon which he shall be punished—and this to advance the purposes of justice; when at the same time, the court by whom the accused is to be tried is constituted upon principles the most abhorrent to justice, and from the very nature of things, must be presumed to have a bias, for, or against the culprit. Have gentlemen taken into consideration one great, plain distinction between courts martial and courts of law (which I have not yet heard mentioned—perhaps it may have been, and has escaped me) when they are about to compel the equal attendance of the citizen upon both, by the same penalties?—that courts of law are regular—held at stated periods and places, which have been selected by law for the public convenience—the creatures of an enlightened and benevolent policy—that courts martial are irregular, that they may, and most frequently must be held in places the most difficult and even dangerous of access—the most destitute of accommodation, and in seasons the