New York Daily Tribune
Wednesday, June 28, 1865
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THE ASSASSINATION.

THE TRIAL ON TUESDAY

THE EVIDENCE ALL IN.

SANFORD CONOVER RECALLED.

Interesting Report of His Last Visit to Canada.

How He was Compelled to Swear Falsely.

Gale, the Alabama Assassin.

Judge Bingham on the Jurisdiction of the Court.

MILITARY TRIBUNALS UPHELD.

Reverdy Johnson's Argument Analyzed and Answered.

WASHINGTON, Tuesday, June 27, 1865.

The Court met at 11 o'clock, when Judge-Advocate-General Holt recalled Sanford Conover, alias J.W. Wallace, as a witness for the Government; Gen. Holt said he held in his hand a volume containing the judicial proceedings in the case of the St. Albans raid, and asked the witness whether his evidence was therein truthfully reported; the witness said the testimony to which Gen. Holt has especially referred was partly his, but associated with that of another person named Wallace.

Q. Do you remember how many persons named Wallace gave testimony on that trial? A. There were three, so far as I know: William Pope Wallace, J. Watson Wallace and J. Wallace. What was read from the book just now was the report of *The Montreal Telegraph*, printed from the type of that newspaper. The report which appeared in *The Montreal Witness* was correct. This read as follows:

"James Watson Wallace said: I reside at present in this city, and have been here since October; I was formerly a resident of the Confederate States; I know James A. Seddon; he occupied the position of Secretary of War; I should say the signatures to the papers M, N and O are those of the said Seddon; I have on several occasions seen the signatures of James A. Seddon, and have seen him on several occasions sign his name; he has signed documents in my presence, and handed them to me after signing; I never belonged to the Confederate army, but have seen many commissions issued by the Confederate Government; the commission of L. Young, marked M, is in the usual form; the army commissions are always signed by the Secretary of War; I have never seen a commission with the name of the President on with the seal of the Government; the Confederates, at the time I left the country, had no seal; one had been designed, but not prepared."

The witness remarked the above was substantially what he did say. It was clipped either from *The Montreal Witness* or *The Herald*.

Q. State whether, after you gave your testimony in this court, you visited Montreal? A. I left here perhaps the same day.

Q. Whom did you meet there of those spoken of as refugees? A. I met Tucker, Carroll, Dr. Patton, ex-Gov. Wescott, George Sanders, Lewis Sanders, his son, and a number of others; I had free conversation with some of them, especially with Tucker and Sanders.

Q. What did Tucker say, so far as the purpose of those men was concerned? A. They had not the slightest idea that I had testified before this Commission, and received me with great cordiality; the subject of this trial was generally discussed; Tucker, after denouncing Stanton and President Johnson as great scoundrels, spoke of Judge Holt as a blood-thirsty old villain; he said they must protect themselves by a guard at present; but, by the Eternal, a day of reckoning would come; then they would have a heavy account to settle. Sanders did not make such violent threats as Tucker did; William S. Cleary, whom he also met, made similar violent threats; he said Beal would have been pardoned by the President had it not been for Judge Holt; he also said that blood should follow blood; he reminded me of what he has formerly remarked of President Lincoln—that retributive justice had come, and that the assassination of the President was the beginning of it.

Q. After giving your testimony did you not go to Canada for me? A. I did to get a certified copy of the report at Montreal; I met the conspirators; I had not been there long when they discovered that my testimony had been published; I received a message from Sanders, Tucker, Carroll and O'Donnell, a Virginian, sometimes called McDonnell.

Q. The man who boasted of setting fire to houses in New-York? A. He so boasted; I went into a saloon to wait until the public offices were opened; while setting there, in about ten minutes a dozen Rebels surrounded me; they accused me of having betrayed their secrets; not knowing at the time that my testimony had ever been published, I denied it; they said if I would give them a letter to that effect it would be well; just as I was about to get away Beverly Tucker came in; he said a mere letter would not do, because I had testified before the Court; therefore I must give some paper under oath to make my denial sufficiently strong; about a dozen of these men assailed me in a furious manner; O'Donnell took out his pistol, and said unless I did so I should never leave the room alive; at least Sanders said, "Wallace, you see what kind of hands you are in;" I at length consented; it was understood that I was to prepare the paper in my own way; I intended, however, not to prepare the paper but to escape from them at the most convenient opportunity; they insisted they must go to O'Donnell's room, and I was forced to comply; Mr. Kerr, who had defended the St. Albans raiders, was then sent for to prepare the paper; two of Morgan's men were there; a pistol was again drawn on me; Kerr came; the affidavit was prepared and I signed it and went through the ceremony of an oath.

Q. Did you know that Kerr had knowledge of these menacies? A. It must have so appeared to him, as Tucker said if I did not sign the paper I should never leave the town alive, and that they would follow me to hell.

