New York Daily Tribune
Tuesday, June 20, 1865
page 1 column 1

THE ASSASSINATION.

THE TRIAL ON MONDAY

ARGUMENT OF REVERDY JOHNSON.

HAS THE COURT JURISDICTION?

MR. STONE'S DEFENSE OF HARROLD.

A Plea for Arnold and O'Laughlin.

MRS. SURRATT QUITE ILL.

WASHINGTON, Monday, June 19, 1865.

Mr. Aiken stated to the Court that he should not be prepared until Wednesday to read the argument in the case of Mrs. Surratt. The delay was attributable to the voluminous evidence previously to be examined by him.

THE PLEA AGAINST JURISDICTION.

Mr. Clampitt, with the consent of the Court, then proceeded to read the argument on the plea of jurisdiction as follows:

It commences by asking, has the Commission jurisdiction of the cases before it? 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 awful importance when error may lead to the unauthorized taking of 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 cannot be avoided. Every member composing the commission will meet all the responsibility that belongs to it as becomes gentlemen and soldiers. So far the question of jurisdiction has not been discussed.

The pleas which specially presented it, as soon as filed, were overruled. But that will not, because properly it should not, prevent the commission from considering it with the deliberation which its grave nature demands. It was for them to decide it, and at this time for them alone. The commission under which they are acting does not and could not decide it. If unauthorized, it is a mere nullity—the usurpation of a power not vested in the Executive and confering no authority upon them. 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, are amply sufficient to give all needed efficiency to the office.

The Convention that framed the Constitution, and the people who adopted it, considered these powers sufficient, and granted no others. In the minds of both (and subsequent events have served to strengthen the impression), danger to liberty is 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 to "faithfully discharge its duties, and, to the 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 and 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 vote, and liable to be indicted and convicted, and to be imprisoned. 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 that framed the Constitution, 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 carefully restricted and guarded so as to render its abuse or usurpation almost impossible. If these observations are well founded, it follows that an executive act beyond executive authority can furnish no defense against the legal consequences of what are done under it. Unless jurisdiction exists the authority to try does not exist, and whatever is done is *ceram non judice* and utterly void.

This doctrine is as applicable to military as to other Courts. 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 crime imputed to them. That a tribunal like this has no jurisdiction over them than military officers, is believed to be evident. That offenses defined and punished by the civil law and whose trial is provided for 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 prisoners 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 military jurisdiction. The general law has "supreme and undisputed jurisdiction over all. The military law puts forth no such pretension—it aims solely to enforce on the *soldier* the additional duties he has assumed. It constitutes tribunals for the trial of breeches 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 citizen as such.—(Ib.)

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. The army cannot be raised or have law for its goverment and regulation except as Congress shall provide. The power of Congress 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 Com., sec. 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. The power given to Congress is to "make sales 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, and they are therefore to be construed to exclude 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 this view they adopted the fifth constitutional amendment, which declares that: "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 active service in time of war or public danger."

This view is elaborated by reference to the highest legal authority, and the constitutional questions are discussed at length.

The sixth amendment, which our fathers thought so vital to individual liberty, when assailed by governmental prosecution, is but a dead letter, totally inefficient for the purpose whenever the Government shall deem it proper to try a citizen by a military commission. Against such a doctrine the very instincts of free men 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.

The counsel then proceeds to examine, with somewhat of particularity, the grounds on which he is informed the jurisdiction of this Commission is maintained, and contends, in the second place, that if the power in question, if claimed under the authority supposed to be given to the President in certain cases to suspend the writ of *habeas corpus* and declare martial law, the claim is equally, if not more evidently untenable.

The Act of 1806, establishing the Articles of War, provides for no military court like this; and it is maintained that it does not embrace the crimes charged against these parties or the parties themselves, and until the Rebellion he was not aware that a different construction was ever intimated. It is the exclusive fruit of the Rebellion.

In the course of this elaborate argument Mr. Johnson says: "As counsel for 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 the Constitution and 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 been 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 if guilt is legally established, 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. 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 the 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 (Weichman 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 have 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 with Booth and Payne are true to their knowledge of the purpose to commit the crimes and their participation in them is much more 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.

THE ARGUMENT FOR HARROLD.

