

ed only by his own judgment, or in other words, his own arbitrary will, which is no limitation at all.

In most cases, the judiciary of the United States are the ultimate judges of the constitution, and whether its powers are fairly pursued.—But in *this* case the remedy would be inadequate.—During an appeal to the supreme court, which sits but twice a year, and which might consume many months in deliberation, an invasion might lay waste the country, and be fatal to our liberties—or a rash president might seize the militia, send them on board ships, to fight on the borders of the Dwina, or on the sands of Africa—or, if a firm and dignified governor should *resist such an usurpation*, a headstrong president, and obedient congress might carry civil war, fire, and sword, into the state which dared to assert their constitutional rights.

There can be therefore *no umpire*.—Either the delegate or the constituent must be the judge. To suppose that the delegate should be the judge would be to pervert the very first principles of common sense, prudence, freedom, and common law.

Of common sense, because of what use is a limitation, if the person you *wish to restrain*, can judge exclusively whether he breaks the limitation or not?—Of prudence and freedom, because if you once permit the delegate to be the judge of his own powers, what security can you possibly have against the grossest abuses?—At common law too, unless where the authority is coupled with an interest, the power of the constituent is always superior to that of the attorney, or substitute.

Besides, from the very *form* of proceeding, adopted in ordering out the militia, a *form* rendered necessary by the provisions of the constitution, the right of judging seems to be necessarily placed in the governors of the several states. The orders are issued to them—they must therefore decide, whether the orders are in due form, and whether they are issued in a case which *authorizes congress to order out the militia*.—In ordinary military cases, the subordinate officer is justified by the orders of his superior officer, whether those orders are right or wrong. But the governors of the several states are not *subordinate* to the president, *until after* they are *actually in the service* of the United States. For ordering out the militia, which is an act which *precedes the actual service*, the governors are responsible to their constituents, and may, and ought to be impeached if they do it, at the request of the president, in any case, *not provided for by the constitution*.

Now a man cannot be liable to punishment for doing that of which he was not the free judge, to decide whether he would, or would not do it.

I have said that the *form required* by the constitution made it *necessary* that the governors should judge whether the militia are rightfully ordered out.—I add, further, that it is not in the power of congress to dispense *with that form*.—They cannot *authorize* the president to skip over the governor, and order out the militia, directly, or to issue his orders to inferior officers—because, the president is not vested with the command of the militia,