ARGUMENT
ON THE
JURISDICTION OF THE MILITARY COMMISSION,
BY
REVERDY JOHNSON,
OF COUNSEL FOR MRS. SURRATT.

Mr. President and Gentlemen of the Commission:

Has the Commission jurisdiction of the cases before it, is the question which I propose to discuss. That question, in all courts, civil, criminal, and military, must be considered and answered affirmatively before judgment can be pronounced. And it must be answered correctly, or the judgment pronounced is void. Ever an interesting and vital inquiry, it is of engrossing interest and of awful importance when error may lead to the unauthorized taking of human life. In such a case, the court called upon to render, and the officer who is to approve its judgment and have it executed, have a concern peculiar to themselves. As to each, a responsibility is involved which, however conscientiously and firmly met, is calculated and cannot fail to awaken great solicitude and induce the most mature consideration. The nature of the duty is such that even honest error affords no impunity. The legal personal consequences, even in a case of honest, mistaken judgment, can not be avoided. That this is no exaggeration, the Commission will, I think, be satisfied before I shall have concluded. I refer to it now, and shall again, with no view to shake your firmness. Such an attempt would be alike discourteous and unprofitable. Every member comprising the Commission will, I am sure, meet all the responsibility that belongs to it as becomes gentlemen and soldiers. I therefore repeat that my sole object in adverting to it is to obtain a well-considered and matured judgment. So far the question of jurisdiction has not been discussed. The pleas which specially present it, as soon as filed, were overruled. But that will not, because properly it should not, prevent your considering it with the deliberation that its grave nature demands. And it is for you to decide it, and, at this time, for you alone. The commission you are acting under of itself does not and could not decide it. If unauthorized it is a mere nullity, usurpation of a power not vested in the Executive, and conferring no authority whatever upon you. To hold otherwise would be to make the Executive the exclusive and conclusive judge of its own powers, and that would be to make that department omnipotent. The powers of the President under the Constitution are great, and amply sufficient to give all needed efficiency to the office. The convention that formed the Constitution,

and the people who adopted it, considered those powers sufficient, and granted no others. In the minds of both (and subsequent history has served to strengthen the impression) danger to liberty was no more to be dreaded from the Executive than from any other department of the Government. So far, therefore, from meaning to extend its powers beyond what was deemed necessary to the wholesome operation of the Government, they were studious to place them beyond the reach of abuse. With this view, before entering "on the execution of his office," the President is required to take an oath "faithfully" to discharge its duties, and to best of his "ability, preserve, protect, and defend the Constitution of the United States." He is also liable to "be removed from office on impeachment for and conviction of treason, bribery, or other high crimes or misdemeanors." If he violates the Constitution; if he fails to preserve it; and, above all, if he usurps powers not granted, he is false to his official oath, and liable to be indicted and convicted, and to be impeached. For such an offense his removal from office is the necessary consequence. In such a contingency, "he shall be removed" is the command of the Constitution. What stronger evidence could there be that his powers, all of them, in peace and in war, are only such as the Constitution confers? But if this was not evident from the instrument itself, the character of the men who composed the Convention, and the spirit of the American people at that period, would prove it. Hatred of a monarchy, made the more intense by the conduct of the monarch from whose government they had recently separated, and a deep-seated love of constitutional liberty, made the more keen and active by the sacrifices which had illustrated their revolutionary career, constituted them a people who could never be induced to delegate any executive authority not so carefully restricted and guarded as to render its abuse or usurpation almost impossible. If these observations are well founded—and I suppose they will not be denied—it follows that an executive act beyond executive authority can furnish no defense against the legal consequences of what is done under it. I have said that the question of jurisdiction is ever open. It may be raised by counsel at any stage of the trial, and if it is not, the Court not only may, but is bound to notice it. Unless jurisdiction then exists, the authority to try does not exist, and whatever is done is "*coram no judice*," and utterly void. This doctrine is as applicable to military as to other courts.

O'Brien tells us that the question may be raised by demurrer if the facts charged do not constitute an offense, or if they do, not an offense cognizable by a military court, or that it may be raised by special plea, or under the general one of not guilty. *O'Brien*, 248.

DeHart says: The court "is the judge of its own competency at any stage of its proceedings, and is bound to notice questions of jurisdiction whenever raised." *DeHart, III.*

The question then being always open, and its proper decision essential to the validity of its judgment, the Commission must decide before pronouncing such judgment whether it has jurisdiction over these parties and the crimes imputed to them. That a tribunal like this has no jurisdiction over other than military offenses, is believed to be self-evident. That offenses defined and punished by the civil law, and whose trial is provided for by the same law, are not the subjects of military jurisdiction, is of course true. A military, as contradistinguished from a civil offense, must therefore be made to appear, and when it is, it must also appear that the military law provides for its trial and punishment by a military tribunal. If that law does not furnish a mode of trial, or affix a punishment, the case is unprovided for, and, as far as the military power is concerned, is to go unpunished. But as either the civil, common, or statute law embraces every species of offense that the United States, or the States have deemed it necessary to punish, in all such cases the civil courts are clothed with every necessary jurisdiction. In a military court, if the charge does not state a "crime provided for generally or specifically by any of the articles of war," the prisoner must be discharged. *O'Brien*, p. 235. Nor is it sufficient that the charge is of a crime known to the military law. The offender, when he commits it, must be subject to such law, or he is not subject to military jurisdiction. The general law has "supreme and undisputed jurisdiction over all. The military law puts forth no such pretensions; it aims solely to enforce on the soldier the additional duties he has assumed. It constitutes tribunals for the trial of breaches of military duty only." *O'Brien*, 26, 27. "The one code (the civil) embraces all citizens, whether soldiers or not; the other (the military) has no jurisdiction over any citizens as such." *Ibid.*

The provisions of the Constitution clearly maintain the same doctrine. The Executive has no authority "to declare war, to raise and support armies, to provide and maintain a navy," or to make "rules for the government and regulation" of either force. These powers are exclusively in Congress. An army can not be raised or have law for its government and regulation except as Congress shall provide. This power of Congress to govern and regulate the army and navy, was granted by the convention without objection. In England, the King, as the generalissimo of the whole kingdom, has this sole power, though Parliament has frequently interposed and regulated for itself. But with us, it was thought safest to give the entire power to Congress, "since otherwise summary and severe punishments might be inflicted at the mere will of the Executive." 3 *Story's Com., sect.* 1192. No member of the Convention, or any commentator on the Constitution since, has intimated that even this Congressional power could be applied to citizens not belonging to the army or navy. In respect, too, to the latter class, the power was conferred exclusively on Congress