Q. Did that paper appear in *The Telegraph*, and was it afterwards copied into *The New-York World*? A. It did.

The paper was read. It appeared in *The Montreal Evening Telegraph* of June 10, and is to the effect that if President Johnson will send him, James W. Wallace, a safe conduct to go to Washington and return to Montreal he would proceed thither and go before the Military Court, in order that they may see whether he was the same Sanford Conover who swore as stated. This is dated June 8, 1865, and signed James W. Wallace. To this the affidavit before referred to is appended, viz.:

"I am the same James W. Wallace who gave evidence on the subject of the St. Albans raid, which evidence appears on page 212 of the Montreal report of the case; I am a native of the County of Loudon, Virginia; I resided in Montreal in October; I have seen and examined the report of what is called the suppressed evidence before the Court-Martial now being holden at Washington on Mistress Surratt, Payne and others, and I have looked carefully through the report of the evidence in the New-York papers of a person calling himself Sanford Conover, who referred to the fact that while in Montreal, he went by the name of James Watson Wallace, and gave evidence in the St. Albans raid investigation; that said Sanford Conover evidently personated me before the said Court-Martial; that I never gave any testimony wentsoever before the said Court-Martial at Washington City; that I never had knowledge of John Wilkes Booth excepting seeing him on the stage, and did not know he was in Montreal until I saw it published after the murder of President Lincoln; that I never was a correspondent of THE NEW-YORK TRIBUNE; that I never went under the name of Sanford Conover; that I never had any confidential communication with George N. Sanders, Beverly Tucker, Hon. Jacob Thompson, Gen. Carroll of Tennessee, Dr. M. N. Patton, or any of the others therein mentioned; that my acquaintance with every one of these gentlemen was slight; and, in fine, I have no hesitation in stating that the evidence of the said Sanford Conover personating me is false, untrue and unfounded in fact, and is from beginning to end a tissue of falsehoods. I have made this deposition voluntarily, and in justice to my own character and name. J. WATSON WALLACE."

This was sworn to before G. Smith, Justice of the Peace at Montreal, on June 8.

Alfred Terry certified that Wallace subscribed to the paper of his own free will, &c.

By Judge Holt—Q. I understand that this is the paper sworn and subscribed to and by you under the circumstances which you have detailed, with pistols presented at your face. The statements in this paper are false? A. Yes, sir; I never heard of Alfred Terry, who said I swore to it voluntarily; the advertisement appended to the deposition, which is as follows, was also induced by the same threats:

"Four hundred dollars reward will be given for the arrest so that I can bring to punishment in Canada the infamous and perjured scoundrel who recently personated me under the name of Sanford Conover, and deposed to a tissue of falsehoods before the Military Commission at Washington.

"JAMES W. WALLACE."

Q. You have stated that you were never in the Confederate army; what did you mean? A. I meant that I never served as a soldier; after I was conscripted I was detailed as a clerk in the Rebel War Department.

By the Judge-Advocate—Q. Was any attempt made by those men to detain you in Canada? A. I believe so, by friends of theirs, and I was relieved through the influence of Gen. Dix.

TESTIMONY OF NATHAN AUSER.

Nathan Auser of New-York was called by the Government; he said he had known Sanford Conover for eight or ten years; his character for integrity is good; recently he accompanied Conover to Montreal, and was present at the interview with Tucker and Sanders; after they went into O'Donnell's room, Mr. Cameron came there with a paper containing an account of Conover's testimony; Conover had the paper shown to him, but denied that he had so testified; he was told he must sign a writing to that effect or he should not leave the room alive; they would shoot him like a dog; they all went into St. Lawrence Hall, but would not let the witness follow; there were 12 or 15 persons in the party, including Sanders, Tucker, O'Donnell, Carroll Patton and Cameron; the witness said he did not see any weapons on these persons.

TESTIMONY OF JOHN CANTLEY.

John Cantley, called for the Government, testified as follows: I reside at Selma, Alabama; am a printer in the office of *The Selma Dispatch*.

By the Judge-Advocate—I will read the following, which purports to have been clipped from that newspaper, namely:

"A MILLION DOLLARS WANTED TO HAVE PEACE BY THE FIRST OF MARCH.—If the citizens of the Southern Confederacy will furnish me with the cash or good securities for the sum of one million of dollars, I will cause the lives of Abraham Lincoln, William H. Seward and Andrew Johnson to be taken by the first of March next. This will give us peace, and satisfy the world that cruel tyrants cannot live in a land of liberty. If this is not accomplished nothing will be claimed beyond the sum of fifty thousand dollars in advance, which is supposed to be necessary to reach and slaughter the three villains. I will give myself one thousand dollars towards the patriotic purpose. Every one wishing to contribute will address X, Cahawba, Alabama."—Dec. 1, 1864.

Q. Will you state whether this advertisement was published in *The Selma Dispatch*, in December, 1864? A. As far as I recollect, it was so worded and was published four or five times; I saw the manuscript, which was in the handwriting of G. W. Gale of Cahawba, Ala.; his name was signed at the bottom of the sheet merely to indicate the author and who was responsible for it; *The Dispatch* had a circulation of 800 copies, and exchanged with the Richmond papers; Gale is a lawyer of considerable reputation, and is distinguished for his extreme views on the subject of Slavery; I never saw Gale before his arrest.

TESTIMONY OF WATKINS D. GRAVES.

Watkins D. Graves, also a printer, who had been employed in *The Selma Dispatch* office, remembered to have seen the advertisement signed "X." It was in the handwriting of Mr. Gale, which he had seen frequently.

DR. MERRITT RECALLED.

