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A PROTEST

AGAINST THE DESTRUCTION OF

JURY TRIALS

SPEECH OF OUR MARTYRED PRESIDENT

JAMES A. GARFIELD

IN THE FAMOUS MILLIGAN CASE

TRIED IN THE

SUPREME COURT OF THE UNITED STATES

MARCH 6TH, 1866

(Mr. Garfield did not know Milligan personally, and represented him without charge, because of the great principle involved in the case—the right of a citizen in civil life to a trial according to the law of the land. The Supreme Court sustained the contention of Mr. Garfield, and, in an opinion that has become one of the judicial landmarks of American law, ordered Milligan delivered to the civil authorities for trial by the civil courts.)

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The decision of the Supreme Court of Appeals of West Virginia, rendered on the 19th day of December, 1912, in the cases of State Ex Rel L. A. Mays v. M. L. Brown, Warden, &c., and State Ex Rel S. F. Nance v. M. L. Brown, Warden, &c., makes the question of Martial Law the most important that has ever confronted the people of West Virginia. When the full significance of that decision fully dawns upon the minds of the citizens of this State, a protest will be heard that will force the court to recede from a position that means the destruction of the ancient right of trial by jury. Those cases, briefly, presented the following facts:

S. F. Nance was a miner living in Kanawha county, and L. A. Mays was a railroad conductor on the Paint Creek Branch of the C. & O. Railroad, and also a resident of that county. During the trouble between the operators and their armed guards on one side, and the miners on the other side, the Governor of West Virginia declared martial law throughout Cabin Creek District of Kanawha County, W. Va. He rushed a large body of militiamen into the district, and created a Military Commission composed of five soldiers and one Judge Advocate for the purpose of trying civilians for offenses committed against the criminal laws of the State, although the Intermediate Court of Kanawha County, and the Circuit Court of said county

were in the full and undisturbed exercise of all the powers given them by law. The military forces arrested Nance and Mays for the alleged commission of simple misdemeanors, and Mays was sentenced to two years, and Nance to five years in the penitentiary at Moundsville, W. Va., although a civil court could have sentenced them to only one year in jail as the highest penalty.

Nance and Mays applied to the Supreme Court of Appeals of West Virginia for a writ of habeas corpus, praying for their release from custody upon the ground that they were entitled to a jury trial, and that said Military Commission had no authority to try civilians for offenses against the laws of the State. Among other provisions of the Constitution of West Virginia, they relied particularly upon Section 12, Article III, which reads as follows:

> "Standing armies in time of peace, should be avoided as dangerous to liberty. The military shall be subordinate to the civil power; and no citizen, unless engaged in the military service of the State, shall be tried or punished by any military court, for any offense that is cognizable by the civil courts of the State."

The prayer of the petitioners was denied, and they were remanded to the custody of the warden of the penitentiary at Moundsville. The court, in passing upon these cases, used the following language:

> "The authorized application of martial law to territory in a state of war includes the power to appoint a military commission for the trial and punishment of offenses within such territory."
>
> "Martial law may be instituted, in case of invasion, insurrection or riot, in a magisterial district of a county and offenders therein punished by the military commission, notwithstanding the civil courts are open and sitting in other portions of the county."

Judge Ira E. Robinson rendered a dissenting opinion in these cases in which he referred to the decision of the majority of the Court in part as follows: "A decision based on that which our people have so clearly condemned and inhibited from recognition in our State government, and which the highest tribunal in the land has so plainly declared to be pernicious and to have no place in our form of government, meets my emphatic dissent." In closing his opinion, Judge Robinson said: "A sense of duty has impelled the writing of this opinion. If it may in the fu-

ture only cause the doctrine promulgated by the majority to be questioned, the labor will not have been in vain."

In the case of Ex parte Milligan (4 Wall. 120) decided by the Supreme Court of the United States, the jurisdiction of Military Commissions to try and punish civilians came in issue, and James A. Garfield, the martyred president, made an argument in behalf of Milligan. This speech ranks as one of the great classics of the American bar. It gives the views of one of the greatest and most patriotic of American statesmen of the latter half of the nineteenth century. Every citizen who is devoted to his country and the preservation of its institutions, especially the preservation of the ancient right of trial by jury, should read carefully this masterful argument in behalf of the great rights of personal liberty.

ARGUMENT MADE BY JAMES A. GARFIELD BEFORE THE SUPREME COURT OF THE UNITED STATES, ON THE 6TH DAY OF MARCH, 1866, IN EX PARTE L. P. MILLIGAN ET AL.

I desire to say, in the outset, that the questions now before this court have relation only to constitutional law, and involve neither the guilt or the innocence of the relators, nor the motives and patriotism of the officers who tried and sentenced them. I trust I need not say in this presence, that in my estimation nothing in the calendar of infamy can be more abhorrent than the crimes with which the relators were charged; nothing that more fully deserves the swift vengeance of the law, and the execration of mankind. But the questions before your Honors are not personal. They reach those deep foundations of law on which the republic is built; and in their proper settlement are involved the highest interests of every citizen.

Had the Military Commission jurisdiction legally to try and sentence the petitioners? Upon the determination of this question the whole cause rests. If the Commission had such jurisdiction, the petitioners are legally imprisoned, and should not be discharged from custody; nor should a writ of Habeas Corpus be issued in answer to their prayer. If the Military Commission had not jurisdiction, the trial was void, the sentence illegal, and should not be further executed.

As a first step toward reaching an answer to this question, I affirm that every citizen of the United States in under the dominion of law: that, whether he be a civilian, a soldier, or a sailor, the Constitution provides for him a

tribunal before which he may be protected if innocent, and punished if guilty of crime. In the fifth article of the Amendments to the Constitution it is declared 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 actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; not shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation."

This sweeping provision covers every person under the jurisdicting of the Constitution. To the general rule of presentment or indictment of a grand jury, there are three exceptions: First, cases arising in the land forces; second, cases arising in the naval forces; third, cases arising in the militia when in actual service in time of war or public danger. All of these classes are covered by express provisions of the Constitution. In whatever one of these situations an American citizen may be placed, his rights are clearly defined, and a remedy is provided against oppression and injustice. The Constitution establishes the Supreme Court, and empowers Congress to constitute tribunals inferior to that court; "to make rules for the government and regulation of the land and naval forces," and to provide for governing such part of the militia as may be employed in the service of the United States. No other tribunal is authorized or recognized by Congress. For all cases not arising in the land or naval forces, Congress has amply provided in the Judiciary Act of September 25, 1789, and the acts amendatory thereof. For all cases arising in the naval forces, it has fully provided in the act of March 2, 1799, "for the Government of the Navy of the United States," and in similar subsequent acts.

But since the opposing counsel do not claim to find authority for the tribunal before which the petitioners were tried in either of these categories, I shall proceed to examine, somewhat minutely, the limits and boundaries of the military department: the character of its tribunals; the classes of persons who come within its jurisdiction; and the defences which the law has thrown around them.

We are apt to regard the military department of the government as an organized despotism, in which all personal rights are merged in the will of the commander-in-

chief. But that department has definitely marked boundaries, and all its members are not only controlled, but also sacredly protected, by definitely prescribed law. The first law of the Revolutionary Congress touching the organization of the army, passed September 20, 1776, provided that no officer or soldier should be kept in arrest more than eight days without being furnished with the written charges and specifications against him; and he should be tried, at as early a day as possible, by a regular military court, whose proceedings were regulated by law, and that no sentence should be carried into execution until the full record of the trial had been submitted to Congress or to the commander-in-chief, and his or their direction be signified thereon. From year to year Congress has added new safeguards to protect the rights of our soldiers, and the Rules and Articles of War are as really a part of the laws of the land as the Judiciary act or the act establishing the Treasury Department. If the humblest private soldier in the army be wronged by his commanding officer, he may demand redress by sending the statement of his grievance step by step through the appointed channels, till it reaches the President or Congress, if justice be not done him sooner.