to prevent that class being made the object of abuse by the Executive—to guard them especially from "summary and severe punishments" inflicted by mere Executive will. The existence of such a power being vital to discipline, it was necessary to provide for it. But no member suggested that it should be or could be made to apply to citizens not in the military service, or be given to any other department, in whole or in part, than Congress. Citizens not belonging to the army or navy were not made liable to military law, or under any circumstances to be deprived of any of the guaranties of personal liberty provided by the Constitution. Independent of the consideration that the very nature of the Government is inconsistent with such a pretension, the power is conferred upon Congress in terms that exclude all who do not belong to "the land and naval forces." It is a rule of interpretation coeval with its existence, that the Government, in no department of it, possesses powers not granted by express delegation or necessarily to be implied from those that are granted. This would be the rule incident to the very nature of the Constitution, but to place it beyond doubt, and to make it an imperative rule, the 10th amendment declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The power given to Congress, "is to make rules for the government and regulation of the land and naval forces." No artifice of ingenuity can make these words include those who do not belong to the army and navy; all others, as if negative words to that effect had been added. And this is not only the obvious meaning of the terms, considered by themselves, but is demonstrable from other provisions of the Constitution. So jealous were our ancestors of ungranted power, and so vigilant to protect the citizen against it, that they were unwilling to leave him to the safeguards which a proper construction of the Constitution, as originally adopted, furnished. In this they resolved that nothing should be left in doubt. They determined, therefore, not only to guard him against executive and judicial, but against Congressional abuse. With that view, they adopted the fifth constitutional amendment, which declares that "no persons shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, EXCEPT in *cases arising in the land or naval forces, or in the militia when in active service in time of war or public danger*." This exception is designed to leave in force, not to enlarge the power vested in Congress by the original Constitution, "to make rules for the government and regulation of the land and naval forces." "The land or naval forces" are the terms used in both, have the same meaning, and until lately, have been supposed by every commentator and judge, to exclude from military jurisdiction offenses committed by citizens not belonging to such forces. Kent, in a note to his 1 Coms., p. 341, states, and with accuracy, that "military and

naval crimes, and offenses committed while the party is attached to and under the immediate authority of the army and navy of the United States and in actual service, are not cognizable under the common law jurisdiction of the civil courts of the United States." According to this great authority every other class of persons and every other species of offense, are within the jurisdiction of the civil courts, and entitled to the protection of the proceeding by presentment or indictment, and a public trial; a right to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to compulsory process for his witnesses, and the assistance of counsel. The exception in the 5th amendment of cases arising in the land or naval forces applies by necessary implication, at least in part, to this. To construe this as not containing the exception would defeat the purpose of the exception; for the provisions of the 6th amendment, unless they are subject to the exceptions of the 5th, would be inconsistent with the 5th. The 6th is therefore to be construed as if it in words contained the exception. It is submitted that this is evident. The consequence is, that if the exception can be made to include those who, in the language of Kent, are not, when the offense was committed, "attached to under the immediate authority of the army or navy, and in actual service," the securities designed for other citizens by the 6th article are wholly nugatory. If a military commission, created by the mere authority of the President, can deprive a citizen of the benefit of the guaranties secured by the 5th amendment, it can deprive him of those secured by the 6th. It may deny him the right to a "speedy and public trial," information "of the nature and cause of the accusation," of the right "to be confronted with the witnesses against him," of compulsory process for his witnesses," and of "the assistance of counsel for his defense." That this can be done no one has as yet maintained; no opinion, however latitudinarian, of executive power, of the effect of public necessity, in war or peace to enlarge its sphere, and authorize a disregard of its limitations; no one, however convinced he may be of the policy of protecting accusing witnesses from a public examination, under the idea that their testimony can not otherwise be obtained, and that crime may consequently go unpublished, has to this time been found to go to that extent. Certainly, no writer has ever maintained such a doctrine. Argument to refute it, is unnecessary. It refutes itself. For, if sound, the 6th amendment, which our fathers thought so vital to individual liberty when assailed by governmental prosecution, is but a dead letter, totally inefficient for its purpose whenever the Government shall deem it proper to try a citizen by a military commission. Against such a doctrine the very instincts of freemen revolt. It has no foundation but in the principle of unrestrained, tyrannic power, and passive obedience. If it be well founded, then are we indeed a nation of slaves, and not of freemen. If the Executive can legally

decide whether a citizen is to enjoy the guaranties of liberty afforded by the Constitution, what are we but slaves? If the President, or any of his subordinates, upon any pretence whatever, can deprive a citizen of such guaranties, liberty with us, however loved, is not enjoyed. But the Constitution is not so fatally defective. It is subject to no such reproach. In war and in peace, it is equally potential for the promotion of the general welfare, and as involved in and necessary to such welfare, for the protection of the individual citizen. Certainly, until this rebellion, this has been the proud and cherished conviction of the country. And it is to this conviction and the assurance that it could never be shaken that our past prosperity is to be referred. God forbid that mere power, dependent for its exercise on Executive will (a condition destructive of political happiness), shall ever be substituted in its place. Should that unfortunately ever occur, unless it was soon corrected by the authority of the people, the objects of our Revolutionary struggle, the sacrifices of our ancestors, and the design of the Constitution will all have been in vain.

I proceed now to examine with somewhat of particularity the grounds on which I am informed your jurisdiction is maintained.

1st. That it is an incident of the war power.

I. That power, whatever be its extent, is exclusively in the Congress. War can only be declared by that body. With its origin the President has no concern whatever. Armies, when necessary, can only be raised by the same body. Not a soldier, without its authority, can be brought into service by the Executive. He is as impotent to that end as a private citizen. And armies, too, when raised by Congressional authority, can only be governed and regulated by "rules" prescribed by the same authority. The Executive possesses no power over the soldier except such as Congress may, by legislation, confer upon him. If, then, it was true that the creation of a military commission like the present is incidental to the war power, it must be authorized by the department to which that power belongs, and not by the Executive, to whom no portion of it belongs. And, if it be said to be involved in the power "to make rules for the government and regulation of the land and naval forces," the result is the same. It must be done by Congress, to whom that power also exclusively belongs, and not by the Executive. Has Congress, then, under either power, authorized such a commission as this to try such cases as these? It is confidently asserted that it has not. If it has, let the statute be produced. It is certainly not done by that of the 10th of April, 1806, "establishing articles for the government of the armies of the United States." No military courts are there mentioned or provided for but courts-martial and courts of inquiry. And their mode of appointment and organization, and of proceeding, and the authority vested in