F. Stone, esq., counsel for Harrold, being necessarily absent, the argument prepared by him was read by Mr. James J. Murphy, one of the official reporters of the Court. It commences by saying that at the earnest request of the widowed mother and estimable sisters of the accused, he had consented to act as his counsel. After denying the jurisdiction of the Court, the counsel says the charge in this case consists of several distinct and separate offenses embodied in one charge. The parties accused are charged with a conspiracy in aid of the Rebellion, with murder, with assault with intent to kill, and with lying in wait. It is extremely doubtful from the language of the charge and the specification under which of the following crimes the accused, Harrold, is arraigned and is now on his trial, viz.: First, Whether he is on trial for conspiracy to overthrow the Government of the United States, punishable by the act of the Congress of the United States

New York Daily Tribune
Tuesday, June 20, 1865
page 1 column 1

passed on the 31st of July, 1861; or, second, Whether he is on his trial for giving aid and comfort to the existing Rebellion, as punishable by the act of Congress passed the 17th of July, 1862; or, third, whether he is on his trial for aiding and abetting the murder of Abraham Lincoln, President of the United States. His counsel well understands the legal definition of the three crimes above mentioned, but does not understand that either to the Common Law or to the law of War is known any one offense comprised of the three crimes mentioned in this charge. He knows of no one crime of a conspiracy to murder and an actual murder all in aid of the Rebellion, distinct and separate from the well known and defined crimes of murder, of conspiracy in aid of the Rebellion, or of giving aid and comfort to the Rebellion, as defined by the Act of Congress. It is extremely doubtful, from the language of this charge, whether the murder of the President of the United States is not referred to as the mere means by which the conspirators gave aid and comfort to the Rebellion; whether it was not merely the overt act by which the crime of aiding the Rebellion was complete.

First—As to the crime of conspiracy, counsel after reviewing the testimony for the Goverment says these facts would probably convict fifty people, but they do not give, either separately or collectively, the slightest evidence that this boy Harrold ever conspired with Booth and others in aid of the Rebellion, and for the overthrow of the Government of the United States. They show nothing that might not have occurred to any one perfectly consistent with the most perfect innocence. The term "confidential communication" is the witness Weichman's own construction. He meant only to say that the three were talking together; that after leaving the theater together where they had been the three stopped and went into a restaurant and that he found them there talking together near a stove. So much for the conspiracy. Of the fact that this boy Harrold was an aider and abetter in the escape of Booth there was no rational or reasonable doubt. He was clearly guilty of that crime, and must abide by its consequences, but the accused, by his counsel, altogether denies that he was guilty of the murder of Abraham Lincoln or that he aided or abetted in such murder, as set forth in the specifications and charge. But though Booth exercised unlimited control over this miserable boy, body and soul, he found him unfit for deeds of blood and violence. He was cowardly, he was too weak and trifling, but still he could be made useful. He knew some of the roads through lower Maryland, and Booth persuaded him to act as guide, footboy, companion. This accounts for their companionship. There was one piece of evidence introduced by the Government that should be weighed by the Commission: it is the declaration of Booth made at the time of his capture—"I declare before my Maker that this man is innocent." Booth well knew at the time he made that declaration that his hours, if not his minutes, were numbered. There is no evidence to prove that Harrold procured, counseled, commanded or abetted Booth to assassinate the President of the United States. The feeble aid that he could render to any enterprise was rendered in accompanying and aiding Booth in his flight, and nothing beyond. That itself is a grave crime and carries with it its appropriate punishment. Counsel concludes the defense with a quotation from Benet on Military Law and Courts-Martial, where the punishments for particular offenses are not fixed by law, but left discretionary with Courts. The above mandate of the Constitution must be directly kept in view, and the benign influence of a mandate from a still higher law ought not to be ignored—that justice should be tempered with mercy.

The elaborate argument, of which the above is a mere notice, is signed by "F. Stone, Counsel for D. E. Harrold."

THE ARGUMENT FOR ARNOLD AND O'LAUGHLIN.