The main boundary line between the civil and military jurisdiction is the muster unto service. Before that act the citizen is subject to the jurisdiction of the civil courts; after it, until his muster out, he is subject to the military jurisdiction in all matters of military duty. This line has been carefully surveyed by all the courts, and fixed as the lawful boundary. They do not regard a citizen as coming under the jurisdiction of a Federal court-martial, even when he has been ordered into the military service by the Governor of his State, on requisition of the President, until he reaches the place of general rendezvous, and has been actually mustered into the service of the United States. On this point I cite the case of Nills v. Martin. In that case, a militiaman, called out by the Governor of the State of New York, and ordered by him to enter the service of the United States, on a requisition of the President for troops, refused to obey the summons, and was tried by a Federal court-martial for disobedience of orders. The Supreme Court of the State of New York decided that, until he had gone to the place of general rendezvous, and had been regularly enrolled, and mustered into the national militia, he was not amenable to the action of a court-martial composed of officers of the United States. The judge, in giving his opinion, quoted the following lan-

guage to Mr. Justice Washington, of the Supreme Court of the United States, in the case of Houston v. Moore; "From this brief summary of the laws, it would seem that actual service was considered by Congress as the criterion of national militia; and that the service did not commence until the arrival of the militia at the place of rendezvous. That is the terminus a quo the service the pay, and subject to the articles of war, are to commence and continue.

By the sixtieth article of war, the military jurisdiction is so extended as to cover those persons not mustered into the service but necessarily connected with the army. It provides that "All sutlers and retainers to the camp, and all persons whatsoever serving with armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the Rules and Articles of War."

That the question of jurisdiction might not be doubtful, it was thought necessary to provide by laws of Congress that spies should be subject to trial by Court Martial. As the law stood for eighty-five years, spies were described as "persons not citizens of or owing allegiance, to the United States, who shall be found lurking," etc. Not until after the great Rebellion began was this law so amended as to allow the punishment by court-martial of citizens of the United States who should be found lurking about the lines of our army to betray it to the enemy; for until then, be it said to the honor of our people, it had never been thought possible that any American citizen would become a spy to aid the enemies of the Republic; but in 1862 the law was so amended that such a citizen, if found lurking about the lines of the army as a spy, in time of war, should be tried by a court-martial as though he were a spy of a foreign nation.

It is evident, that by no loose and general construction of the law can citizens be held amendable to military tribution, whose jurisdiction extends only to persons mustered into the military service, and such other classes of persons as are, by express provisions of law made subject to the rules and articles of war.

But even within their proper jurisdiction military courts are, in many important particulars, subordinate to the civil courts. This is acknowledged by the leading authorities on this subject. I read from O'Brien's Military Law. After discussing the general relations between the civil and military departments of the government, he says: "From this admitted principle, it would seem a necessary

consequence that the Supreme Court of the United States has an inherent power over all military tribunals, of precisely the same nature as that it asserts and exercises over inferior courts of civil judicature. Any mandatory or prohibitory writ, therefore, emanating from the Supreme Court of the United States, and addressed to a court-martial, would demand the most unhesitating obedience on the part of the latter. Whether in the absence of a special law to that effect, the same obedience is due to a writ coming from a Circuit or District Court of the Union, and directed to a court-martial assembled in the district or circuit, does not appear to be so clear. A military tribunal would doubtless obey such a writ.

As to State courts, the case is very different. Military courts are entirely independent of them. Their powers are derived from a distinct, separate, and independent source. In regard to the courts of the United States, there can be no question. * * * * Each individual member of a court-martial is also liable to the supreme courts of civil judicature, not only for any abuse of power, but for any illegal proceedings of the court, if he has voted for or participated in the same. * * * *

"The authority of court-martial is sometimes extended by executive governments, subjecting, by proclamations, certain districts or countries to the jurisdiction of martial law during the existence of a rebellion. But in all such cases a court-martial ought to be fully assured that the warrant or order under which they are assembled is strictly legal; and that the prisoners brought before them were actually apprehended in the particular district or country which may have been subject to martial law, and during the period that the proclamation was actually in force.

Any error in these particulars would render their whole proceedings illegal." In further vindication of my last proposition I shall cite a few precedents from English and American history: 1. A Lieutenant Fry, serving in the West Indies in 1743 on board the Oxford, a British man-of-war, was ordered by his superior officer to assist in arresting another officer and bringing him on board the ship as a prisoner. The Lieutenant doubting the legality of the order, demanded—what he had, according to the customs of the naval service, a right to demand—a written order before he would obey the command. For this he was put under arrest, tried by a naval court-martial, sentenced to fifteen years' imprisonment, and forever de-

barred from serving the King.

He was sent to England to be imprisoned, but was released by order of the Privy Council. In 1746 he brought an action before a civil court against the president of the court-martial, Sir Chaloner Ogle, and damages of one thousand (1,000) pounds were awarded him for illegal detention and sentence; and the learned judge informed him that he might also bring his action against any member of the court-martial. Rear-Admiral Mayne and Captain Rentone, who were members of the court that tried him, were at the time when damages were awarded to Lieutenant Fry, sitting on a naval court-martial for the trial of Vice-Admiral Lestock.

The Lieutenant proceeded against them, and they were arrested upon a writ from the Court of Common Pleas. The order of arrest was served upon them just as the court-martial adjourned, one afternoon. Its members, fifteen in number, immediately reassembled and passed resolutions declaring it a great insult to the dignity of the naval service that any person, however high in civil authority should order the arrest of a naval officer for any of his official acts.

The Lord Chief Justice, Sir John Wiles, immediately ordered the arrest of all the members of the court who signed the resolutions and they were arrested. They appealed to the King, who was very indignant at the arrest. The judge, however, persevered in his determination to maintain the supremacy of the civil law, and after two months' examination and investigation of the cause all the members of the court-martial signed an humble and submissive letter of apology, begging leave to withdraw their resolutions, in order to put an end to the further proceedings. When the Lord Chief Justice had heard the letter read in open court, he directed that it be recorded in the Remembrance Office, as "a memorial to the present and future ages, that whoever set themselves up in opposition to law, or think themselves above the law, will in the end find themselves mistaken."

2. I beg leave to cite the case of Wilson V. MacKenzie. This court will remember the remarkable mutiny, in 1842, on board the brig Somers, in which a son of the then Secretary of the Treasury of the United States was tried by court-martial for mutiny, and executed at the yard-arm. It was proved that a mutiny of very threatening aspect had broken out, and that the lives of the captain and his officers were threatened by the mutineers.

Among the persons arrested was the plaintiff, Wilson,

an enlisted sailor, who being supposed to be in the conspiracy, was knocked down by the captain, ironed, and held in confinement for a number of days. When the cruise was ended, Wilson brought suit against the captain for illegal arrest and imprisonment. The cause was tried before the Supreme Court of New York, and his Honor, Chief Justice Nelson, delivered the opinion of the Court. He says:

"The martial question presented in this case is, whether the common law court have any jurisdiction of personal wrongs committed by a superior officer of the navy upon a subordinate, while at sea, and engaged in the public service. * * * Actions of trespass for injuries to the person have been frequently brought and sustained in the common law courts of England, against naval as well as military commanders, by their subordinates, for act done both at home and abroad, under pretense and color of naval military discipline.

(See Wall v. McNamara, and Swinton v. Molly, stated in 1. T. R. 536, 537; also, Mostyn v. Fabrigas, Cowp, 161; Warden v. Baily, 4 Taunt, 674: Maule & Selw, 500, S. C.) * * * * There are are also many cases in the books where action have been sustained against members of courts-martial, naval and military, who have exceeded their authority in the infliction of punishment. See 4 Taunt. 70-75, and the cases there cited.) * * * * It was suggested on the argument, by the counsel of the defendant, that inasmuch as he (Wilson) was in the service of the United States when the acts complained of were done, the courts of this State, as a matter of comity and policy, should decline to take jurisdiction. * * * * I am of opinion that the demurrer (to the suggestion) is well taken, and that the plaintiff (Wilson) is entitled to judgment. Ordered accordingly.

3. As a clear and exhaustive statement of the relation between civil and military courts, I quote from an opinion of this court in the case of Dynes v. Hoover:—"With the sentence of court-martial which have been convened regularly, and have been proceeded legally, and by which punishments are directed, not forbidden by laws, or which are according to laws and customs of sea, civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise, the civil courts would virtually administer the Rules and Articles of War, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been

given to the civil magistrate of civil courts.