them are also prescribed. Military commissions are not only not authorized, but are not even alluded to. And, consequently, the parties, whoever these may be, who, under that act, can be tried by courts-martial or courts of inquiry, are not made subject to trial by a military commission. Nor is such a tribunal mentioned in any prior statute, or in any subsequent one, until those of the 17th of July, 1862, and the 3d of March, 1863. In the 5th section of the first, the records of "military commissions are to be returned for revision to the Judge Advocate General," whose appointment it also provides for. But how such commissions are to be constituted, what powers they are to have, how their proceedings are to be conducted, or what cases or parties they are to try, is not provided for. In the 38th section of the second, they are mentioned as competent to try persons "lurking or acting as spies." The same absence in the particulars stated in respect to the first is true of this. And as regards this act of 1863, this reflection forcibly presents itself. If military commissions can be created, and from their very nature possess jurisdiction to try all alleged military offenses (the ground on which your jurisdiction, it is said, in part rests), why was it necessary to give them the power, by express words to try persons "lurking or acting as spies?" The military character of such an offense could not have been doubted. What reason, then, can be suggested for conferring the power to express language than that without it it would not be possessed? Before these statutes a commission, called a military commission, had been issued by the Executive to Messrs. Davis, Holt, and Campbell, to examine into certain military claims against the Western Department, and Congress, by its resolution of the 11th of March 1862 (No. 18), provided for the payment of its awards. Against a commission of that character no objection can be made. It is but ancillary to the auditing of demands upon the Government, and in no way interferes with any constitutional right of the citizen. But until this rebellion a military commission like the present, organized in a loyal State or Territory where the courts are open and their proceedings unobstructed, clothed with the jurisdiction attempted to be conferred upon you—a jurisdiction involving not only the liberty, but the lives of the parties on trial—it is confidently stated, is not to be found sanctioned, or the most remotely recognized, or even alluded to, by any writer on military law in England or the United States, or in any legislation of either country. It has its origin in the rebellion, and like the dangerous heresy of secession, out of which that sprung, nothing is more certain in my opinion that that, however pure the motives of its origin, it will be considered, as it is, an almost equally dangerous heresy to constitutional liberty, and the rebellion ended, perish with the other, then and forever. But to proceed; such commissions were authorized by Lieutenant-General Scott in his Mexican campaign. When he obtained possession of the City of Mexico, he, on the 17th of

September, 1847, re-published, with additions, his order of the 19th of February preceding, declaring martial law. By this order, he authorized the trial of certain offenses by military commissions, regulated their proceedings, and limited the punishments they might inflict. From their jurisdiction, however, he excepts cases "clearly cognizable by court-martial," and in words limits the cases to be tried to such as are (I quote) "not provided for in the act of Congress establishing rules and articles for the government of the armies of the United States," of the 10th of April, 1806. The second clause of the order mentions, among other offenses to be so tried, "assassination, murder, poisoning, " and in the fourth (correctly, as I submit, with all respect for a contrary opinion), he states that "the rules and articles of war" do not provide for the punishment of any one of the designated offenses, "even when committed by individuals of the army upon the persons or property of other individuals of the same, except in the very restricted case in the 9th of the articles." The authority, too, for even this restricted commission—Scott—not more eminent as soldier than civilian—placed entirely upon the ground that named offenses if committed in a foreign country by American troops, could not be punished under any law of the United States then in force. "The Constitution of the United States and the rules and articles of war," he said, and said correctly, provided no court for their trial or punishment, "no matter by whom, or on whom" committed. *Scott's Autobiography*, 392.

And he further tells us that even this order, so limited and so called for by the greatest public necessity, when handed to the then Secretary of War, (Mr. Marcy) "for his approval," "a startle at the title (martial law order) was the only comment then, or ever, made on the subject," and that it was "soon silently returned as too explosive for safe handling." "A little later (he adds), the Attorney-General (Mr. Cushing) called and asked for a copy, and the law officer of the Government, whose business it is to speak on all such matters, was stricken with *legal dumbness*," *Ib*. How much more startled and more paralyzed would these great men have been had they been consulted on such a commission as this!—a commission, not to sit in another country, and to try offenses not provided for by any law of the United States, civil or military, but in their own country, and in a part of it where there are laws providing for their trial and punishment, and civil courts clothed with ample powers for both, and in the daily and undisturbed exercise of their jurisdiction; and where, if there should be an attempt at disturbance by a force which they had not the power to control, they could invoke (and it would his duty to afford it) the President to use the military power at his command, and which every knows to be ample for the purpose.

If it be suggested that the civil courts and juries for this District could not safely be relied upon for the trial of these cases, because either of incompetency, disloyalty or corruption, it would be an unjust reflection upon the judges, upon the people, upon the Marshal, an appointee of the President, by whom the juries are summoned, and upon our civil institutions themselves—upon the very institutions on whose integrity and intelligence the safety of our property, liberty and lives, our ancestors thought, could not only be safely rested, but would be safe nowhere else. If it be suggested that a secret trial, in whole or in part, as the Executive might deem expedient, could not be had before any other than a military tribunal, the answer is that the Constitution, "in all criminal prosecutions," gives the accused "the right" to a "public trial." So abhorrent were private trials to our ancestors, so fatal did they seem to individual security, that they were thus denounced, and, as they no doubt thought, so guarded against as in all future time to be impossible. If it be suggested that witnesses may be unwilling to testify, the answer is that they may be compelled to appear and made to testify.

But the suggestion, upon another ground, is equally without force. It rests on the idea that the guilty only are ever brought to trial—that the only object of the Constitution and laws in this regard is to afford the means to establish alleged guilt; that the accusation, however made, is to be esteemed *prima facie* evidence of guilt, and that the Executive should be armed, without other restriction than his own discretion, with all the appliances deemed by him necessary to make the presumption from such evidence conclusive. Never was there a more dangerous theory. The peril to the citizen from a prosecution so conducted, as illustrated in all history, is so great that the very elementary principles of constitutional liberty, the spirit and letter of the Constitution itself repudiate it.

II. Innocent parties, sometimes by private malice, sometimes for a mere partisan purpose, sometimes from a supposed public policy, have been made the subjects of a criminal accusation. History is full of such instances. How are such parties to be protected if a public trial, at the option of the Executive, can be denied them, and a secret one, in whole, or in part, substituted? If the names of witnesses, and their evidence, are not published, what obstacles does it not interpose to establish their innocence? The character of the witnesses against them may be all important to that end. Kept in prison, with no means of consulting the outer world, how can they make the necessary inquiries? How can those who may know the witnesses be able to communicate with them on the subject? A trial so conducted, though it may not, as, no doubt is the case in the present instance, be intended to procure the punishment of any but the guilty, it is obvious, subjects the