Dr. Merritt was recalled for the Government with reference to a statement made by Mr. Hutchinson that he overheard a conversation on the 2nd of June. The Doctor said on that day he saw Gen. Carroll at St. Lawrence Hall, and introduced himself as Dr. Merritt, of Memphis; as there was a large family of that name at Memphis, from which vicinity Gen. Carroll came, he expressed to the witness great gratification at meeting him; Gen. Carroll introduced him to Tucker and others as Dr. Merritt; on Tuesday, the 6th of June, the testimony was published in Canada, when Tucker said they were perfectly posted as to everything on this trial, and Tucker said they had burned the papers from the Confederate Government for fear some Yankee would steal them for evidence; ex-Gov. Wescott was present; during the interview he did not hear the latter utter any disloyal sentiments, although it must be inferred he was playing into his friends' hands.

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By Gen. Wallace.—Q. By whom were they being posted? A. He said we have friends in Court; who, I don't know; I did not take for granted it was any member of the Court. [Laughter.]

Gen. Wallace.—I only wanted to know.

THE GOVERNMENT EVIDENCE CONCLUDED.

Judge-Advocate-General Holt said the Government was now through with its testimony.

Associate-Judge-Advocate Bingham then delivered his argument, as follows:

JUDGE BINGHAM'S ARGUMENT.

Mr. Bingham begins his argument by reciting the charge against the accused, and calling the attention of the Court to the circumstances in which it comes before them.

THE CRIME.

The crime charged and specified upon your record is not simply the crime of murdering a human being, but it is the crime of killing and murdering, on the 14th day of April, A. D. 1865, within the Military Department of Washington, and the intrenched lines thereof, Abraham Lincoln, then President of the United States, and Commander-in-Chief of the army and navy thereof; and then and there assaulting, with intent to kill and murder, William H. Seward, then Secretary of State of the United States; and then and there lying in wait to kill and murder Andrew Johnson, then Vice-President of the United States, and Ulysses S. Grant, then Lieutenant-General, and in command of the armies of the United States, in pursuance of a treasonable conspiracy entered into by the accused with one John Wilkes Booth and John H. Surratt, upon the instigation of Jefferson Davis, Jacob Thompson, and George N. Sanders and others, with intent thereby to aid the existing Rebellion and subvert the Constitution and laws of the United States.

It was a conspiracy—the final effort of a four years' rebellion, a conspiracy formed at the instigation of the chiefs in that Rebellion. That is what the accused are on trial for.

THE COURT AND ITS JURISDICTION.

The President of the United States, in the discharge of his duty as Commander-in-Chief of the Army, and by virtue of the power vested in him by the Constitution and laws of the United States, has constituted you a military court, to hear and determine the issue joined against the accused, and has constituted you a court for no other purpose whatever. To this charge and specification the defendants have pleaded, first, that this court has no jurisdiction in the premises; and, second, not guilty. As the court has already overruled the plea to the jurisdiction, it would be passed over in silence by me but for the fact, that a grave and elaborate argument has been made by counsel for the accused, not only to show the want of jurisdiction, but to arraign the President of the United States before the country and the world as a usurper of power over the lives and the liberties of the prisoners. Denying the authority of the President to constitute this commission is an averment that this tribunal is not a court of justice, has no legal existence, and therefore no power to hear and determine the issue joined. The learned counsel for the accused, when they make this averment by way of argument, owe it to themselves and to their country to show how the President could otherwise lawfully and efficiently discharge the duty enjoined upon him by his oath to protect, preserve and defend the Constitution of the United States, and to take care that the laws be faithfully executed.

THE CIVIL COURTS NOT OPEN.

The civil courts, say the counsel, are open in the District. I answer, they are closed throughout half the republic, and were only open in this District on the day of this confederation and conspiracy, on the day of the traitorous assassination of your President, and are only open at this hour by force of the bayonet. Does any man suppose that if the military forces which garrison the intrenchments of your capital, fifty thousand strong, were all withdrawn, the Rebel bands who this day infest the mountain passes in your vicinity would allow this court, or any court, to remain open in this District for the trial of these their confederates, or would permit your executive officers to discharge the trust committed to them, for twenty-four hours?

Booth himself was not and could not be arrested by civil process, but was pursued and slain by military power. Was that an act of usurpation? Yet it can only be justified by the argument which fully justifies the constitution of this military court.

REVERDY JOHNSON'S EXTRAORDINARY ARGUMENT.

But the argument of Mr. Johnson affirms that the President, under the Constitution and laws of the United States, was not only not authorized but absolutely forbidden to constitute this court for the trial of the accused, and, therefore, the act of the President is void, and the gentlemen who compose the tribunal without judicial authority or power, and are not in fact or in law a court. But the court is a military commission and bar, at any rate no power, as a court, to declare the authority by which it was constituted null and void, and the act of the President a mere nullity, a usurpation. Has it been shown by the learned gentleman, who demands that this court shall so decide, that officers of the army may lawfully and constitutionally question in this manner the orders of their Commander-in-Chief, disobey, set them aside, and declare them a nullity and a usurpation? Even if it be conceded that the officers thus detailed by order of the Commander-in-Chief may question and utterly disregard his order and set aside his authority, is it possible, in the nature of things, that any body of men, constituted and qualified as a tribunal of justice, can sit in judgment upon the proposition that they are not a court for any purpose, and finally decide judicially, as a court, that the government which appointed them was without authority?

IS A COURT A COURT!