But we repeat, if a court-martial has no jurisdiction over the subject-matter of the charge, it has been convened to try, or shall inflict a punishment forbidden by the law, though its sentence shall be approved by the officers having a revisory power of its, civil courts may, on an action by a party aggrieved by it, inquire into the want of the court's jurisdiction and give him redress. (Harman v. Tappenden, 1 East 555; as to ministerial officers, Marshall's Case, 10 Cr. 76; Moravia v. Willes, 30; Parton v. Williams, 3 B. & A. 330; and as to justice of the peace, by Lord Trentenden, in Basten v. Carew, 3 B. & C. 653; Mills v. Collectt, 6 Bing. 85)."

"Such is the law of England. By the Mutiny acts, court-martial have been created with authority to try those who are a part of the army or navy for breaches of military or naval duty. It has been repeatedly determined that the sentences of those courts are conclusive in any action brought in the courts of common law. But the courts of common law will examine whether court-martial have exceeded the jurisdiction given them, though it is said, 'not however, after the sentence has been ratified and carried into execution.' (Grant v. Gould, 2 H. Black, 69; Ship Bounty, 1 East, 313; Shalford's case 1 East, 313; Mann v. Owen, 9 B. & C. 595: In the matter of Poe, 5 B. & A., 681, on a motion for a prohibition.)"

I hold it therefore established, that the Supreme Court of the United States may inquire into the question of jurisdiction of a military court; may take cognizance of extraordinary punishment inflicted by such a court not warranted by law, and may issue writs of prohibition, or give such other redress as laws of the United States may require. It is also clear that the Constitution and laws of the United States have carefully provided for the protection of individual liberty, and the right of accused persons to a spedy trial before a tribunal established and regulated by law.

The petitioners must, as I have already shown, be placed in one of four categories. First, they were either in the naval service; or second, in the military service; or, third, belonged to the militia and were called out to serve by order of the President in the national militia; or fourth, if neither of these three, nor so connected with them as to be placed by law under the naval or military jurisdiction, then they were simply civilians, and subject exclusively to the jurisdiction of the civil courts. It is set

forth in the petition, and not denied by the opposing counsel, that they were in neither of the first three classes, nor connected with them. They must, therefore, belong to the fourth class—unless a fifth should be added, as the learned counsel on the other side have suggested, and it be held that they were prisoners of war; but of that I shall speak hereafter. Under such circumstances, it is not surprising that the learned counsel should go beyond the constitution, beyond the civil, the naval, and even the military law, to find a basis on which they may rest the jurisdiction of the tribunal before which the petitioners were tried. They tell us frankly that they do not find its justification either in the civil or military laws of the land.

The Honorable Attorney-General and his distinguished colleague declare in their printed brief, that,—

I.—"A military commission derives its powers and authority wholly from martial law; and by that law and by military authority only are its proceedings to be judged or reviewed."

II.—"Martial law is the will of the commanding officer of an armed force, or of a geographical military department, expressed in time of war, with the limits of his military jurisdiction, as necessity demands and prudence dictates, restrained or enlarged by the orders of his military chief or supreme executive rules," and "the officer executing martial law is at the same time supreme legislator, supreme judge, and supreme executive."

To give any color of plausibility to these novel propositions, they were compelled not only to ignore the Constitution, but to declare it suspended, its voice drowned in the thunders of war. Accordingly with consistent boldness, they declare that the third, fourth and fifth articles of Amendments "are all peace provisions of the Constitution, and, like all other conventional and legislative laws and enactments, are silent inter arma, when salus populi suprema est lex." Applying these doctrines to this cause, they hold that from the 5th of October, 1864, to the 9th of May, 1865, martial law alone existed in Indiana; and it silenced not only the civil courts, but all the laws of the land, and even the Constitution itself; and during that silence the executor of martial law could lay his hand upon every citizen, could not only suspend the writ of habeas corpus, but could create a court which should have the exclusive jurisdiction over the citizens to try him, sentence him, and put him to death.

We have already seen that the Congress of the United

States raises and supports armies, provides and maintains navies, and makes the rules and regulation for the government of both; but it would appear from the teachings of the learned counsel on the other side, that when Congress has done all these things—when, in the name of the republic, and in order to put down rebellion and restore the supremacy of law, it has created the grandest army that ever fought—the power thus created rises above its source and destroys both the law and its creator. They would have us believe that the government of the United States has evoked a spirit which it cannot lay—has called into being a power which at once destroyed and superseded its author, and rode, in uncontrolled triumph, over citizens and court, Congress and Constitution. All this mockery is uttered before this august court, whose every member is sworn to administer the law in accordance with the Constitution. This monstrous assumption I shall now proceed to examine.

And now what is martial law? It is a new term to American jurisprudence; and I congratulate this court that never before in the long history of this republic has that word rung out its lawless echoes in this sacred chamber.

Mr. Butler. Did not the decision in the case of Luther v. Borden have something to do with martial law?

It was not the subject decided by the court, and only remotely analagous to this case. The claim to exercise martial law in that case was under the old charter of Charles II. in Rhode Island, and not under the Constitution.

1. Sir Matthew Hale, in his History of the Common Law, says:

"Touching the business of martial law, these things are to be observed, viz:—

"First. That in truth and reality it is not a law, but something indulged rather than allowed as a law. The necessity of government, order, and discipline in an army is that only which can give those laws a countenance;—quod enim necessitas cogit defendi.

"Secondly. This indulged law was only to extend to members of the army, or to those of the opposite army, and never was so much indulged as intended to be executed or exercised upon others. For others who were not listed under the army had no color or reason to be bound by military constitutions applicable only to the army, whereof they were not parts. But they were to be ordered

and governed according to the laws to which they were subject, though it were a time of war.

"Thirdly. That the exercise of martial law, whereby any person should lose his life, or member, or liberty, may not be permited in time of peace, when the King's courts are open for all persons to receive justice according to the laws of the land. This is in substance declared in the Petition of Right, 3 Car. 1, whereby such commissions and martial law were repealed and declared to be contrary to law."

2. Blackstone quotes the above approvingly, and still further enforces the same doctrine.

3. Wharton, in his Law Lexicon, says: "Martial law is that rule of action which is imposed by the military power. It has no place in the institutions of this country (Great Britain), unless the articles of war established under the military acts be considered as of that character. The prerogative of proclaiming martial law within this kingdom is destroyed, as it would appear, by the Petition of Right."

4. Lord Wellington defined martial law as "the will of the commanding general exercised over a conquered or occupied territory." This definition was given by him in his despatches from the Peninsula, and was subsequently repeated in Parliament, in 1851. In the same debate, Lords Cottenham and Campbell, and the Attorney-General, Sir J. Jervis, declared that "martial law was the setting aside of all law, and acting under military power, in circumstances of great emergency—a proceeding which requires to be followed up by an act of indemnity."

This is the kind of law to which the gentlemen appeal to establish the validity of the court that tried the petitioners.

In order to trace the history and exhibit the character of martial law, I shall refer to several leading precedents in English history.

1. The Earl of Lancaster. In the year 1322, the Earl of Lancaster and the Earl of Hereford rebelled against the authority of Edward II. They collected an army so large that Edward was compelled to raise thirty thousand men to withstand them. The rebellious Earls posted their forces on the Trent, and the armies of the King confronted them. They fought at Boroughbridge; the insurgent forces were overthrown; Hereford was slain, and Lancaster, taken in arms at the head of his army, was, amid the noise of battle, tried by a court-martial, sentenced to death, and executed. When Edward III. came into pow-

er, five years later, on a formal petition presented to Parliament by Lancaster's son, setting forth the facts, the case was examined and a law was enacted reversing the attainder, and declaring: "1. That in time of peace no man ought to be adjudged to death for treason, or any other offense, without being arraigned and put to answer. 2. That regularly, when the King's courts are open, it is a time of peace in judgment of law. 3. That no man ought to be sentenced to death, by the record of the King, without his legal trial per pares."

I call attention to this case as being similar in some of the points to the cause before us. This man was taken in arms at the head of his army, and in battle. He was immediately tried by court-martial and executed; but it was declared, in the decree that reversed the attainder, that he might have been tried by the courts of the land, and therefor, for the purpose of his trial, it was a time of peace; that he might have been presented, indicted, and regularly tried before the civil tribunal, and therefore the whole proceeding was illegal. So carefully was the line drawn between civil and martial law five hundred years ago.