innocent to great danger. It partakes more of the character of the Inquisition, which the enlightened civilization of the age has driven almost wholly out of existence, than a tribunal suited to a free people. In the palmiest days of the tribunal, kings, as well as people, stood abashed in its presence, and dreaded its power. The accused was never informed of the names of his accusers; heresy, suspected was ample grounds for arrest; accomplices and criminals were received as witnesses, and the whole trial was secret, and conducted in a chamber almost as silent as the grave. It was long since denounced by the civilized world, not because it might not at times punish the heretic (then, in violation of all rightful human power, deemed a criminal), but because it was as likely to punish the innocent as the guilty. A public trial, therefore, by which the names of witnesses and the testimony are given, even in monarchical and despotic Governments, is now esteemed and amply adequate to the punishment of guilt, and essential to the protection of innocence. Can it be that a secret trial, wholly or partially, if the Executive so decides, is all that an American citizen is entitled to? Such a doctrine, if maintained by an English monarch, would shake his government to its very center, and, if persevered in, would lose him his crown. It will be no answer to these observations to say that this particular trial has been only in part of a secret one, and that secrecy will never be resorted to, except for purposes of justice. The reply is, that the principle itself is inconsistent with American liberty, as recognized and secured by constitutional guaranties. It supposes that, whether these guaranties are to be enjoyed in the particular case, and to what extent, is dependent on Executive will. The Constitution, in this regard, is designed to secure them in spite of such will. Its patriotic authors intended to place the citizen, in this particular, wholly beyond the power, not only of the Executive, but of every department of the Government. They deemed the right to a public trial vital to the security of the citizen, and especially and absolutely necessary to his protection against Executive power. A public trial of all criminal prosecutions they, therefore, secured by general and unqualified terms. What would these great men have said, had they been asked so to qualify the terms as to warrant his refusal, under any circumstances, and make it dependent upon Executive discretion? The member who made the inquiry would have been deemed by them a traitor to liberty, or insane. What would they have said if told that, without such qualification, the Executive would be able legally to impose it as incidental to Executive power? If not received with derision, it would have been indignantly rejected as an imputation upon those who, at any time thereafter, should legally fill the office.

III. Let me present the question in another view. If such a Commission as this, for the trial of cases like the present, can be legally constituted, can it be done by mere Executive authority?

1. You are a Court, and, if legally existing, endowed with momentous power, the highest known to man, that of passing upon the liberty or life of the citizen. By the express words of the Constitution an army can only be raised, and governed and regulated, by laws passed by Congress. In the exercise of the power to rule and govern it, the act before referred to, of the 10th of April, 1806, establishing the articles of war, was passed. That act provides only for courts-martial and courts of inquiry, and designates the cases to be tried and before each, and the laws that are to govern the trial. Military commissions are not mentioned, and, of course, the act contains no provision for their government. Now, it is submitted, as perfectly clear, that the creation of a court, whether civil or military, is an exclusive legislative function, belonging to the department upon which the legislative power is conferred. The jurisdiction of such a court, and the laws and regulations to guide and govern it, is also exclusively legislative. What cases are to be tried by it, how the judges are to be selected, and how qualified, what are to be rules of evidence, and what punishments are to be inflicted, all solely belong to the same department. The very element of constitutional liberty, recognized by all modern writers on government as essential to its security, and carefully incorporated into our constitution, is a separation of the legislative, judicial and executive powers. That this separation is made in our Constitution, no one will deny. Article 1st declares that "All legislative powers herein granted shall be vested in a Congress." Article 2d vests "the Executive power" in a President, and Article 3d, "the judicial power" in certain designated courts, and in courts to be thereafter constituted by Congress. There could not be a more careful segregation of the three powers. If, then, courts, their laws, modes of proceeding, and judgments, belong to legislation (and this, I suppose, will not be questioned), in the absence of legislation in regard to this Court, and its jurisdiction to try the present cases, it has for that purpose no legal existence or authority. The Executive, whose functions are altogether executive, cannot confer it. The offenses to be tried by it, the laws to govern its proceedings, the punishment it may award, can not, for the same reason, be prescribed by the Executive. These, as well as the mere constitution of the Court, all exclusively belong to Congress. If it be contended that the Executive has the powers in question, because by implication they are involved in the war power, or in the President's constitutional function as commander-in-chief of the army, then this consequence would follow, that they would not be subject to Congressional control, as that department has no more right to interfere with the constitutional power of the Executive than that power has a right to interfere with that of Congress. If, by implication, the powers in question belong to the Executive, he may not only constitute and regulate military commissions, and prescribe the laws for their government, but

all legislation upon the subject by Congress would be a usurpation. That the proposition leads to this result would seem so inconsistent with all previous legislation, and all executive practice, and so repugnant to every principal of constitutional liberty, that it demonstrates its utter unsoundness. Under the power given to Congress, "to make rules for the government and regulation of land" forces, they have, from time to time, up to and including the act of the 10th of April, 1806, and since, enacted such rules as they deemed to be necessary, as well in war as in peace, and their authority to do so has never been denied. This power, too, to govern and regulate, from its very nature, is exclusive. Whatever is not done under it, is to be considered as purposely omitted. The words used in the delegation of the power, "govern and regulate," necessarily embrace the entire subject and exclude all like authority in others. The end of such a power can not be attained, except through a uniformity of government and regulation, and this is not to be attained if the power is in two hands. To be effective, therefore, it must be in one, and the Constitution gives it to one—to Congress—in express terms, and nowhere intimates a purpose to bestow it, or any portion of it, upon any other department. In the absence then, of all mention of military commissions in the Constitution, and in the presence of the sole authority it confers on Congress, by rules of its own enacting, to govern and regulate the army, and, in the absence of mention of such commissions in the act of the 10th of April, 1806, and a single word in that act, or in any other, how can the power be considered as in the President? Further, upon what ground, other than those I have examined, can this authority be placed?

I. Is it that the constitutional guaranties referred to are designed only for a state of peace? There is not a syllable in the instrument that justifies, even plausibly, such a qualification. They are secured by the most general and comprehensive terms, wholly inconsistent with any restriction. They are, also, not only not confined to a condition of peace, but are more peculiarly necessary to the security of personal liberty in war than in peace. All history tells us that war, at times, maddens the people, frenzies government, and makes both regardless of constitutional limitations of power. Individual safety, at such periods, is more in peril than at any other. Constitutional limitations and guaranties are, then, also absolutely necessary to the protection of the Government itself. The maxim, "*salus populi suprema est lex*," is but fit for a tyrant's use. Under its pretense the grossest wrongs have been committed, the most awful crimes perpetrated, and every principle of freedom violated, until, at last, worn down by suffering, the people, in very despair, have acquiesced in a resulting despotism. The safety which liberty needs, and without which it sickens and dies, is that which law, and not mere unlicensed human will, affords. The Aristotelian maxim

"*Salus publica supremas est lex*"—"Let the public weal be under the protection of the law"—is the true and only safe maxim. Nature, without law, would be chaos; government without law, anarchy or despotism. Against both these last, in war and in peace, the Constitution happily protects us.

II. If the power in question is claimed under the authority supposed to be given the President in certain cases to suspend the writ of *habeas corpus* and to declare martial law, the claim is equally, if not more evidently, untenable.

1. Because the first of these powers, if given to the President at all, is given "when, in cases of rebellion or invasion," he deems the public safety requires it. I think he has this power, but there are great and patriotic names who think otherwise. But if he has it, or if it be in Congress alone, it is entirely untrue that its exercise works any other result than the suspension of the writ—the temporary suspension of the right of having the cause of the arrest passed upon at once by the civil judges. It in no way or impairs the other rights secured to the accused. In what court he is to be tried, how he is to be tried, what evidence is to be admitted, and what judgment pronounced are all to be what the Constitution secures, and the laws provide in similar cases, when there is no suspension of the writ. The purpose of the writ is merely, without delay, to ascertain the legality of the arrest. If adjudged legal, the party is detained; if illegal, discharged. But in either contingency, when he is called to answer any criminal accusation, and he is a civilian, and not subject to the articles of war constitutionally enacted by Congress, it must be done by presentment or indictment, and his trial be held in a civil court, having, by State or Congressional legislation, jurisdiction over the crime and under laws governing the tribunal and defining the punishment. The very fact, too, that express power is given in a certain condition of things to suspend or deny any of the other securities for personal liberty provided by the Constitution, is conclusive to show that all of the latter were designed to be in force "in cases of rebellion or invasion," as well as in a state of perfect peace and safety.