So with the question presented in this remarkable argument for the defense: before this Court can enter upon the inquiry of the want of authority in the President to constitute them a court, they must take for granted and decide the very point in issue, that the President had the authority, and that they are in law and in fact a judicial tribunal; and having assumed this, they are gravely asked, as such judicial tribunal, to finally and solemnly decide and declare that they are not in fact or in law a judicial tribunal, but a mere nullity and nonentity. A most lame and impotent conclusion! The Supreme Court of the United States has decided explicitly that no court can enter upon such an inquiry; for if it should come to the conclusion that the Government under which it acted had been put aside, it would cease to be a court, and be *incapable* of pronouncing a judicial decision upon the question it undertook to try.

The argument of Mr. Johnson is

NOT A PLEA TO THE JURISDICTION.

The absurdity of the proposition so elaborately urged upon the consideration of this court cannot be saved from the ridicule and contempt of sensible men by the pretense that the court is not asked judicially to decide that it is not a court, but only that it has no jurisdiction; for it is a fact not to be denied that the whole argument for the defense on this point is that the President had not the lawful authority to issue the order by which alone this court is constituted, and that the order for its creation is null and void.

Gentlemen might as well ask the Supreme Court of the United States upon a plea to the jurisdiction to decide as a court that the President had no lawful authority to nominate the judges thereof severally to the Senate, and that the Senate had no lawful authority to advise and consent to their appointment, as to ask this court to decide as a court that the order of the President of the United States constituting it a tribunal for the sole purpose of this trial was not only without authority of law, but against and in violation of law. If this court is not a lawful tribunal, it has no existence, and can no more speak as a court than the dead, much less pronounce the judgment required at its hands—that it is not a court, and that the President of the United States, in constituting it such to try the question upon the charge and specification preferred, has transcended his authority, and violated his oath of office.

MILITARY COURTS, AS SUCH, PERFECTLY CONSTITUTIONAL.

To the argument that the Constitution confides the judical power to the Supreme Court, and inferior courts created by Congress, it is a sufficient answer to say that the power of this Government to try and punish military offenses by military tribunals is no part of the "judicial power of the United States," under the 3d article of the Constitution, but a power conferred by the 8th section of the 1st article, and so it has been ruled by the Supreme Court in Dyres agt. Hoover, 20 Howard, 78. If this power is so conferred by the 8th section, a military court authorized by Congress, and constituted as this has been, to try all persons for military crimes in time of war, though not exercising "the judicial power" provided for in the 3d article, is nevertheless a court as constitutional as the Supreme Court itself. The gentleman admits this to the extent of the trial, by courts-martial, of persons in the military or naval service, and by admitting it, he gives up the point. There is no *express* grant for any such tribunal, and the power to establish such a court, therefore, is *implied* from the provisions of the 8th section, 1st article, that "Congress shall have power to provide and maintain a navy," and also "to make rules for the government of the land and naval forces." From these grants the Supreme Court infer the power to establish courts-martial, and from the grants in the same 8th section, as I shall notice hereafter, that "Congress shall have power to declare war," and "to pass all laws necessary and proper to carry this and all other powers into effect," it is necessarily implied that in time of war Congress may authorize military commissions, to try all crimes committed in aid of the public enemy; as such tribunals are *necessary* to give effect to the power to make war and suppress insurrection.

SOMETHING FOR REVERDY JOHNSON TO THINK OF.

A representative of the people and of the rights of the people before this court, by the appointment of the President, and which appointment was neither sought by me nor desired, I cannot allow all that has here been said by way of denunciation of the murdered President and his successor to pass unnoticed. This has been made the occasion by the learned counsel, Mr. Johnson, to volunteer, not to defend the accused, Mary E. Surratt, not to make a judicial argument in her behalf, but to make a political harangue, a partisan speech against his government and country, and thereby swell the cry of the armed legions of sedition and rebellion that but yesterday shook the heavens with their infernal enginery of treason, and filled the habitations of the people with death. As the law forbids a Senator of the United States to receive compensation, or fee, for defending, in cases before civil or military commissions, the gentleman volunteers to make a speech before this court, in which he denounces the action of the Executive Department in proclaiming and executing martial law against Rebels in arms, their aiders and abettors, as a usurpation and a tyranny. I deem it my duty to reply to this denunciation, not for the purpose of presenting thereby any question for the decision of this court, for I have shown that the argument of the gentleman presents no question for its decision as a court, but to repel, as far as I may be able, the unjust aspersion attempted to be cast upon the memory of our dead President and upon the official conduct of his successor.

I propose now to answer fully all that the gentleman (Mr. Johnson) has said of the want of jurisdiction in this court, and of the alleged usurpation and tyranny of the Executive, that the enlightened public opinion to which he appeals may decide whether all this denunciation is just—whether indeed conspiring against the whole people, and confederation and agreement in aid of insurrection to murder all the executive officers of the Government, cannot be checked or arrested by the executive power. Let the people decide this question, and in doing so, let them pass upon the action of the Senator as well as upon the action of those whom he so arrogantly arraigns. His plea in behalf of an expiring and shattered rebellion is a fit subject for public consideration and for public condemnation.

BEN WOOD, AND REVERDY JOHNSON IN COMPANY.

Let that people also note, that while the learned gentleman (Mr. Johnson), as a volunteer, without pay, thus condemns as a usurpation the means employed so effectually to suppress this gigantic insurrection, *The New-York News*, whose proprietor, Benjamin Wood, is shown by the testimony upon your record to have received from the agents of the Rebellion $25,000, rushes into the lists to champion the cause of the Rebellion, its aiders and abettors, by following to the letter his colleague (Mr. Johnson), and with greater plainness of speech, and a fervor intensified, doubtless, by the $25,000 received, and the hope of more, denounces the Court as a usurpation and threatens the members with the consequences!