2. Sir Thomas Darnell. He was arrested and imprisoned in 1625, by order of the King, for refusing to pay a tax which he regarded as illegal. A writ of habeas corpus was prayed for, but special order of the King, and that was held to be a sufficient answer to the petition. Then the great cause came up to be tried in Parliament, whether the order of the King was sufficient to override the writ of habeas corpus, and after a long and stormy debate, in which the ablest minds in England were engaged, the Petition of Right, of 1628, received the sanction of the King. In that statute it was decreed that the King should never again suspend the writ of habeas corpus; that he should never again try a subject by military commission; and since that day, no king of England has presumed to usurp that high prerogative which belongs to Parliament alone.

3. For the purpose of citing a passage in the argument of Counsellor Prynn, I call attention to the trial of Lord Macquire, before the Court of King's Bench, in 1645. Lord Macquire was the leader of the great Irish rebellion of 1641, during the progress of which more than one hundred thousand men, women and children were murdered, under circumstances of the greatest brutality. He was arrested and held until order had been restored; and in 1645 was brought before the King's Bench for trial. Mr. Prynn, counsel for the Crown, published his argument in

the case, in order, as he says, to vindicate the laws of England—"In trying this notorious offender guilty of the horridest, universalest treason and rebellion that ever brake forth in Ireland; and that in a time of open war both in Ireland and England, only by a legal indictment, and indifferent sworn jury of honest and lawful freeholders, according to the known laws and statutes of the realm; not in a court-martial, or any other new-minted judicature, by an arbitrary, summary illegal, or martial proceeding, without any lawful presentment, indictment, or trial by a sworn, impartial, able jury, resolved to be diametrically contrary to the fundamental laws, customs, great charters, statutes of the realm, and inherent liberty of the subject, especially in time of peace when all other courts of justice are open, and of very dangerous consequences, and thereupon especially prohibited, and enacted against."

After giving a long list of references to authorities, he goes on to say that the law is vindicated still more—

"In allowing him a free, honorable trial upon an indictment first found upon oath by the grand jury, and then suffering him to take not only his particular challenges by the poll to every of the jurors returned, upon a voyre dire (not formerly heard of, yet allowed him, as reasonable, to take away all color of partiality or non-indifference in the jurors), whereupon every juryman was examined before he was sworn of the jury, whether he had contributed or advanced any moneys upon the propositions for Ireland, or was to have any share in the rebels' lands in Ireland, by an act of Parliament, or otherwise. But likewise in permitting him to take his peremptory challenge to thirty-five of the two juries returned, without any particular cause alleged; which liberty—our laws allowing men, in favorem vitae, and there may be private causes of just exceptions to them known to the prisoner, not fit to be revealed, or for which he wants present proof, and that in cases of high treason, as well as of felony—the court thought just and equal to allow the same to him, though a notorious Irish rebel."

4. The Bill of Rights of 1688. The house of Stuart had been expelled, and William had succeeded to the British throne. Great disturbances had arisen in the realm consequence of the change of dynasty. Plots were formed in favor of James in all parts of England. The King's person was unsafe in London. He informed the Lords and Commons of the great dangers that threatened the kingdom, and reminded them that he had no right to declare

martial law, to suspend the writ of habeas corpus, or to seize and imprison his subjects on suspicion of treason or intended outbreak against the peace of the realm. He laid the case before them, and asked their advice and assistance. In answer Parliament passed the celebrated Habeas Corpus Act. Since that day, no king of England has dared to suspend the writ. It is only done by Parliament.

5. Governor Wall. In the year 1782, Joseph Wall, Governor of the British Colony at Goree, in Agrica, had under his command about five hundred British soldiers. Suspecting that a mutiny was about to break out in the garrison, he assembled them on the parade-ground, held a hasty consultation with his officers, and immediately ordered Benjamin Armstrong, a private and supposed ringleader, to be seized, stripped, tied to the wheel of an artillery carriage, and to receive eight hundred lashes with a rope one inch in diameter. The order was carried into execution, and Armstrong died of his injuries. Twenty years afterward Governor Wall was brought before the most august civil tribunal of England to answer for the murder of Armstrong. Sir Archibald MacDonald, Lord Chief Baron of the Court of Exchequer, Sir Soulden Lawrence, of the King's Bench, and Sir Giles Rooke, of the Common Pleas, constituted the court. Wall's counsel claimed that he had the power of life and death in his hands in time of mutiny; that the necessity of the case warranted him in suspending the usual forms of law; that as governor and military commander-in-chief of the forces at Goree, he was the sole judge of the necessities of the case. After a patient hearing before that high court, he was found guilty of murder, was sentenced and executed.

I now ask your attention to analogous precedents in our own history.

1. On the 12th of June, 1775, General Gage, the commander of the British forces, declared martial law in Boston. The battles of Concord and Lexington had been fought two months before. The Colonial army was besieging the city and its British garrison. It was but five days before the battle of Bunker Hill. Parliament had, in the previous February, declared the Colonies in a state of rebellion. Yet by the common consent of English jurists, General Gage violated the laws of England, and laid himself liable to its penalty, when he declared martial law. This position is sustained, in the opinion of Mr. Justice Woodbury, in Luther v. Borden et al.

2. On the 7th of November, 1775, Lord Dunmore declared martial law throughout the Commonwealth of Virginia. This was long after the battle of Bunker Hill, and when war was flaming throughout the Colonies; yet he was denounced by the Virginia Assembly for having assumed a power which the King himself dared not exercise, as it "annuls the law of the land, and introduces the most execrable of all systems, martial law." Mr. Justice Woodbury declares the act of Lord Dunmore unwarranted by British law.

3. The practice of our Revolutionary fathers on this subject is most instructive. Their conduct throughout the great struggle for independence was equally marked by respect for civil law and jealousy of martial law. Indeed, it was one of the leading grievances set forth in the Declaration of Independence, that the King of Great Britain had "affected to render the military independent of, and superior to, the civil power"; and though Washington was clothed with almost dectatorial powers, he did not presume to override the civil law, or disregard the orders of the courts, except by express authority of Congress or the States. In his file of general orders, covering a period of five years, there are but four instances in which civilians appear to have been tried by a military court, and all these trials were expressly authorized by resolutions of Congress.

In the autumn of 1777, the gloomiest period of the war, a powerful hostile army landed on the shore of Chesapeake Bay, for the purpose of invading Maryland and Pennsylvania. It was feared that the disloyal inhabitants along his line of march would give such aid and information to the British commander as to imperil the safety of our cause. Congress resolved "that the executive authorities of Pennsylvania and Maryland, be requested to cause all persons within their respective States, notoriously disaffected, to be forthwith apprehended, disarmed, and secured till such time as the respective States think they can be released without injury to the common cause." The Governor of Pennsylvania authorized the arrests, and many disloyal citizens were taken into custody by Washington's officers, who refused to answer the writ of habeas corpus which a civil court issued for the release of the prisoners. Very soon afterwards, the Pennsylvania legislature passed a law indemnifying the Governor and the military authorities, and allowing a similar course to be pursued thereafter, on recommendation of Congress or the commanding officer of the army. But this law gave

authority only to arrest and hold—not to try; and the act was to remain in force only till the end of the next session of the General Assembly. So careful were our fathers to recognize the supremacy of civil law, and to resist all pretensions of martial law to authority.

4. I pass next to notice an event that occurred under the Confederation, before the Constitution was adopted. I refer to Shays's Rebellion, in 1787—that rebellion which was mentioned by Hamilton in the Federalist as a proof that we needed a strong central government to preserve our liberties. During all that disturbance there was no declaration of martial law, and the habeas corpus was only suspended for a limited time and with very careful restrictions. Governor Bowdoin's order to General Lincoln, on the 19th of January, 1787, was in these words: "Consider yourself in all your military offensive operations constantly as under the direction of the civil officer, save where any armed force shall appear to oppose your marching to execute these orders."

5. I refer next to a case under the Constitution, the rebellion of 1793 in Western Pennsylvania. President Washington did not march with his troops until the judge of the United States District Court had certified that the Marshal was unable to execute his warrants. Though the parties were tried for treason, all the arrests were made by the authority of the civil officers. The orders of the Secretary of War stated that "the object of the expedition was to assist the Marshal of the District to make prisoners." Every movement was made under the direction of the civil authorities. So anxious was Washington on this subject ,that he gave his orders with the greatest care, and went in person to see that they were carefully executed. He issued orders declaring that "the army should not consider themselves as judges or executioners of the laws, but only as employed to support the proper authorities in the execution of the laws."