III. I have already referred to the act of 1806 establishing the articles of war, and said what must be admitted, that it provides for no military court like this. But for argument's sake, let it be conceded that it does. And I then maintain, with becoming confidence and due respect for a different opinion, that it does not embrace the crimes charged against these parties or the parties themselves.

First. The charge is a traitorous conspiracy to take the lives of the designated persons "in aid of the existing armed rebellion." Second. That in the execution of the conspiracy, the actual

murder of the late President, and the attempted murder of the Secretary of State, occurred, Throughout the charge and its specification, the conspiracy and its attempted execution are alleged to have been *traitorous*. The accusation, therefore, is not one merely of murder, but of murder designed and in part accomplished, with *traitorous* purpose. If the charge is true, and the intent (which is made a substantial part of it) be also true, then the crime is treason, and not simple murder. Treason against the United States, as defined by the Constitution, can "consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."

III Art. This definition, not only tells us what treason is, but tells us that no other crime than the defined one shall be considered the offense. And the same section provides that "no person shall be convicted of treason, except on the testimony of two witnesses to the same overt act, or on confession in open court," and gives to Congress the power to declare what its punishment shall be. The offense in the general is the same in England. In that country, at no period since its freedom became settled, has any other treason been recognized. During the pendency of this rebellion (never before), it has been alleged that there exists with us the offense of military treason, punishable by the laws of war. It is so stated in the instructions of General Halleck to the end commanding officer in Tennessee, of the 5th of March, 1863. *Lawrence's Wheaton, Suppt. p. 41*. But Halleck confines it to acts committed against the army of a belligerent, when occupying the territory of the enemy. And he says what is certainly true, if such an offense can be committed, that it "is broadly distinguished from the treason defined in the constitutional and statutory laws, and made punishable by the civil courts." But the term *military treason* is not to be found in any English work or military order, or before this rebellion, in any American authority.

It has evidently been adopted during the rebellion as a doctrine of military law on the authority of continental writers in governments less free than those of England and the United States, and in which, because they are less free, treason is made to consist of certain specific acts, and no others. But if Halleck is right, and all our prior practices, and that of England, from whom we derive ours, is to be abandoned, the cases before you are not cases of "military treason," as he defines it. When the offense here alleged is stated to have occurred in this District, the United States were not and did not claim to be in its occupation as a belligerent, nor is it pretended that the people of this District were, in a belligerent sense, enemies. On the contrary, they were citizens entitled to every right of citizenship. Nor were the parties on trial enemies. They were either citizens of the District, or of Maryland, and under the protection of the Constitution. The offense charged, then, being treason, it is treason as known to the Constitution and laws, and can only be tried and

punished as they provide. To consider these parties belligerents, and their alleged offense military treason, is not only unwarranted by the authority of Halleck, but is in direction conflict with the Constitution and laws which the President and all of us are bound to support and defend. The offense, then, being treason, as known to the Constitution, its trial by a military court is clearly illegal. And this for obvious reasons. Under the Constitution no conviction of such an offense can be had, "unless on the testimony of two witnesses to the same overt act, or on confession in open court." And under the laws the parties are entitled to have "a copy of the indictment and a list of the jury and witnesses, with the names and places of abode of both, at least three entire days before the trial." They also have the right to challenge peremptorily thirty-five of the jury, and to challenge for cause without limitation. And finally, unless the indictment shall be found by a grand jury within three years next after the treason done or committed, they shall not be prosecuted, tried or punished. *Act. 30, April,* 1790, *stat. at large*, 118, 119. Upon what possible ground, therefore, can this Commission possess the jurisdiction claimed for it? It is not alleged that it is subject to the provisions stated, and in its very nature it is impossible that it should be. The very safeguards designed by the Constitution, if it has such jurisdiction, are wholly unavailing. Trial by jury in all cases, our English ancestors deemed (as Story correctly tells us), "the great bulwark of their civil and political liberties, and watched with an unceasing jealousy and solicitude." It constituted one of the fundamental articles of Magna Charta—"*Nullus liber homo capiatur nec imprisonetur aut exulet, aut aliquo modo, destruator, etc.; nisi per legae judicium parium suorum, vel per legem terrea*." This great right the American colonists brought with them as their birth-right and inheritance. It landed with them at Jamestown and on the rock of Plymouth, and was equally prized by Cavalier and Puritan; and ever since, to the breaking out of the rebellion, has been enjoyed and esteemed the protection and proud privilege of their posterity. At times, during the rebellion, it has been disregarded and denied. The momentous nature of the crisis, brought about by that stupendous crime, involving, as it did, the very life of the nation, has caused the people to tolerate such disregard and denial. But the crisis, thank God, has passed. The authority of the Government throughout our territorial limits is reinstated so firmly that reflecting men, here and elsewhere, are convinced that the danger has passed never to return. The result proves that the principles on which the government rests have imparted to it a vitality that will cause it to endure for all time, in spite of foreign invasion or domestic insurrection; and one of those principles—the choicest one—is the right in cases of "criminal prosecutions to a speedy and public trial by an impartial jury," and in cases of treason to the additional securities before adverted to. The great

purpose of the Magna Charta and the Constitution was (to quote Story again) "to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people." The appeal for safety can, under such circumstances, scarcely be made by innocence in any other manner than by the severe control of courts of justice, and by the firm and impartial verdict of a jury sworn to do right and guided solely by legal evidence and a sense of duty. In such a course there is a double security against the prejudices of judges, who may partake of the wishes and opinions of the government, and against the passions of the multitude, who may demand their victim with a clamorous precipitancy." And Mr. Justice Blackstone, with the same deep sense of its value, meets the prediction of a foreign writer, "that because Rome, Sparta, and Carthage, at the time when their liberties were lost, were *strangers to the trial by jury*." 3 *Bla*., 379. That a right so valued, and esteemed by our fathers to be so necessary to civil liberty, so important to the very existence of a free government, was designed by them to depend for its enjoyment upon the war power, or upon any power intrusted to any department of our Government, is a reflection on their intelligence and patriotism.

IV. But to proceed: The articles of war, if they provided for the punishment of the crimes on trial, and authorized such a court as this, do not include such parties as are now on trial. And, until the rebellion, I am not aware that a different construction was ever intimated. It is the exclusive fruit of the rebellion.

The title of the act is "An act for establishing rules and articles for the government of the *armies of the United States*."