JOHNSON THE CHAMPION OF REBELLION.

The argument of the gentleman to which the court has listened so patiently and so long is but an attempt to show that it is unconstitutional for the Government of the United States to arrest upon military order and try before military tribunals and punish upon conviction, in accordance with the laws of war and the usages of nations, all criminal offenders acting in aid of the existing Rebellion. It does seem to me that the speech in its tone and temper is the same as that which the country has heard for the last four years, uttered by the armed Rebels themselves and by their apologists, averring that it was unconstitutional for the Government of the United States to defend by arms its own rightful authority and the supremacy of its laws.

THE TRIAL HAS NOT BEEN SECRET.

Mr. Johnson, while leaving to other counsel to argue the defense on its merits, arraigns the country and the Government for conducting a trial with closed doors and before a secret tribunal, and compares the proceedings of this court to the Spanish Inquisition, using the strongest words at his command to intensify the horror which he supposes his announcement will excite throughout the civilized world.

Was this dealing fairly by this Government? Was there anything in the conduct of the proceedings here that justified any such remark? Has this been a secret trial? Has it not been conducted in open day in the presence of the accused, and in the presence of seven gentlemen learned in the law, who appeared from day to day as their counsel? Were they not informed of the accusation against them? Were they deprived of the right of challenge? Was it not secured to them by law, and were they not asked to exercise it? Has any part of the evidence been suppressed? Have not all the proceedings been published to the world? What, then, was done, or intended to be done, by the Government which justifies this clamor about a Spanish Inquisition?

Mr. Bingham then proceeds to expose sundry misquotations and misrepresentations of legal authorities by Mr. Johnson, and passes to consider whether martial law has been declared and is still in force throughout the country.

THE PROCLAMATION OF MARTIAL LAW.

The second point, that martial law has not been de-

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clared by any competent authority, is an arraignment of the late murdered President of the United States for his proclamation of September 24, 1862, declaring martial law throughout the United States; and of which, in Lawrence's edition of Wheaton on International Law, p. 522, it is said: "Whatever may be the inference to be deduced either from constitutional or international law, or from the usages of European governments, as to the legitimate depository of the power of suspending the writ of *habeas corpus*, the virtual abrogation of the judiciary in cases affecting individual liberty, and the establishment as *matter of fact* in the United States, by the Executive alone, of martial law, not merely in the insurrectionary districts, or in cases of military occupancy, but throughout the entire Union, and not temporarily, but as an institution as permanent as the insurrection on which it professes to be based, and capable on the same principle of being revived in all cases of foreign as well as civil war, are placed beyond question by the President's proclamation of September 24, 1862." That proclamation is as follows:

"BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

"A PROCLAMATION.

"Whereas it has become necessary to call into service not only volunteers, but also portions of the militia of the States, by a draft, in order to suppress the insurrection existing in the United States, and disloyal persons are not adequately restrained by the ordinary processes of law from hindering this measure, and from giving aid and comfort in various ways to the insurrection. Now, therefore, be it ordered, that during the existing insurrection, and as a necessary means of suppressing the same, all Rebels and insurgents, their aiders and abettors, within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to Rebels, against the authority of the United States, shall be subject to martial law, and liable to trial and punishment by courts-martial or military commission.

"Second. That the writ of habeas corpus is suspended in respect to all persons arrested, or who are now, or hereafter, during the Rebellion, shall be imprisoned in any fort, camp, arsenal, military prison, or other place of confinement, by any military authority, or by the sentence of any Court-Martial or military commission.

"In witness whereof, I have hereunto set my hand, and caused the seal of the United States to be affixed.

"Done at the City of Washington, this 24th day of September, A. D. 1862, and of the independence of the United States the eighty-seventh. ABRAHAM LINCOLN.

"By the President: WILLIAM H. SEWARD, Sec. of State."

This proclamation is duly certified from the War Department to be in full force and not revoked, and is evidence of record in this case; and but a few days since a proclamation of the President, of which this court will take notice, declares that the same remains in full force.

The authority of the President to make this proclamation has been denied by Mr. Johnson, but it stands on the same ground with the proclamations of blockade issued April 19 and 27, 1861, which declared a blockade of the ports of the insurgent States, and that all vessels violating the same were subjects of capture, and, together with the cargo to be condemned as prize. Inasmuch as Congress had not then recognized the fact of civil war, these proclamations were denounced as void. The Supreme Court decided otherwise, and affirmed the power of the Executive.

MILITARY TRIBUNALS JUSTIFIED BY PRECEDENT.

The Revolutionary War began with the establishment of Military Courts, and they continued throughout the war, and the legislation of the Continental Congress included civilians as well as soldiers.

THE EXAMPLE OF WASHINGTON.