6. I next refer to an incident connected with the Burr conspiracy, in 1807. The first development of this plot were exceedingly alarming. Reports were forwarded to President Jefferson, and by him communicated confidentially to the Senate of the United States, with his recommendation that Congress pass a law authorizing the suspension, for a limited period, of the writ of habeas corpus. On the 26th of January, the Senate, by a unanimous vote, passed a bill authorizing the suspension of the writ for three months, in cases of persons who were charged under oath with treason or misprison of treason. Thus care-

fully limited and restricted, the bill was sent, under the seal of secrecy, to the House of Representatives. When it was read, the doors were immediately opened; a motion was made to reject th bill, that it might not even reach its first reading; and, after a very able debate of five days, it was rejected by a vote of one hundred and thirteen to nineteen.

Not content, even with that decided expression of sentiment, two weeks later, on the 17th of February, a resolution was introduced into the House ordering the Committee on the Judiciary "to bring in a bill more thoroughly to protect the rights of American citizens from arrest and imprisonment under color of authority of the President of the United States." After a very searching and able debate, it was concluded that existing laws afforded ample protection; but so anxious were the representatives of the people to place the safety of the citizen beyond the reach of doubt, that the resolution came within two votes of passing in the House. The vote stood 58 yeas to 60 nays; and that, too, in the very midst of the threatened conspiracy.

I will remark in this connection, that, though President Jefferson recommended the passage of the act referred to, yet in his correspondence he had previously expressed the opinion that it was unwise, even in insurrection, to suspend the writ of habeas corpus.

So jealous were our people of any infringement of the rights of the citizens to the privileges of the writ, that in the very midst of the dangers at New Orleans General Wilkinson was brought before a court there for having neglected promptly to obey a writ of habeas corpus.

7. I call the attention of the court for a moment to the discussion in Congress in relation to the action of General Jackson, in 1814, at New Orleans. It will be remembered that, notwithstanding flagrant war was blazing around New Orleans when the General declared martial law, yet it was held that he had violated the sanctity of the courts, and he was fined accordingly. In 1842 a bill was introduced into Congress to reimburse him for the fine. The debate was very able and thorough. James Buchanan, then a member of Congress, spoke in its favor, and not one will doubt his willingness to put the conduct of Jackson on the most favorable ground possible. I quote from his speech:

"It had never been contended on this floor that a military commander possessed the power, under the Consti-

tution of the United States, to declare martial law. No such principle had ever been asserted on this (the Democratic) side of the House. He had then expressly declared (and the published report of the debate, which he had recently examined, would justify him in this assertion) that we did not contend, strictly speaking, that Geneneral Jackson had any constitutional right to declare martial law at New Orleans; but that, as this exercise of power was the only means of saving the city from capture by the enemy, he stood amply justified before this country for the act. We placed the argument not upon the ground of strict constitutional right, but of such an overruling necessity as left General Jackson no alternative between the establishment of martial law and the sacrifice of New Orleans to the rapine and lust of the British soldiery. On this ground Mr. B. had planted himself firmly at the last session of Congress; and here he intended to remain."

All the leading members took the same ground. It was not attempted to justify, but only to palliate and excuse the conduct of Jackson.

8. I call attention next to the opinions of our courts in regard to martial law and the suspension of the writ of habeas corpus, and first read from the opinion of Chief Justice Marshall in Exparte Bollman: "If at any time the public safety should require the suspension of the powers vested * * * * in the courts of the United States, it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide. Until the legislature will be expressed, the court can only see its duty, and must obey the laws."

I also cite the opinion of the late Chief Justice in Ex parte Merryman, in which it was decided that the legislative authority alone could suspend the writ of habeas corpus. This decision was rendered in 1862, in the Maryland Circuit.

I shall conclude these citations from our own judicial history by reading a few paragraphs from the opinion of Mr. Justice Woodbury in Luther v. Borden et al. The passage loses none of its force from the fact that it is part of a dissenting opinion; for the principles involved in it were not strictly in issue, nor were they denied by the court. After stating his position at length, the learned justice says:

"For convincing reasons like these, in every country which makes any claim to political or civil liberty, "mar-

tial law," as here attempted, and as once practised in England against her own people, has been expressly forbidden there for near two centuries, as well as by the principles of every other free constitutional government. (Hallam's Const. Hist. 420.) And it would be not a little extraordinary if the spirit of our institutions, both State and National, was not much stronger than in England against the unlimited exercise of martial law over a whole people, whether attempted by any chief magistrate or even by a legislature. * * * *

"My impression is that a state of war, whether foreign or domestic, may exist, in the great perils of which it is competent, under its rights and on principles of national law, for a commanding officer of troops under the controlling government to extend certain rights of war, not only over his camp, but its environs and the near field of his military operations. (6 American Archives, 186.) But no further nor wider. (Johnson v. Davis et al., 3 Martin, 530, 551.) On this rested the justification of one of the great commanders of this country and of the age, in a transaction so well known at New Orleans. But in civil strife they are not to extend beyond the place where insurrection exists. (3 Martin, 551.) Nor to portions of the State remote from the scene of military operations, nor after the resistance is over, not to persons not connected with it. (Grant v. Gould et al., H. Black, 69.) Nor even within the scene can they extend to the person or property of citizens against whom no probable cause exists which may justify it. (Sutton v. Johnson, D. & E. 549.)"

I cannot leave this branch of my argument without fortifying my position by the authority of two of the greatest names on the roll of British jurists. To enable me to do this, I call attention to the celebrated trial of the Rev. John Smith, missionary at Demerara in British Guiana. In the year 1823 a rebellion broke out in Demerara, extending over some fifty plantations. The governor of the district immediately declared martial law. A number of the insurgents were killed, and the rebellion was crushed. It was alleged that the Rev. John Smith, a missionary sent out by the London Missionary Society, had been an aider and abettor of the rebellion. A court-martial was appointed, and, in order to give it the semblance of civil law, the Governor-General appointed the chief justice of the district as a staff officer, and then detailed him as president of the court to try the accused. All the other members of the court were military men, and he was made a military officer for the special occasion. Mission-

ary Smith was tried, found guilty, and sentenced to be hung. The proceedings came to the notice of Parliament, and were made the subject of inquiry and debate. Smith died in prison before the day of execution, but the trial gave rise to one of the ablest debates of the century, in which the principles involved in the cause now before this court were fully discussed. Lord Brougham and Sir James Mackintosh were among the speakers. In the course of his speech, Lord Brougham said:

"No such thing as martial law is recognized in Great Britain, and courts founded on proclamations of martial law are wholly unknown. * * * * Suppose I were ready to admit that, on the pressure of a great emergency, such as invasion or rebellion, when there is no time for the slow and cumbrous proceedings of the civil law, a proclamation may justifiably be issued for excluding the ordinary tribunals, and directing that offences should be tried by a military court—such a proceeding might be justified by necessity; but it could rest on that alone. Created by necessity, necessity must limit its continuance. It would be the worst of all conceivable grievances—it would be a calamity unspeakable—if the whole law and constitution of England were suspended one hour longer than the most imperious necessity demanded. * * * * I know that the proclamation of martial law renders every man liable to be treated as a soldier. But the instant the necessity ceases, that instant the state of soldiership ought to cease, and the rights, with the relations, of civil life to be restored."

The speech of Sir James Macintosh, who was perhaps the very first English jurist of his day, is in itself a magazine of legal learning, and treats so fully and exhaustively the subject of martial law and military tribunals that I shall take the liberty of quoting several passages. I do this with less hesitation because I have found no argument so full and complete, and no authority more perfectly applicable to the cause before this court.

"On the legality of the trial, sir, the impregnable speech of my learned friend has left me little if anything to say. The only principle on which the law of England tolerates what is called "martial law" is necessity! its introduction can be justified only by necessity: its continuance requires precisely the same justification of necessity: and if it survives the necessity, in which alone it rests, for a single minute, it becomes instantly a mere exercise of lawless violence. When foreign invasion or civil war renders it impossible for courts of law to sit, or to en-

force the execution of their judgment, it becomes necessary to find some rude substitute for them, and to employ for that purpose the military, which is the only remaining force in the community."

I desire to call particular attention to the sentences which lay down the chief condition that can justify martial law, and also mark the boundary between martial and civil law.