The first section states "the following shall be the rules and articles by which the *armies of the United States shall be governed*," and every other section, except the 56th and 57th, are, in words, confined to persons belonging to the army in some capacity or other. I understand it to be held by some, that because such words are not used in the two sections referred to, it was the design of Congress to include persons who do not belong to the army. In my judgment, this is a wholly untenable construction; but if it was a correct one, it would not justify the use sought to be made of it in this instance. It would not bring these parties for their alleged crime before a military known to the act; certainly not before a military commission—a court unknown to the act. The offense charged is a traitorous conspiracy, and murder committed in pursuance of it. Neither offense, conspiracy or murder, if indeed two are charged, is embraced by either the 56th or 57th articles of the statute. The 56th prohibits the relieving "the enemy with money, victuals, or ammunition, or knowingly harboring and protecting him." Sophistry itself can not bring the offenses in question,

under this article. The 57th prohibits only the "holding correspondence with, or giving intelligence to the enemy, either directly or indirectly." It is equally clear that the offenses in question are not within this provision. But, in fact, the two articles relied upon admit of no such construction as is understood to be claimed. This is thought to be obvious, not only from the general character of the act, and of all the other articles in contains, but because the one immediately preceding, like all those preceding and succeeding it, other than the 56th and 57th, includes only persons belonging to the "armies of the United States." Its language is "whosoever *belonging to the armies of the United States*, employed in foreign parts, shall do the act prohibited, shall suffer the prescribed punishment. Now, it is a familiar rule of interpretation, perfectly well settled, in such a case, that unless there be something in the following sections that clearly shows a purpose to make them more comprehensive than their immediate predecessor, they are to be constructed as subject to the same limitation. So far from there being in this instance, any evidence of a different purpose, the declared object of the statute, as evidenced by its title, its first section, and its general contents, are all inconsistent with any other construction. And when to this is considered that the statute was merely the constitutional one to make rules for the government and regulations of the *army*, it is doing great injustice to that department to suppose that in exercising it they designed to legislate for any other class. The words, therefore, in the 55th article, "belonging to the armies of the United States," qualifying the immediate preceding word "whosoever," are applicable to the 56th and 57th, and equally qualify the same word "whosoever" also used in each of them. And, finally, upon this point I am supported by the authority of Lieutenant-General Scott. The Commission have seen from my previous reference to his autobiography that he placed his right to issue his martial law order, establishing, among other things, military commissions to try certain offenses in a foreign country, upon the ground that otherwise they would go unpunished, and his army become demoralized. One of these offenses was murder committed or attempted, and for such an offense he tells us that the articles of war provided no court for their trial and punishment, "no matter by whom or on whom committed." And this opinion is repeated in the 4th clause of his order, as true of all the designated offenses, "except in the very restricted case in the 9th of the article."

V. There are other views which I submit to the serious attention of the Commission.

I. The mode of proceeding in a court like this, and which has been pursued by the prosecution, with your approval, because deemed legal by both, is so inconsistent with the proceedings of civil courts, as regulated for ages by established law, that the fact, I think, demonstrates that persons not belonging to the army can not be subjected to such a jurisdiction. 1.

The character of the pleadings. The offense charged is a conspiracy with persons not within the reach of the Court, and some of them in a foreign country, to commit the alleged crime. To give you jurisdiction, the design of the accused and their co-conspirators is averred to have been to aid the rebellion, and to accomplish that end not only by the murder of the President and Lieutenant-General Grant, but of the Vice-President and Secretary of State. It is further averred that the President being murdered, the Vice-President becoming thereby President, and as such, Commander-in-Chief, the purpose as to murder him; and as, in the contingency of the death of both, it would be the duty of the Secretary of State to cause an election to be held for President and Vice-President, he was to be murdered in order to prevent a "lawful election" of these officers; and that by all these means, "aid and comfort" were to be given "the insurgents engaged in armed rebellion against the United States," and "the subversion and overthrow of the Constitution and the laws of the United States," thereby effected. That such pleading as this would not be tolerated in a civil court, I suppose every lawyer will concede. It is argumentative, and even in that character unsound. The continuance of our Government does not depend on the lives of any or all of its public servants. As fact, or law, therefore, the pleading is fatally defective. The Government has an inherent power to preserve itself, which no conspiracy to murder, or murder, can in the slightest degree impair. And the result which we have just witnessed proves this, and shows the folly of this madman and fiend by whose hands our late lamented President fell. He, doubtless, thought that he had done a deed that would subvert the "Constitution and laws." We know that it has not had even a tendency to that result. Not a power of the Government was suspended; all progressed as before the dire catastrophe. A cherished and almost idolized citizen was snatched from us by the assassin's arm, but there was no halt in the march of the government. That continued in all its majesty wholly unimpeded. The only effect was to place the nation in tears, and drape it in mourning, and to awake the sympathy, and excite the indignation of the world.

II. But this mode of pleading renders, it would seem, inapplicable, the rules of evidence known to the civil courts. It justifies, in the opinion of the Judge Advocate and the Court (or what has been done would not been done), a latitude that no civil court would allow, as in the judgment of such a court the accused, however, innocent, could not be supposed able to meet it. Proof has been received, not only of distinct offenses from those charged, but of such offenses committed by others than the parties on trial. Even in regard to the party himself, other offenses alleged to have been previously committed by him can not be proved. At one time a different practice prevailed in England, and does now, it is believed, in some of the Continental governments. But since the days

of Lord Holt (a name venerated by lawyers and all admirers of enlightened jurisprudence), it has not prevailed in England. In the case of Harrison, tried before the judge for murder, the counsel for the government offered a witness to prove some felonious design of the prisoner three years before. Holt indignantly exclaimed, "Hold! hold! what are you doing now? How can he defend himself away from charges of which he has no notice? And how many issues are to be raised to perplex and the jury? Away! away! that ought not to be—that is nothing of the matter." 12 *State Trials*, 833-874. I refer to this case, not to assail what has been done in these cases contrary to this rule, because I am bound to infer that before such a commission as this the rule has no legal force. If, in a civil court, then, these parties would be entitled to the benefit of this rule, one never departed from in such courts, they would not have had proved against them crimes alleged to have committed by others, and having no necessary or legal connection with those charged. With the same view, and not denying the right of the Commission in the particular case I am about to refer to, but to show that the Constitution could not have designed to subject citizens to the practice, I cite the same judge to prove that in a civil court those parties could not have been legally fettered during their trial. In the case of Cranbum, accused as implicated in the "assassination plot," on trial before the same judge, Holt put an end to what Lord Campbell terms "the revolting practice of trying prisoners in fetters." Hearing the clanking of chains, though no complaint was made to him, he said, "I should like to know why the prisoner is brought in ironed." "Let them be instantly knocked off. When prisoners are tried they should stand at their ease." (13 State Trails, 221, 2d Campbell, *Lives Chief Justices*, 140). Finally, I deny the jurisdiction of the Commission, not only because neither Constitution or laws justify, but, on the contrary, repudiate it, but on the ground that all the experience of the past is against it. Jefferson, ardent in the prosecution of Burr, and solicitous for his conviction, from a firm belief of his guilt, never suggested that he should be tried before any other than a civil court. And in that trial, so ably presided over by Marshall, the prisoner was allowed to "stand at his ease;" was granted every constitutional privilege, and no evidence was permitted to be given against him but such as a civil court recognizes; and in that case, as in this, the overthrow of the Government was the alleged purpose, and yet it was not intimated in any quarter that he could be tried by a military tribunal. In England, too, the doctrine on which this prosecution is placed is unknown. Attempts were made to assassinate George the Third and the present Queen, and Mr. Percival, then Prime Minister, was assassinated as he entered the House of Commons. In the first two instances, the design was to murder the commander-in-chief of England's army and navy, in whom, too, the whole war power of the