Washington, the peerless, the stainless, and the just, with whom God walked through the night of that great trial, enforced this just and wise enactment upon all occasions. On the 30th of September, 1780, Joshua H. Smith, by the order of Gen. Washington, was put upon his trial before a court-martial, convened in the State of New-York, on the charge of there aiding and assisting Benedict Arnold, in a combination with the enemy, to *take, kill* and *seize* such loyal citizens or soldiers of the United States as were in garrison at West Point. Smith objected to the jurisdiction, averring that he was a private citizen, not in the military or naval service, and therefore was only amenable to the civil authority of the State, whose Constitution had guaranteed the right of trial by jury to all persons held to answer for crime. (Chandler's Criminal Trials, vol. 2, p. 187.) The Constitution of New-York then in force had so provided; but, notwithstanding that, the court overruled the plea, held him to answer and tried him. I repeat that, when Smith was thus tried by court-martial, the Constitution of New-York as fully guaranteed trial by jury in the civil courts to all civilians charged and held to answer for crimes within the limits of that State, as does the Constitution of the United States guarantee such trial within the limits of the District of Columbia. By the second of the Articles of Confederation each State retained "its sovereignty," and every power, jurisdiction, and right not *expressly* delegated to the United States in Congress assembled. By those articles there was no express delegation of judicial power; therefore the States retained it fully.

The power to try by military tribunals is a

NECESSITY TO THE EXISTENCE OF THE NATION.

Here is a conspiracy, organized and prosecuted by armed traitors and hired assassins, receiving the moral support of thousands in every State and district, who pronounced the war for the Union a failure, and your now murdered but immortal Commander-in-Chief, a tyrant; the object of which conspiracy, as the testimony shows, was to aid the tottering Rebellion which struck at the nation's life. It is in evidence that Davis, Thompson, and others, chiefs in this Rebellion, in aid of the same, agreed and conspired with others to poison the fountains of water which supply your commercial metropolis, and thereby murder its inhabitants; to secretly deposit in the habitations of the people and in the ships in your harbors inflammable materials, and thereby destroy them by fire; to murder by the slow and consuming torture of famine your soldiers, captive in their hands; to import pestilence in infected clothes to be distributed in your capital and camps, and thereby murder the surviving heroes and defenders of the Republic, who, standing by the holy graves of your unreturning brave, proudly and defiantly challenge to honorable combat and open battle all public enemies, that their country may live; and, finally, to crown this horrid catalogue of crime, this sum of all human atrocities, conspired, as charged upon your record, with the accused and John Wilkes Booth and John H. Surratt to kill and murder in your capital the executive officer of your Government and the commander of your armies. When this conspiracy, entered into by these traitors, is revealed by its attempted execution and the foul and brutal murder of your President in the capital, you are told that it is unconstitutional, in order to arrest the further execution of the conspiracy, to interpose the military power of this Government for the arrest, without civil process, of any of the parties thereto and for their trial by a military tribunal of justice. If any such rule had obtained during our struggle for independence we never would have been a nation. If any such rule had been adopted and acted upon now, during the fierce struggle of the past four years, no man can say that our nationality would have thus long survived.

AND IT IS THE NATION WHICH EXERCISES THE POWER.

That these powers for the common defense, intrusted by the Constitution exclusively to the Congress and the President, are, in time of civil war or foreign invasion, to be exercised without limitation or restraint, to the extent of the public necessity, and without any intervention of the federal judiciary or of State constitutions or State laws, are facts in our history not open to question.

The position is not to be answered by saying you make the American Congress thereby omnipotent, and clothe the American Executive with the asserted attribute of hereditary monarchy—the king can do no wrong. Let the position be fairly stated—that the Congress and President, in war as in peace, are but the agents of the whole people, and that this unlimited power for the common defense against armed rebellion or foreign invasion is but the power of the people intrusted exclusively to the executive and legislative departments as their agents, for any and every abuse of which, these agents are directly responsible to the people—and the demagogue cry of an omnipotent Congress, and an Executive invested with royal prerogatives, vanishes like the baseless fabric of a vision. If the Congress, corruptly, or oppressively, or wantonly abuse this great trust, the people by the irresistible power of the ballot hurl them from place. If the President so abuse the trust, the people by their Congress withhold supplies, or by impeachment transfer the trust to better hands, strip him of the franchises of citizenship and of office, and declare him forever disqualified to hold any position of honor, trust or power under the Government of his country.

Mr. Bingham then proceeds to give copious citations in proof of his proposition that the power to exercise martial law is fully conferred by the Constitution upon the Executive and Congress. Both the advocates and opponents of the Constitution previous to its ratification affirmed that this power resided in it.

PUBLIC SAFETY THE SUPREME LAW.

It was as well understood then in theory as it has since been illustrated in practice, that the judicial power, both Federal and State, had no voice and could exercise no authority in the conduct and prosecution of a war, except in subordination to the political department of the Government. The Constitution contains the significant provision, "The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

What was this but a declaration, that in time of rebellion, or invasion, the public safety is the highest law?—that so far as necessary the civil courts (of which the Commander-in-Chief, under the direction of Congress shall be the sole judge) must be silent, and the right of each citizen, as secured in time of peace, must yield to the wants, interests, and necessities of the nation? Yet we have been gravely told by the gentleman, in his argument, that the maxim, *salus populi suprema est lex*, is but fit for a tyrant's use. Those grand men, whom God taught to build fabric of empire, thought otherwise, when they put that maxim into the Constitution of their country. It is very clear, that the Constitution recognizes the great principle which underlies the structure of society and of all civil government: that no man lives for himself alone, but each for all; that, if need be, some must die that the State may live, because at best the individual is but for to-day, while the commonwealth is for all time. I agree with the gentleman in the maxim which he borrows from Aristotle, "Let the public weal be under the protection of the law;" but I claim that in war, as in peace, by the very terms of the Constitution of the country, the public safety is under the protection of the law; that the Constitution itself has provided for the declaration of war for the common defense, to suppress rebellion, to repel invasion, and, by express terms, has declared that whatever is necessary to make the prosecution of the war successful, may be done, and ought to be done, and is therefore constitutionally lawful.