"While the laws are silenced by the noise of arms, the rulers of the armed force must punish, as equitably as they can, those crimes which threaten their own safety and that of society, but no longer—every moment beyond is usurpation. As soon as the laws act, every other mode of punishing supposed crimes is itself an enormous crime. If argument be not enough on this subject—if, indeed, the mere statement be not the evidence of its own truth—I appeal to the highest and most venerable authority known to our law."

He proceeds to quote Sir Matthew Hale on martial law, and cites the case of the Earl of Lancaster, to which I have already referred, and then declares:

"No other doctrine has ever been maintained in this country since the solemn Parliamentary condemnation of the usurpations of Charles I., which he was himself compelled to sanction in the Petition of Right. In none of the revolutions or rebellions which have since occurred has martial law been exercised, however much, in some of them the necessity might seem to exist. Even in those most deplorable of all commotions which tore Ireland in pieces in the last years of the eighteenth century—in the midst of ferocious revolt and cruel punishment—at the very moment of legalizing these martial jurisdictions in 1799, the very Irish statute which was passed for that purpose did homage to the ancient and fundamental principles of the law in the very act of departing from them. The Irish statute, 39 George III., chap. 3, after reciting that martial law had been successfully exercised to the restoration of peace, so far as to permit the course of the common law partially to take place, but that the rebellion continued to rage in considerable parts of the kingdom, whereby it has become necessary for Parliament to interpose, goes on to enable the Lord Lieutenant "to punish rebels by court-martial." This statute is the most positive declaration that, where the common law can be exercised in some parts of the country, martial law cannot be established in others, though rebellion actually prevails in those others, without an extraordinary inter-

position of the supreme legislative authority itself.

* * * * * * * * * * *

"I have already quoted from Sir Matthew Hale his position respecting the twofold operation of martial law—as it affects the army of the power which exercises it, and as it acts against the army of the enemy. That great judge, happily unused to standing armies, and reasonably prejudiced against military jurisdiction, does not pursue his distinction through all its consequences, and assigns a ground for the whole which will support only one of its parts. The necessity of order and discipline in an army is, according to him, the reason why the law tolerates this departure from its most valuable rules; but this necessity only justifies the exercise of martial law over the army of our own state. One part of it has since been annually taken out of the common law and provided for by the Mutiny Act, which subjects the military offences of soldiers only to punishment by military courts even in time of peace. Hence we may now be said annually to legalize military law; which, however, differs essentially from martial law, in being confined to offences against military discipline, and in not extending to any persons but those who are members of the army. Martial law exercised against enemies or rebels cannot depend on the same principle, for it is certainly not intended to enforce or preserve discipline among them. It seems to me to be only a more regular and convenient mode of exercising the right to kill in war—a right originating in self-defense, and limited to those cases where such killing is necessary as the means of insuring that end. Martial law put in force against rebels can only be excused as a mode of more deliberately and equitably selecting the persons from whom quarter ought to be withheld in a case where all have forfeited their claim to it. It is nothing more than a sort of better regulated decimation, founded upon choice, instead of chance, in order to provide for the safety of the conquerors, without the horrors of undistinguished slaughter; it is justifiable only where it is an act of mercy. Thus the matter stands by the law of nations. But by the law of England it cannot be exercised except where the jurisdiction of courts of justice is interrupted by violence.. Did this necessity exist at Demerara, on the 13th of October, 1823? Was it on that day impossible for the courts of law to try offenses? It is clear that, if the case be tried by the law of England, and unless an affirmative answer can be given to these questions of fact, the court-martial had no legal power

to try Mr. Smith."

After presenting arguments to show that a declaration of martial law was not necessary, the learned jurist continues:

"For six weeks, then, before the court-martial was assembled, and for twelve weeks before that court pronounced sentence of death on Mr. Smith, all hostility had ceased, no necessity for their existence can be pretended, and every act which they did was an open and deliberate defiance of the law of England.

Where, then, are we to look for any color of law in these proceedings? Do they derive it from the Dutch law? I have diligently examined the Roman law, which is the foundation of that system, and the writings of those most eminent jurists who have contributed so much to the reputation of Holland. I can find in them no trace of any such principle as martial law. Military law, indeed, is clearly defined; and provision is made for the punishment by military judges of the purely military offenses of soldiers. But to any power of extending military jurisdiction over those who are not soldiers, there is not an illusion. I will not furnish a subject for the pleasantries of my right honorable friend, or tempt him into a repetition of his former innumerable blunders, by naming the greatest of these jurists: lest his date, his occupation, and his rank might be again mistaken, and the venerable President of the Supreme Court of Holland might be once more called a "clerk of the States General.' "Persecutio militis," says that learned person, pertiner ad judicem militarem quando delictum sit militare, et ad judicem communem quando delictum sit commune. Far from supposing it to be possible that those who were not soldiers could ever be triable by military courts for crimes not military, he expressly declares the law and practice of the United Provinces to be, that even soldiers are amenable, for ordinary offences against society, to the court of Holland and Friesland, of which he was long the chief. The law of Holland, therefore, does not justify this trial by martial law.

"Nothing remains but some law of the colony itself. Where is it? It is not alleged or alluded to in any part of this trial. We have heard nothing of it this evening. So unwilling was I to believe that this court-martial would dare to act without some pretense of legal authority, that I suspected an authority for martial law would be dug out of some dark corner of a Guiana ordinance. I knew it was neither in the law of England nor in that

of Holland; and I now believe that it does not exist even in the law of Demerara. The silence of those who are interested in producing it is not my only reason for this belief. I happen to have seen the instructions of the States General to their Governor of Demerara, in November, 1792, probably the last ever issued to such an officer by that illustrious and memorable assembly. They speak at large of councils of war, both for consultation and for judicature. They authorize these councils to try the military offenses of soldiers; and therefore, by an inference which is stronger than silence, authorize us to conclude that the Governor had no power to subject those who were not soldiers to their authority.

"The result, then, is, that the law of Holland does not allow what is called "martial law" in any case; and that the law of England does not allow it without a necessity which did not exist in the case of Mr. Smith. If, then, martial law is not to be justified by the law of England, or by the law of Holland, or by the law of Demerara, what is there to hinder me from affirming, that the members of this pretended court had no more right to try Mr. Smith than any other fifteen men on the face of the earth; that their acts were nullities, and their meeting a conspiracy; that their sentence was a direction to commit a crime; that if it had been obeyed, it would not have been an execution, but a murder; and that they, and all other parties engaged in it, must have answered for it with their lives?"

May it please the court, many more such precedents as I have already cited might be added to the list, but it is unnecessary. They all teach the same lesson. They enable us to trace from its far-off source the progress and development of Anglo-Saxon liberty; its innumerable conflicts with irresponsible power; its victories, dearly bought, but always won—victories which have crowned with immortal honors the institutions of England, and left their indelible impress upon the Anglo-Saxon mind. These principles our fathers brought with them to the New World, and guarded with sleepless vigilance and religious devotion. In its darkest hour of trial, during the late Rebellion, the republic did not forget them. So completely have they been impressed on the minds of American lawyers, so thoroughly have they been ingrained into the very fibre of American character, that notwithstanding the citizens of eleven States went off into wild rebellion, broke their oaths of allegiance to the Constitution, and levied war against their country, yet, with all their

crimes upon them, there was still in the minds of those men, during all the struggle, so deep and enduring an impression on this great subject that, even during their rebellion, the courts of the Southern States adjudicated causes like the one now before you in favor of the civil law and against court-martial established under military authority for the trial of citizens. In Texas, Mississippi, Virginia, and other insurgent States, by the order of the Rebel President, the writ of habeas corpus was suspended, martial law was declared, and provost-marshals were appointed to exercise military authority. But when civilians, arrested by military authority, petitioned for release by writ of habeas corpus, in every case save one the writ was granted, and it was decided that there could be no suspension of the writ or declaration of martial law by the Executive, or by any other than the supreme legislative authority. The men who once stood high on the list of American lawyers, such as Alexander H. Stephens, Albert Pike, and General Houston, wrote letters and made speeches against the practice until it was abandoned. In the year 1862, the commander-in-chief of the Rebel armies, compelled by the force of public sentiment, published a general order disclaiming any right or claim of right to establish martial law or suspend the writ of habeas corpus without the authority of the Rebel Congress.