Government was also vested; in the last, a secretary, clothed with powers so great, at least, as those than belong to our Secretary of State; and yet, in each, the parties accused were tried before a civil court, no one suggesting any other. And during the period of the French Revolution, when its principles, if principles they can be termed, were being inculcated in England to an extent that alarmed the Government, and caused it to exert every power it was thought to possess to frustrate their effect, when the writ of *habeas corpus* was suspended, and arrests and prosecutions resorted to almost without limit, no one suggested a trial, except in the civil courts. And yet the apprehension of the Government was, that the object of the alleged conspirators was to subvert its authority, bring about its overthrow, and subject the kingdom to the horrors of the French Revolution, then shocking the nations of the world. Hardy, Horne, Tooke, and others, were tried by civil courts, and their names are remembered for the principles of freedom that were made triumphant mainly through the efforts of "that great genius," in the words of a modern English statesman (Earl Russell), "whose sword and buckler protected justice and freedom during the disastrous period;" having "the tongue of Cicero and the soul of Hampden, an invincible orator and an undaunted patriot." *Erskine*.

As it was, these trials were conducted in so relentless a spirit, and, as it was thought, with such disregard of the rights of the subject, that the administration of the day were not able to withstand the torrent of the people's indignation. What would have been their fate, individually as well as politically, if the cases had been tried before a military commission, and life taken? Can it be that with us Executive power at times casts into the shade and renders all other power subordinate? An American statesman, with a world-wide reputation, long since gave answer to these inquiries. In a debate in the Senate of the United States, in which he assailed what he deemed an unwarranted assumption of Executive power, he said, "the first object of a free people is the preservation of their liberties, and liberty is only to be maintained by constitutional restraints and just divisions of political power." "It does not trust the amiable weaknesses of human nature, and, therefore, will not permit power to overstep its prescribed limits, though benevolence, good intent, and patriotic intent come along with it." And he added, "Mr. President, the contest for ages has been to rescue liberty from the grasp of Executive power." "In the long list of the champions of human freedom there is not one name dimmed by the reproach of advocating the extension of Executive authority." Thoughts so eloquently expressed appeal with subduing power to every patriotic heart, and demonstrate that Webster, if here, would be heard raising his mighty voice against the jurisdiction of this Commission—a jurisdiction placed upon Executive authority alone. But it has been urged

that martial law warrants such a commission, and that such law prevails here. The doctrine is believed to be alike indefensible and dangerous. It is not, however, necessary to inquire whether martial law, if it did prevail, would maintain your jurisdiction, as it does not prevail. It has never been declared by any *competent* authority, and the civil courts we know are in the full and undisturbed exercise of all their functions. We learn, and the fact is doubtless true, that one of the parties, the very chief of the alleged conspiracy, has been indicted, and is about to be tried before one of those courts. If he, the alleged head and front of the conspiracy, is to be and be so tried, upon what ground of right, of fairness, or of policy can the parties who are charged to have his mere instruments be deprived of the same mode of trial? It may be said that in acting under this commission you are but conforming to an order of the President, which you are bound to obey. Let me examine this for a moment. If that order merely authorizes you to investigate the cases and report the facts to him and not to pronounce a judgment, and is to that extent legal, then it is because the President has the power himself, without such a proceeding, to punish the crime, and has only invoked your assistance to enable him to do it the more justly. Can this be so? Can it be that the life of a citizen, however humble, be he soldier or not, depends in any case on the mere will of the President? And yet it does, if the doctrine be sound. What more dangerous one can be imagined? Crime is defined by law, and is to be tried and punished under the law. What is murder, treason, or conspiracy, and what is admissible evidence to prove either, are all legal questions, and many of them, at times, difficult of correct solution. What the facts are may also present difficult inquiries. To pass upon the first, the Constitution provides courts consisting of judges selected for legal knowledge, and made independent of Executive power. Military judges are not so selected, and so far from being independent, are absolutely dependent on such power. To pass upon the latter, it provides juries as being not likely to "partake of the wishes and opinions of the Government." But if your function is only to act as aids to the president, to enable him to exercise his function of punishment as he has under no obligation by any to call for such aid, he may punish upon his own unassisted judgment, and without even the form of a trial. In conclusion, then, gentlemen, I submit that your responsibility, whatever that be, for error, in a proceeding like this, can find no protection in Presidential authority. Whatever it be, it grows out of the laws, and may, through the laws, be enforced. I suggested in the outset of these remarks that that responsibility in one contingency may be momentous. I recur to it again, disclaiming, as I did at first, the wish or hope that it would cause you to be wanting in a single particular of what you may believe to be your duty, but to obtain your best and most matured judgment. The wish and hope

disclaimed would be alike idle and discourteous; and I trust the Commission will do me the justice to believe that I am incapable of failing into either fault.

Responsibility to personal danger can never alarm soldiers who have faced, and will ever be willing in their country's defense to face, death on the battle-field. But there is a responsibility that every gentleman, be he soldier or citizen, will constantly hold before him, and make him ponder—responsibility to the Constitution and laws of his country and an intelligent public opinion—and prevent his doing anything knowingly that can justly subject him to censure of either. I have said that your responsibility is great. If the commission under which you act is void and confers no authority, whatever you may do may involve the most serious personal liability. Cases have occurred that prove this. It is sufficient to refer to one. Joseph Wall, at the time the offense charged against him was committed, was Governor and commander of the garrison of Goree, a dependency of England, in Africa. The indictment was for the murder of Benjamin Armstrong, and the trial was had in January, 1802, before a special court, consisting of Sir Archibald McDonald, Chief Baron of the Exchequer; Lawrence, of the King's bench, and Rocke, of the Common Pleas. The prosecution was conducted by Law, then Attorney General, afterward Lord Ellenborough. The crime was committed in 1782, and under a military order of the accused, and the sentence of a regimental court-martial. The defense relied upon was, that at the time the garrison was in a state of mutiny, and that the deceased took a prominent part in it, that because of the mutiny, the order for the court-martial was made, and that the punishment which was inflicted and said to have caused the death, was under its sentence. The offense was purely a military one, and belonged to the jurisdiction of a military court, if the facts relied upon by the accused were true, and its judgment constituted a valid defense. The court, however, charged the jury, that if they found that there was no mutiny to justify such a court-martial or its sentence, they were void, and furnished no defense whatever. The jury so finding, found the accused guilty, and he was soon after executed. (28 *St. Tr.*, 51, 178). The application of the principle of this case to the question I have considered is obvious. In that instance want of jurisdiction in the court-martial was held to be fatal to its judgment as a defense for the death that ensued under it. In this, if the Commission has no jurisdiction, its judgment for the same reason will be of no avail, either to Judges, Secretary of War, or President, if either shall be called to a responsibility for what may be done under it. Again, upon the point of jurisdiction, I beg leave to add that the opinion I have endeavored to maintain is believed to be the almost unanimous opinion of the profession, and certainly is of every judge or court who has expressed any.