Mr. Cox next offered his argument on behalf of Arnold and O'Laughlin. He said that for himself, execrating as he did the odious crime wrought on the Chief Magistrate of the Nation, he would not have been willing to connect his name with this defense until he felt sure the accused was merely the victim of compromising appearances, and was wholly innocent of the great offense. The evidence, he contended, showed that even if these two accused were beguiled for a moment to listen to the suggestions of this restless schemer, Booth, yet there was no blood on their hands, and they were wholly guiltless of all previous knowledge of and participation in that arch deed of malice which plunged the Nation into mourning. Both the accused and their counsel have in this trial labored under disadvantages not incident to the civil courts and courts-martial. The accused receives not only a copy of the charge, or indictment, in time to prepare his defense, but also a list of the witnesses with whom he is to be confronted; and in the civil court it is usual for the prosecutor to state in advance the general nature of the charges he expects to establish, and the general scope of the evidence he expects to advance. The crime was laid at Washington. The purlieus of Montreal and Toronto had been searched. The City of New-York was examined. The sea had been encompassed; and the Western waters and Yellow Fever hospitals had been visited; and this eccentric career had terminated in a New-York wood. [Laughter.] In this case the accused were aroused from their slumbers on the night before the arraignment and for the first time presented with a copy of the charges. For the most part, they were unable to procure counsel until the trial had commenced; and when the counsel were admitted they came to the discharge of their duties in utter ignorance of the whole case which they were to combat, except as they could gather from the general language of the charge, as well as for the most part wholly unacquainted with the prisoners and their antecedents; and the consequence is that the earlier witnesses for the Government were allowed to depart with little or no cross examination, which subsequent events showed was of vital importance to elicit the truth and reduce their vagaries of statement to more of accuracy. And he would add that this testimony had consisted of the statements of informers and accomplices, always suspicious, brought from remote places, whose antecedents and characters it is impossible for the prisoners to trace. He was constrained further to notice the manner in which the trial was conducted. The accused were arraigned upon a single charge. It described one offense of some kind; but however specific in form it seems to have been intended to fit every conceivable form of crime which the wickedness of man can devise. The crime is located in Washington; yet we have been carried to the purlieus of Toronto and Montreal; have skirted the borders of New-York and Vermont, touching at Ogdensburg and St. Albans; have passed down the St. Lawrence and out to sea, inspected our ocean shipping; have visited the fever hospitals of the British isles, and have returned to the prison pen of Andersonville, and seen the camp at Belle Island and the historical Libby, and penetrated the secret councils of Richmond; have passed thence to the hospitals of the West and ascended the Mississippi; and at length terminated this eccentric career in the woods of New-York. Under the charge against the prisoners of conspiring to kill the President and others in Washington, Jefferson Davis and his associates have been tried, and in the judgment of many convicted of starving, poisoning, arson, and other crimes too numerous to mention. He had apprehended that the counsel for the accused would appear in a false position by their apparent acquiescence in this wide range of inquiry; and therefore he felt it due to himself, at least, to explain. For his part he felt no interest whatever, in resisting the exposure of the misdeeds of the Rebel authorities and agents; his only concern had been to show that his clients had had nothing to do with the conspiracy set forth in the charge. To the best of his ability he had scrutinized the evidence of that conspiracy so far as necessary to their defense. With regard to other matters foreign to this issue he had to say, in the first place, the charge was artfully framed with a view to admit them in evidence. It imputes that the accused conspired with Jefferson Davis and others to kill, and murder the President, &c., with intent to aid and comfort the insurgents, &c., and thereby aid in the subversion and overthrow of the Constitution and laws of the United States; and on the principle that other acts constituting distinct offenses were sometimes admitted as proof of intent, these subjects, foreign to the main issue have even put in evidence. By no possible ingenuity can these foreign matters be used to the prejudice of the accused. He had supposed that the object of introducing them was to bring to the public, in the shape of sworn testimony, information of the practices of the Rebel leaders, to which, however irregular the proceedings, he had no objection to oppose. He could not for a moment suppose that the object was to inflame prejudice against the accused because of their supposed remote connection with the authors of all these evils, and for want of higher victims to make them the scapegoats for all the other atrocities imputed to the Rebellion, to annihilate them to hush the clamors of the public for a victim, or to appease the nemesis that has recorded the secrets of the Southern prison-houses or the deadly deeds wrought by fire and pestilence. In regard to the issue before this commission he had intended to confine himself to a simple review of the evidence, but the anomalous character of the charge, the uncertainty with which they were left with reference to the positions to be taken by the Government, and the general course of the investigation pursued, admonished him that he should present some legal considerations at least of a general character. Assuming for argument's sake that the court has jurisdiction to to try the accused upon this charge, he proceeded to discuss the ground and limits of that jurisdiction and the mode in which it is to be exercised. After submitting some general reflections upon the character of the offenses set forth in the charge and specifications, as they are known to and punishable by the civil law of the land, he went on to argue how far this commission in dealing with them is to be guided and restrained by the law. Mr. Cox, in his analysis of the crimes charged, said that below the grade of treason crimes are ranged under two general heads, viz.: felonies and misdemeanors, and proceeded to deal with the question of a conspiracy to commit a felony and then with a conspiracy to commit treason. He then took up the question of unexecuted conspiracy, and the case of a party involved in conspiracy who shall withdraw from it, contending that he is not responsible for any act done by the others in the prosecution of the objects of the conspiracy afterward. These and other points in this connection were presented by Mr. Cox with a large array of citations from legal authorities. The question how far tribunals, sitting by virtue of martial law, can depart from the established law of the land, in its distinction between crimes and its mode of punishment, was dealt with at length. Mr. Cox examined the evidence so far as was material to his case. He claimed that no active design against the life of the President was on foot between January and the early part of April; that during that interval Booth was contriving the capture of the President and others. It appeared that that project was abandoned, and the date of the abandonment is fixed by the facts referred to by Booth, to wit: the defection of some of the parties, the sale of horses, &c., and that date is ascertained to have been about the middle of March. Now, it is clear that if any connection is shown between Booth and O'Laughlin and Arnold, it existed only when this abandoned project was agitated, and terminated with it. Their fitful stay in Washington was only between Feb. 10 and March 18. By Arnold's confession it appeared that he and, if he is not mistaken, O'Laughlin attended one meeting about the middle of March, to consider the plan of capture; but so immature was the plan, so slight his connection with it, that he did not even know the names of the others at the meeting, two in number besides Booth, Surratt and Atzerodt; at that meeting the scheme fell through, and he and O'Laughlin left for Baltimore; Booth told him he might sell the arms he had given him, and in fact he gave part of them away to his brother; as to O'Laughlin, his confession proves nothing but his presence at this single meeting. This was the beginning and the end of their connection with Booth in any scheme whatever of a political character; and in this it is evident that he was the arch-contriver and they the dupes; and when they had once escaped his influence, although he still evidently clung to his design, and telegraphed and wrote and called to see them, it is evident that they refused to heed the voice of the charmer, "charm he never so wisely." From O'Laughlin he received no response at all. From Arnold only the letter offered in evidence. There are expressions in that letter which look to a continued renewal of their relations in the future. But they were employed to parry his importunities for the present. Certainly all connection ceased from that time. If, therefore, any conspiracy at all be proved by the utmost latitude of evidence, against these two accused, it was a mere unenacted, still-born scheme, scarce conceived before it was abandoned, of a nature wholly different from the offense described in this charge—the proof of which does not sustain this charge, and of which the accused could not be convicted on this trial. For this Court is bound by the rules of evidence which prevail in others, and one of the most important is that the proof must correspond with the charge in the indictment, and show the same offense, or the accused is entitled to acquittal; and there is no evidence which connects these two accused with that dreadful conspiracy which forms the subject of this charge. There is nothing to show that during their brief intercourse with Booth at Washington that nefarious design was agitated at all; certainly none that it was ever disclosed to them; and if such a conspiracy had any existence it was in a state of slumbering suspense, awaiting that sanction without which it had no motive, end, aim or life. Mr. Cox contended that the following conclutions were established, viz.: 1. That the accused Samuel Arnold and Michael O'Laughlin had no part whatever in the execution of the conspiracy set forth in this charge and its specifications. 2. That if they were implicated in the conspiracy they withdrew from and abandoned it while yet wholly unexecuted and resting merely in intention, and are not responsible for any of the acts subsequently done in pursuance of it. 3. That there is no legal and competent evidence implicating O'Laughlin in any conspiracy whatever, or implicating either O'Laughlin or Arnold in the conspiracy charged. 4th. That if there is any evidence against them of any conspiracy, it is of one wholly different from that set forth in the charge and specification; and upon these they must be wholly acquitted. He therefore claimed for them an absolute and unqualified acquittal. That the accused were wrong in ever joining the Rebellion against their Government no one will deny; that they