I said there was one exceptional instance. A judge of the Supreme Court of Texas, in the first excitement of the Rebellion, refused to issue a writ of habeas corpus to release from military arrest a citizen charged with disloyalty to the Rebel government. He wrote his opinion, and delivered it; but he was so much agitated when he found that he stood alone among judges on that great question of human rights that he went to the book of records in which his opinion was recorded, and with his own hand plucked the leaves from the volume and destroyed them. He also destroyed the original copy, that it might never be put in type, and, having destroyed everything but the remembrance of it, ended his life by suicide. I believe he alone among Rebel judges ventured to recognize martial law declared without legislative authority.

The spirit of liberty and law is well embodied in this one sentence of De Lolme: "The arbitrary discretion of any man is the law of tyrants; it is always unknown, it is different in different men, it is caused, and depends upon constitution, temper, and passion; in the best it is oftentimes caprice, in the worst it is every vice, folly,

and passion to which human nature is liable." And yet, if this military commission could legally try these petitioners, its authority rested only upon the will of a single man. If it had the right to try these petitioners, it had the right to try any civilian in the United States; it had the right to try your Honors, for you are civilians.

The learned gentlemen tell us that necessity justifies martial law. But what is the nature of that necessity. If, at this moment, Lee, with his Rebel army at one end of Pennsylvania avenue, and Grant, with the army of the Union at the other, with hostile banners and roaring guns, were approaching this Capitol, the sacred seat of justice and law, I have no doubt they would expel your Honors from the bench, and the Senate and House of Representatives from their halls. The jurisdiction of battle would supersede the jurisdiction of law. This court would be silenced by the thunders of war.

If an earthquake should shake the city of Washington, and tumble this Capital in ruins about us, it would drive your Honors from the bench and, for the time, volcanic law would supersede the Constitution.

If the Supreme Court of Herculaneum or Pompeii had been in session when the fiery ruin overwhelmed those cities, its authority would have been suddenly usurped and overthrown; but I question the propriety of calling that law which, in its very nature, is a destruction or suspension of all law.

From this review of the history and character of martial law I am warranted, by the uniform precedents of English law for many centuries, by the uniform practice of our fathers during the Colonial and Revolutionary periods, by the unanimous decisions of our courts under the Constitution, and by the teachings of our statesmen, to conclude,—

1. That the Executive has no authority to suspend the writ of habeas corpus, or to declare or administer martial law; much less has any military subordinate of the Executive such authority; but these high functions belong exclusively to the supreme legislative authority of the nation.

2. That if, in the presence of great and sudden danger, and under the pressure of overwhelming necessity, the Chief Executive should, without legislative warrant, suspend the writ of habeas corpus, or declare martial law, he must not look to the courts for justification, but to the legislature for indemnification.

3. That no such necessity can be pleaded to justify

the trial of a civilian by a military tribunal, when the legally authorized civil courts are open and unobstructed.

It will be observed that in this discussion I have not alluded to the legal status of citizens of those States which were declared, both by the legislative and executive departments of the government, to be in rebellion against the United States. It has been fully settled, not only by the other co-ordinate branches of the government, but by this court, that those States constituted a belligerent government de facto, against which the Federal government might proceed with all the appliances of war, and might extend absolute military jurisdiction over every foot of rebel territory. But the military jurisdiction thus conferred by the government did not extend beyond the territory of the rebellious States, except where the tide of war actually swept beyond those limits, and by its flaming presence made it impossible for the civil courts to exercise their functions. The case before your Honors comes under neither of these conditions; hence, the laws of war are inapplicable to it.

The military commission, under our government, is of recent origin. It was instituted by General Scott, in Mexico, to enable him, in the absence of any civil authority, to punish Mexican and American citizens for offences not provided for in the Rules and Articles of War. The purpose and character of a military commission may be seen from his celebrated Order No. 20, published at Tampico. It was no tribunal with authority to punish, but merely a committee appointed to examine an offender and advise the commanding general what punishment to inflict. It is a rude substitute for a court of justice in the absence of civil law.

Even our own military authorities, who have given so much prominence to these commissions, do not claim for them the character of tribunals established by law. The Judge Advocate General says: "Military commissions have grown out of the necessities of the service, but their powers have not been defined, nor their mode of proceeding regulated by any statute law * * * * In a military department the military commission is a substitute for the ordinary State or United States court, when the latter is closed by the exigencies of war, or is without the jurisdiction of the offence committed."

The only ground on which the learned counsel attempt to establish the authority of the military commission to try these petitioners is that of the necessity of the case. I answer, there was no such necessity. Neither the Con-

stitution nor Congress recognized it. I point to the Constitution as an arsenal stored with ample powers to meet every emergency of national life. No higher test of its completeness can be imagined than has been afforded by the great Rebellion, which dissolved the municipal governments of eleven States, and consolidated them into a gigantic traitorous government de facto, inspired with the desperate purpose of destroying the government of the United States.

From the beginning of the Rebellion to its close, Congress, by its legislation, kept pace with the necessities of the nation. In sixteen carefully considered laws, the national legislature undertook to provide for every contingency, and to arm the Executive at every point with the solemn sanction of law. Observe how perfectly the case of the petitioners was covered by the provisions of law

The first charge against them was "conspiracy against the government of the United States." In the act approved July 31, 1861, that very crime was fully defined and placed within the jurisdiction of the District and Circuit Courts of the United States.

Charge 2: "Affording aid and comfort to rebels against the government of the United States." In the act approved July 17, 1862, this crime is set forth in the very words of the charge, and it is provided that "such person shall be punished by imprisonment for a period not exceeding ten years; or by a fine not exceeding ten dollars and by the liberation of all his slaves, if any he have; or by both of said punishments, at the discretion of the court."

Charge 3: "Inciting Insurrection." In Brightly's Digest there is compiled from ten separate acts a chapter of sixty-four sections on insurrection, setting forth, in the fullest manner possible, every mode by which citizens may aid in insurrection, and providing for their trial and punishment by the regularly ordained courts of the United States.

Charge 4: "Disloyal practices." The meaning of this charge can only be found in the specifications under it which consist in discouraging enlistments and making preparations to resist a draft designed to increase the army of the United States. These offences are fully defined in the thirty-third section of the act of March 3, 1863 "for Enrolling and Calling out the National Forces," and in the twelfth section of the act of February 24, 1864 amendatory thereof. The provost-marshal is authorized to arrest such offenders, but he must deliver them over

for trial to the civil authorities. Their trial and punishment are expressly placed in the jurisdiction of the District and Circuit Courts of the United States.

Charge 5: "Violations of the laws of war."—Which, according to the specifications, consisted of an attempt through a secret organization, to give aid and comfort to rebels. This crime is amply provided for in the laws referred to in relation to the second charge. But Congress did far more than to provide for a case like this. Throughout the eleven rebellious States it clothed the military department with supreme power and authority. State constitutions and laws, the decrees and edicts of courts, were all superseded by the laws of war. Even in States not in rebellion, but where treason had a foothold and hostile collisions were likely to occur, Congress authorized the suspension of the writ of habeas corpus, and directed the army to keep the peace.

But Congress went further still, and authorized the President, during the Rebellion, whenever, in his judgment, the public safety should require it, to suspend the privilege of the writ of habeas corpus in any State or Territory of the United States, and order the arrest of any persons whom he might believe dangerous to the safety of the republic, and hold them till the civil authorities could examine into the nature of their crimes. But this act of March 3, 1863, gave no authority to try the person by any military tribunal, and it commanded judges of the Circuit and District Courts of the United States, whenever the grand jury had adjourned its sessions, and found no indictment against such persons, to order their immediate discharge from arrest. All these capacious powers were conferred upon the military department, but there is no law on the statute-book in which the tribunal that tried the petitioners can find the least recognition.

I wish to call the attention of your Honors to a circumstance showing the sentiment on this subject of the House of Representatives of the Thirty-eighth Congress. Near the close of that Congress, when the Miscellaneous Appropriation Bill, which authorized the disbursement of several millions of dollars for the civil expenditures of the government, was under discussion, the House of Representatives, having observed with alarm the growing tendency to break down the barriers of law, and desiring to protect the rights of citizens as well as to preserve the Union added to the appropriation bill the following section: "And be it further enacted, That no person shall be tried by court-martial or military commission in any State or

Territory where the courts of the United States are open, except persons actually mustered or commissioned or appointed in the military or naval service of the United States, or rebel enemies charged with being spies."