In Maryland, where such commissions have been and are held, the Judge of the Criminal Court of Baltimore, recently made it a matter of special charge to the grand jury. Judge Bond told them: "It has come to my knowledge that here, where the United States Court, presided over by Chief Justice Chase, has always been unimpeded, and where the Marshal of the United States, appointed by the President, selects the jurors, irresponsible and unlawful military commission attempt to exercise criminal jurisdiction over citizens of this state, not in the military or naval service of the United States, nor in the militia, who are charged with offenses either not known to the law, or with crimes for which the mode of trial and punishment are provided by statute in the courts of the land. That this is not done by the paramount authority of the United States, your attention is directed to article 5, of the Constitution of the United States, which says: 'No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger.'" Such persons exercising such unlawful jurisdiction are liable to indictment by you, as well as responsible in civil actions to the parties. In New York, Judge Peckham, of the Supreme Court of that State, and speaking for the whole bench, charged the grand jury as follows:

"The Constitution of the United States, Article 5, of the amendments, declares that 'no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger.'

"Article 6 declares that, 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.'

"Article 3, section 2, declares that 'the trial of all crimes, except in cases of impeachment, shall be by jury,' etc.

"These provisions were made for occasions of great excitement, no matter from what cause, when passion, rather than reason, might prevail.

"In ordinary times, there would be no occasion for such guards, as there would be no disposition to depart from the usual and established modes of trial.

"A great crime has lately been committed that has shocked the civilized world. Every right-minded man desires the punishment of the criminal, but he desires that punishment to be administered according to law, and through the judicial tribunals of the country. No star-chamber court, no secret inquisition, in this nineteenth century, can ever be made acceptable to the American mind.

"If none but the guilty could be accused, then no trial could be necessary—execution should follow accusation.

"It is almost as necessary that the public should have undoubted faith in the purity of criminal justice, as it is that justice in fact be administered with integrity.

"Grave doubts, to say the least, exist in the minds of intelligent men as to the constitutional right of the recent military commissions at Washington to sit in judgment upon the persons now on trial for their lives before that tribunal. Thoughtful men feel aggrieved that such a commission should be established in this free country, when the war is over, and when the common-law courts are open and accessible to administer justice, according to law, without fear or favor.

"What remedy exists? None whatever, except through the power of public sentiment.

"As citizens of this free country, having an interest in its prosperity and good name, we may, as I desire to do, in all courtesy and kindness, and with all proper respect, express our disapprobation of this course in our rulers in Washington.

"The unanimity with which the leading press of our land has condemned this mode of trial, ought to be gratifying to every patriot.

"Every citizen is interested in the preservation, in their purity, of the institutions of his country; and you, gentlemen, may make such presentment on this subject, if any, as your judgment may dictate."

The reputation of both of these judges is well and favorably known, and their authority is entitled to the greatest deference.

Even in France, during the consulship of Napoleon, the institution of a military commission for the trial of Prince Due d'Enhein, for alleged conspiracy against his life, was, to the irreparable injury of his reputation, ordered by Napoleon. The trial was had, and the prince was at once convicted and executed. It brought upon Napoleon the condemnation of the word, and is one of the blackest spots on his character. The case of the Duke, says the eminent historian of the Consulate and the Empire, furnished Napoleon "a happy opportunity of saving his glory from a stain," which he lost, and adds, with philosophic truth, that it was "a deplorable consequence of *violating the ordinary forms of justice*," and further adds, "to defend social order by conforming *to the strict rules and forms of justice*, without allowing any feeling of revenge to operate, is the great lesson to be drawn from these tragical events." *Thier's History, etc.*, 4 *vol.*, 318, 322.

Upon the whole, then, I think I shall not be considered obtrusive if I again invoke the Court to weigh well all that I have thought it my duty to urge upon them. I feel the duty to be upon me as a

citizen sworn to do what I can to preserve the Constitution, and the principles on which it reposes. As counsel of one of the parties, I should esteem myself dishonored if I attempted to rescue my client from a proper trial for the offense charged against her, by denying the jurisdiction of the Commission, upon grounds that I did not conscientiously believe to be sound. And, in what I have done, I have not more had in view the defense of Mrs. Surratt, than of the Constitution and the laws. In my view, in this respect, her cause is the cause of every citizen. And let it not be supposed that I am seeking to secure impunity to any one who may have guilty of the horrid crimes of the night of the 14th of April. Over these the civil courts of this District have ample jurisdiction, and will faithfully exercise it if the cases are remitted to them, and guilt is legally established, and will surely award the punishment known to the laws. God forbid that such crimes should go unpunished! In the black catalogue of offenses, these will forever be esteemed the darkest and deepest ever committed by sinning man. And, in common with the civilized world, do I wish that every legal punishment may be legally inflicted upon all who participated in them.

A word more, gentlemen, and, thanking you for your kind attention, I shall have done. As you have discovered, I have not remarked on the evidence in the case of Mrs. Surratt, nor is it my purpose; but it is proper that I refer to her case, in particular, for a single moment. That a woman, well educated, and, as far as we can judge from all her past life, as we have it in evidence, a devout Christian, ever kind, affectionate and charitable, with no motive disclosed to us that could have caused a total change in her very nature, could have participated in the crimes in question it is almost impossible to believe. Such a belief can only be forced upon a reasonable, unsuspecting, unprejudiced mind, by direct and uncontradicted evidence, coming from pure and perfectly unsuspected sources. Have we these? Is the evidence uncontradicted? Are the two witnesses, Weichmann and Lloyd, pure and unsuspected? Of the particulars of their evidence I say nothing.

They will be brought before you by my associates. But this conclusion in regard to these witnesses must be, in the minds of the Court, and is certainly strongly impressed upon my own, that, if the facts which they themselves state as to their connection and intimacy with Booth and Payne are satisfactorily established than the alleged knowledge and participation of Mrs. Surratt. As far, gentlemen, as I am concerned, her case is now in your hands.

REVERDY JOHNSON.

June 16, 1865.

As associate counsel for Mrs. Mary E. Surratt, we concur in the above.

FREDERICK A. AIKEN

JOHN W. CLAMPITT