New York Daily Tribune
Tuesday, June 20, 1865
page 1 column 1

were wrong in even listening for a moment, if they ever did listen, to any propositions from that wicked schemer Booth, inimical to their Government, no one will deny. But it would be to insult the intelligence of this Court to waste time in showing that this Court are not sitting in judgment on all the errors in the lives of these accused, but to decide the single question whether they are guilty of conspiring to kill and murder the President, Vice-President, Secretary of State and the General in command of the armies of the United States, and of the acts charged against them severally, in pursuance of said conspiracy.

ADJOURNMENT.

The Court adjourned till 2 o'clock to-morrow afternoon, when it is expected that the arguments in the case of Spangler and others will be read.

ILLNESS OF MRS. SURRATT.

Early in the day Mrs. Surratt was compelled to be taken from the court-room, owing to severe sickness.

Resume of Monday's Proceedings.

WASHINGTON, Monday, June 19, 1865.

Mr. Clampitt, of counsel for Mrs. Surratt, read the argument prepared by Reverdy Johnson, the senior counsel, on the plea of jurisdiction, denying the constitutionality and legality of a military court to try the accused parties.

The argument of F. Stone, in behalf of Harrold, was read, the counsel contending that the accused did not aid or abet in the murder of the President. There was no evidence to show that this boy conspired with Booth and others in aid of the Rebellion, or the overthrow of the Government, as charged. That he aided and abetted, however, in the escape of Booth, there was no doubt, and he must take the consequences.

Mr. Cox read an argument in favor of Arnold and O'Laughlin, reviewing the evidence at length, and insisting they were not engaged in the conspiracy charged, and demanding their acquittal.