The section was debated at length in the Senate, and although almost every Senator acknowledged its justice yet, and the nation was then in the very mid-whirl and fury of the war, it was feared that the Executive might thereby be crippled, and the section was stricken out. The bill came back to the House; conferences were held upon it, and finally, in the last hour of the session, the House deliberately determined that, important as the bill was to the interests of the country, they preferred it should not become a law if that section were stricken out. I beg leave to read some passages from the remarks of one of the noblest, ablest and most patriotic men that have honored this nation during the war—that great man, so lately taken from us, Henry Winter Davis, of Maryland. After reporting the provisions of the bill agreed upon by the committee of conference, he said:

"Under these circumstances it remained for a majority of the House committee to determine between the great result of losing an important appropriation bill, or, after having raised a question of this magnitude, touching so nearly the right of every citizen to his personal liberty and the very endurance of Republican institutions, and to insure its consideration fastened it on an appropriation bill, to allow it to be stricken out as a matter of secondary importance. The committee thought that their duty to their constituents, to the House, and to themselves, would not allow them to provide for any pecuniary appropriations at the expense of so grave a reflection on the fundamental principles of the government. * * * *

"The practice of the government has introduced into the jurisprudence of the United States principles unknown to the laws of the United States, loosely described under the general term of the rules and usages of war and new crimes, defined by no law, called military offenses; and without the authority of any statute, constitutional, or unconstitutional, pointing these laws—confined by the usage of the world to enemies in another territory—against our own citizens in our own territory, has repeatedly deprived many citizens of the United States of their liberty, has condemned many to death, who have only been redeemed from that extreme penalty by the kindness of the President's heart, aided doubtless by the serious scrpules he

cannot but feel touching the legality of the judgment that assigned them to death.

"There have been many cases in which judgments of confinement in the penitentiary have been inflicted for acts not punishable, either under the usages of war or under any statute of the United States prescribe the punishment have been visited with other and severer punishments by military tribunals; violations of contract with the government, real or imputed, have been construed by these tribunals into frauds, and punished illegally as crimes; excessive bail has been demanded, and when furnished impudently refused; and the attempt of Congress to discriminate between crimes committed by persons in the military forces and citizens not in those forces, has been annulled, and the very offences it specifically required to be tried before the courts of the United States have been tried before military tribunals dependent upon the will of the President. * * * *

"The committee remember that such things are inconsistent with the endurance of Republican government Before these alternatives they could not hesitate. They thought it best, now, at this time, to leave this law standing as a broken dike in the midst of the rising flood of lawless power around us, to show to this generation how high that flood of lawless power has risen in only three years of civil war, as a warning to those who are to come after us, as an awakening to those who are now with us

"They have, therefore, come to the determination, so far as the constitutional privileges and prerogatives of this House will enable them to accomplish the result, that this bill shall not become a law if these words do not stand as part of it—the affirmation by the Representatives of the States and of the people of the inalienable birthright of every American citizen; and on that question they appeal from the judgment of the Senate to the judgment of the American people."

The appeal was taken; the bill failed; and the record of its failure is an emphatic declaration that the House of Representatives have never consented to the establishment of any tribunals except those authorized by the Constitution of the United States and the laws of Congress.

There was one point suggested rather than insisted upon by the opposing counsel, which it requires but little more than a statement to answer. In their brief, the learned gentlemen say that, if the military tribunal had no jurisdiction, the petitioners may be held as prisoners captured in war, and handed over by the military to the

civil authorities, to be tried for their crimes under the acts of Congress, and before the courts of the United States. The answer to this is, that the petitioners were never enlisted, commissioned, or mustered in the service of the Confederacy; nor had they been within the Rebel lines, or within any theatre of active military operations: nor had they been in any way recognized by the Rebel authorities as in their service. They could not have been exchanged as prisoners of war; nor, if all the charges against them were true, could they be brought under the legal definition of spies. There appears to be no ground whatever for calling them prisoners of war. The suggestion of our opponents that the petitioners should be handed over to the civil authorities for trial is precisely what they petitioned for, and what, according to the laws of Congress, should have been done. We do not ask that they shall be shielded from any lawful punishment, but that they shall not be unlawfully punished, as they now are by the sentence of a tribunal which had no jurisdiction over either their persons or the subject-matter of the charges.

The only color of authority for such a trial was found in the President's proclamation of September 24th, 1862, which was substantially annulled by the Habeas Corpus Act of March 3d, 1863, and the subsequent Presidential proclamation of September 15th, 1863. By these acts, the military authority could only arrest and hold disaffected persons till after a session of the United States District Court.

May it please the court, I have thus reviewed the principles upon which our government was founded, the practice of the fathers who founded it, and the almost unanimous sentiment of its presidents, congresses and courts.

I have shown that Congress undertook to provide for all the necessities which the Rebellion imposed upon the nation; that it provided for the trial of every crime imputed to the petitioners, and pointed out expressly the mode of punishment. There is not a single charge or specification in the petition before you—not a single allegation of crime—that is not expressly provided for in the laws of the United States; and the courts are designated before which such offenders may be tried. These courts were open during the trial, and had never been disturbed by the Rebellion. The Military Commission on the tenth day of its session withdrew from the room where it had been sitting, that the Circuit Court of the United States might hold its regular term in its own chamber. For

the next ten days the Commission occupied, by permission, the chamber of the Supreme Court of the State of Indiana, but removed to another hall when the regular term of that court began. This Military Commission sat at a place two hundred miles beyond the sound of a hostile gun, in a State that had never felt the touch of martial law,—that had never been defiled by the tread of a hostile Rebel foot, except on a remote border, and then but for a day. That State, with all its laws and courts with all its securities of personal rights and privileges is declared by the opposing counsel to have been completely and absolutely under the control of martial laws that not only the Constitution and laws of Indiana, but the Constitution and laws of the United States, were wholly suspended, so that no writ, injunction, prohibition, or mandate of any District or Circuit Court of the United States, or even of this august tribunal, was of any binding force or authority whatever, except by the permission and at the pleasure of a military commander.

Such a doctrine, may it please the court, is too monstrous to be tolerated for a moment; and I trust and believe that, when this cause shall have been heard and considered, it will receive its just and final condemnation. Your decision will mark an era in American history. The just and final settlement of this great question will take a high place among the great achievements which have immortalized this decade. It will establish forever this truth, of inestimable value to us and to mankind, that a republic can wield the vast enginery of war without breaking down the safeguards of liberty; can suppress insurrection, and put down rebellion, however, formidable, without destroying the bulwarks of law; can, by the might of its armed millions preserve and defend both nationality and liberty. Victories on the field were of priceless value, for they plucked the life of the republic out of the hands of its enemies; but

"Peace hath her victories
No less renowned than war,"

and if the protection of law shall, by your decision, be extended over every acre of our peaceful territory, you will have rendered the great decision of the century.

When Pericles had made Greece immortal in arts and arms, in liberty and law, he invoked the genius of Phidias to devise a monument which should symbolize the beauty and glory of Athens. That artist selected for his theme the tutelar divinity of Athens, the Jove-born goddess protectress of arts and arms, of industry and law, who

typified the Greek conception of composed, majestic, unrelenting force. He erected on the heights of the Acropolis a colossal statue of Minerva, armed with spear and helmet, which towered in awful majesty above the surrounding temples of the gods. Sailors on far-off ships beheld the crest and spear of the goddess, and bowed with reverent awe. To every Greek she was the symbol of power and glory. But the Acropolis, with its temples and statues, is now a heap of ruins. The visible gods have vanished in the clearer light of modern civilization. We cannot restore the decayed emblems of ancient Greece but it is in your power, O Judges, to erect in this citadel of our liberties a monument more lasting than brass—invisible indeed to the eye of flesh, but visible to the eye of the spirit as the awful form and figure of Justice, crowning and adorning the republic; rising above the storms of political strife, above the din of battle, above the earthquake shock of rebellion; seen from afar, and hailed as protector by the oppressed of all nations; dispensing equal blessings, and covering with the protecting shield of law the weakest, the humblest, the meanest, and until declared by solemn law unworthy of protection the guiltiest of its citizens.

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