NO TRIAL BY JURY IN WAR FOR PUBLIC ENEMIES.

If this be so, how can there be trial by jury for military offenses in time of civil war? If you cannot, and do not try the armed enemy before you shoot him, or the captured enemy before you imprison him, why should you be held to open the civil courts and try the spy, the conspirator, and the assassin, in the secret service of the public enemy, by jury, before you convict and punish him? Why not clamor against holding imprisoned the captured armed Rebels, deprived of their liberty without due process of law? Are they not citizens? Why not clamor against slaying for their crime of treason, which is cognizable in the civil courts, by your rifled ordnance and the iron hail of your musketry in battle, these public enemies, without trial by jury? Are they not citizens? Why is the clamor confined exclusively to the trial by military tribunals of justice of traitorous spies, traitorous conspirators, and assassins hired to do secretly what the armed Rebel attempts to do openly—murder your nationality by assassinating its defenders and its executive officers? Nothing can be clearer than that the Rebel captured prisoner, being a citizen of the Republic, is as much entitled to trial by jury before he is committed to prison, as the spy, or the aider and abettor of the treason by conspiracy and assassination, being a citizen, is entitled to such trial by jury, before he is subjected to the just punishment of the law for his great crime. I think that in time of war the remark of Montesquieu, touching the civil judiciary, is true: that "it is next to nothing." Hamilton well said, "The executive holds the sword of the community; the judiciary has no direction of the strength of society; it has neither force nor will; it has judgment alone, and is dependent for the execution of that, upon the arm of the executive." The people of these States so understood the Constitution, and adopted it, and intended thereby, without limitation or restraint, to empower their Congress and Executive to authorize by law, and execute by force, whatever the public safety might require to suppress rebellion or repel invasion.

WHAT THE SUPREME COURT SAYS.

The Supreme Court has so decided in effect—affirming by Chief-Justice Marshall that

"The powers given to the government imply the ordinary means of execution, and the government, in all sound reason and fair interpretation, must have the choice of the means which it deems the most convenient and appropriate to the execution of the power. * * * The powers of the government were given for the welfare of the nation; they were intended to endure for ages to come, and to be adapted to the various crises in human affairs. To prescribe the specific means by which government should, in all future time, execute its power, and to confine the choice of means to such narrow limits as should not leave it in the power of Congress to adopt any which might be appropriate and conducive to the end, would be most unwise and pernicious." (4 Wheaton, 420.)

And so Mr. Justice Story:

"When the legislative authority, to whom the right to declare war is confined has declared war in its most unlimited manner, the executive authority, to whom the execution of the war is confided, is bound to carry it into effect. He has a discretion vested in him as to the manner and extent, but he cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims. The sovereignty, as to declaring war and limiting its effects, rests with the legislature. The sovereignty as to its execution rests with the President." (Brown agt. United States, 8 Cranch, 153.)

And in another case, on the question of who is to decide as to the exigency which is to justify Executive action, the Court says:

"When the President has acted and called out the militia, is a circuit court of the United States authorized to inquire whether his decision was right? If it could, then it would become the duty of the court, provided it came to the conclusion that the President had decided incorrectly, to discharge those who were arrested or detained by the troops in the service of the United States." * * * "If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anaarchy and not of order." * * * "Yet if this right does not reside in the courts when the conflict is raging, if the judicial power is at that time bound to follow the decision of the political, it must be equally

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bound when the contest is over. It cannot, when peace is restored, punish as offenses and crimes the acts which it before recognized and was bound to recognize as lawful."—[Luther vs. Borden, 7 Howard, 42, 43.

THE PRESIDENT JUSTIFIED BY CONGRESS.

These acts of the President have, however, all been legalized by the subsequent legislation of Congress, although the Supreme Court decided, in relation to the proclamation of blockade, that no such legislation was necessary. By the act of August 6, 1861, ch. 63, sec. 3, it is enacted that:

"All the acts, proclamations, and orders of the President of the United States, after the 4th of March, 1861, respecting the Army and Navy of the United States, and calling out, or relating to the militia, or volunteers from the States, are hereby approved in all respects, legalized, and made valid to the same extent, and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress of the United States."—(12 Stat. at Large, 326.)

This act legalized, if any such legalization was necessary, all that the President had done from the day of his inauguration to that hour, in the prosecution of the war for the Union. He had suspended the privilege of the writ of habeas corpus, and resisted its execution when issued by the Chief Justice of the United States; he had called out and accepted the services of a large body of volunteers for a period not previously authorized by law; he had declared a blockade of the Southern ports; he had declared the Southern States in insurrection; he had ordered the armies to invade them and suppress it; thus exercising, in accordance with the laws of war, power over the life, the liberty, and the property of the citizens. Congress ratified it and affirmed it.

In like manner and by subsequent legislation did the Congress ratify and affirm the proclamation of martial law of September 25, 1862. That proclamation, as the Court will have observed, declares that during the existing insurrection all Rebels and insurgents, their aiders and abettors within the United States, and all persons guilty of any disloyal practice, affording aid and comfort to the Rebels against the authority of the United States, shall be subject to martial law and liable to trial and punishment by courts-martial or *military commission*; and second, that the writ of habeas corpus is suspended in respect to all persons arrested, or who are now or hereafter during the Rebellion shall be imprisoned in any fort, &c., by any military authority, or by the sentence of any court-martial or *military commission*.

AND THE PEOPLE HAVE JUSTIFIED BOTH PRESIDENT AND CONGRESS.

But, says the gentleman, whatever may be the precedents English or American, whatever may be the provisions of the Constitution, whatever may be the legislation of Congress, whatever may be the proclamations and orders of the President as commander-in-chief, it is a usurpation and a tyranny in time of rebellion and civil war to subject any citizen to trial for any crime before military tribunals, save such citizens as are in the land or naval forces, and against this usurpation, which he asks this court to rebuke by solemn decision, he appeals to public opinion. I trust that I set as high value upon enlightened public opinion as any man. I recognize it as the reserved power of the people which creates and dissolves armies, which creates and dissolves legislative assemblies, which enacts and repeals fundamental laws, the better to provide for personal security by the due administration of justice. To that public opinion upon this very question of the usurpation of authority, of unlawful arrests, and unlawful imprisonments, and unlawful trials, condemnations, and executions by the late President of the United States, an appeal has already been taken to public opinion. On this very issue the President was tried before the tribunal of the people, that great nation of freemen, who cover this continent, looking out upon Europe from their eastern and upon Asia from their western homes. That people came to the consideration of this issue not unmindful of the fact, that the first struggle for the establishment of our nationality could not have been, and was not successfully prosecuted without the proclamation and enforcement of martial law, declaring as we have seen that any inhabitant who, during that war, should kill any loyal citizen, or enter into any combination for that purpose, should, upon trial and conviction before a military tribunal, be sentenced as an assassin, traitor, or spy, and should suffer death, and that in this last struggle for the maintenance of the American nationality, the President but followed the example of the illustrious Father of his Country. Upon that issue the people passed judgment on the 8th day of last November, and declared that the charge of usurpation was false.

From this decision of the people there lies no appeal on this earth. Who can rightfully challenge the authority of the American people to decide such questions for themselves? The voice of the people, thus solemnly proclaimed, by the omnipotence of the ballot in favor of the righteous order of their murdered President, issued by him for the common defense, for the preservation of the Constitution, and for the enforcement of the laws of the Union, ought to be accepted, and will be accepted, I trust, by all just men as the voice of God.

A WORD FROM MR. EWING.

Mr. Ewing—I ask the permission of the Court, to say in response to the allusion of the Assistant Judge-Advocate to my acts as military commander, that he will find in the bureau of military justice, no record of the trial in my former commands of persons not in the military service of the United States or in the Confederate service, except guerrillas, robbers and others *hostes humain generis* taken *flagrante bello*, with arms in their hands, or in acts of hostility; and if he will do me the favor to refer to my argument on the jurisdiction, he will see that I not only deny but conceded the power of arrest and summary punishment by the commanding general in the field, of all such persons restricted only by the laws and the orders of military superiors.

ADJOURNMENT.

The Court adjourned till to-morrow afternoon at one o'clock, when, it is expected, Judge Bingham will proceed to a review of the evidence for the Government.

Resume of Tuesday's Proceedings.

WASHINGTON, Tuesday, June 27, 1865.

Sanford Conover *alias* Wallace, was recalled by the Government, and testified that after he left Washington, which was on the same day that he testified here, he revisited Montreal, where he met Tucker, Sanders, Carroll, Pullin, Westcott, and a number of others. They did not know at that time that he (witness) had been before the Commission, and therefore received him with great cordiality. Tucker, while speaking of this trial, denounced Secretary Stanton and President Johnston as scoundrels, and Judge Holt as a blood-thirsty old villain, and added that they should protect themselves, for, by the Eternal, the day of reckoning would come, and a heavy account would have to be settled. Subsequently, when it became known that witness had testified here, his life was menaced, and on several occasions pistols were drawn and threats made to shoot him (witness) dead, if he did not swear and subscribe to an affidavit to the effect that he had not testified before the Commission, and that the Conover representing him (Wallace) had testified to a tissue of falsehoods.

This, the witness repeated, was sworn to by him under duress, with pistols presented in his face. He did it to save his life.

A witness named Ausier corroborated the above testimony in part.

John Cantley and Watkins D. Graves, printers from Selma, Ala., testified to the handwriting of G. W. Gale of Cahawba, who had procured the publication of an advertisement in *The Selma Dispatch*, advertising for one million of dollars to procure the death of Lincoln, Johnson and Seward.

Judge-Advocate-General Holt said all the Government testimony was now in.

Assistant-Judge-Advocate Bingham then read an elaborate argument in reply to that of Reverdy Johnson, on the jurisdiction of the Court.

After Associate-Judge-Advocate Bingham had delivered his argument, the Court adjourned until one o'clock to-morrow afternoon.

Assistant Judge-Advocate Bingham had a large and apparently much interested auditory this afternoon during the delivery of his argument in reply to the Hon. Reverdy Johnson on the subject of the jurisdiction of the Military Commission now engaged in the trial of the alleged conspirators.