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THE SYKES MURDER CASE.

ARGUMENT OF

ADAM EMPIE, ESQ.,

IN DEFENSE OF THE PRISONERS.

Mr. President, and Gentlemen of the Commission:
The position of the Advocate is always one of difficulty and embarrassment, but it is peculiarly perplexing when he has to appear before a tribunal like this, upon the dis-cussion of a question of law involving such momentous interests as human life. Often during myprofessional career before other fribunals, has a duty equally as grave fallen upon me, but never, I can say, has the responsibility so greatly oppressed me with its magnitude as in the case here at bar. Decraing as humbly of my abilities as any man can, I would nevertheless approach it without anxiety or alarm, were it not for the nature of this court, and the professions of the officers that compose this Commis-sion. These melanchely and peculiar features that mark the trial of a capital crime for the first time in the history of my State, overwhelms me with apprehension, and oply to discharge the important interests that are intrusted to me. Heretofore, when I have been called to exert whatever powers I possessed in defence of human life, my struggles have always been cheered by the reflection that the accused were to be tried according to the course of the common law, by a jury of their peers, of their own selec-tion, drawn from the vicinage in which they lived, tho-roughly acquainted with the prisoners, their habits, their motives of action, and their character, and who therefore could judge them wisely and well, and would judge them. tempering justice with mercy. And to this reflection another consolation has been mine, which I say without any disparagement to any member of this Commission, that I have had a Court to address, to which hitherto, from my infancy, I have been taught to look as the last safe and undoubted -refuge of the citizen, of which I my-self was a member, and to some extent familiar with its principles and its practice, presided over by a Judge skilled and versed in all the principles of the law established by wise and humane men for wise and humane purposes. whose duty as well as whose pleasure it was to accord unto the prisoners all the legal benefits that could be in-voked in their defence, expounding and explaining to a jury of their peers, who were to pass upon them for their lives or death," all the principles involved in their case thereby enabling them to arrive at a just and legal conclu sion in the matters submitted to their consideration.

But to-day I rise before a tribunal unknown to the com-mon law and the usages of the State in which I have been reared and educated; a tribunal the officers whereof have spent their "dearest action in the tented field," and whose fame and honor have been won

" 'Mid flame and smoke." And shout and groan and sabre stroke, And death shots falling thick and fast."

And not in the recesses of the quiet closet, in search of deep philosophy and legal lore, and who, although judges, are not jurists, and can have but little knowledge of th waction of Courts, the rules of evidence upon which human life depends, and the nice and often cob-web distinc the ris which defines legally the degrees of crime. Under all these disadvantages, I cannot but say that I feel my here as Advocate one of difficulty and per Mexity, and that I cannot contemplate it without fear an ly foreboding. But whatever fear oppresses me the hope is still left to me that I shall discharge my duty waving the event to God, and your own acts to your own wing charges and specifications

CHARGE L .- Murder. SPECIFICATION.-In this, that J. L. McMillan and Neil McGill, citizens of Bladen county, North Carolina, in company with one Wilkinson, on or about the 10th day of April X. D. 1865, feloniously, wilfully, of their malice afore thought, did kill and murder one Matthew P. Sykes, loval citizen of the United States. All this in the count of Bladen and State of North Carolina.
Charge II. Violation of the laws and customs of war,

Specification 1st.—In this, that Neill McGill and J. I. McMillan, citizens of Bladen county, North Carolina, i company with one Wilkinson, acting with no authority of color of authority, and in violation of the laws and cus toms of war, unlawfully did seize the person of one Mat thew P. Sykes, a loyal citizen of the United States, resi ding in Bladen county, North Carolina, and did forcibl convey him from his home to the neighboring woods, and ously and feloniously, and with intent to kill an murder the aforesaid Matthew P. Sykes, a loval citizen of United States. All this in the county of North Carolina, on or about the 10th day of April, A

Specification 2d .- In this, that J. L. McMillan and Neill McGill, citizens of Bladen county, North Carolina, it company with one Wilkinson, in violation of the laws and customs of war, barbarously and brutally did mangle the ted States. All this in the county of Bladen, State of North Carolina, on or about the 10th day of April, A. D.

Has this Commission jurisdiction of the case before it It is respectfully insisted that they have not, but that thi jurisdiction alone abides in the Courts of this Common wealth, and that no other Court, under our constitution and the laws, can take cognizance of this offence. I mean no personal disrespect to this Commission, or the honorable gentlemen who compose it in the position that I have here assumed. I take it because I believe upon my honor and my conscience that it is right and in strict conformity with th fundamental law of the land, and the rights of the as embodied in the constitution. I should feel that I were talse to myself, recreant to every trust that was reposed in me by those unfortunate men in this the most solemn me ment of their lives, could I turn my back upon it by ignor ing its existence, instead of presenting it here as a palla dium to cover them in this their extremity. It is in this temper of mind, befitting every advocate who is wor thy of the name, and who is deeply and modestly sen-sible of his duty and proud of his privilege, equally exalt-ed above the meanness of temporizing or of offending, that I now take this position and address you upon a question the most vitally connected with the well-being of eve one within the limits of the United States, and which, decided one way, make us slaves, but which if deter mined another, leaves us freemen. It is not on deaves us freemen. It is not only insurgent States that are involved in this question. Every member of the United States is equally embarked, and if the ship goes down, she drags with her the liberties of every member in the same dark gulf of despotism and despair. Let us, however, ope that no such future shall be ours, and to avert so dire calanity, let us determine that now that the trumpet of war is no longer sounding in our ears, and that Peace with her heavenly wings has settled down upon us and the angry passions of this unnatural strife have subsided, that we shall continue to pursue the beaten paths, to follow the old landmarks that our forefathers have made plain with their feet; that our motto shall be "stet antiquas vias," and that as heretofore we will leave the suppression of crime and the vindication of the majesty of the law to the Judi-ciary and the legally constituted Courts of the country as provided for under that Constitution, the observance of which has ever directed us thus far on the road to glory and greatness. What is the Constitution? It has been said to be the form in which the Government was estab I know of no other Government except that em-in the Constitution. I know of no other life of the odied in the Constitution. nation except that incarnate in the written Constitution which protects property, person, home, conscience, libert, and life. Take away these, and there is no nation. Th Constitution is the very embodiment of freedom in this country; and of the Union it is the body, the life and the soul. When you strike down this Constitution, you strike down the life of the nation. When you preserve the Constitution from destruction, you preserve the life of the Government. As has been elequently said by Judge Thomas, "we must cling to it as the bond of unity in the past as the only practical bond of the future_the nd lifted above the waters on which the ark of the Un ion can be moored. From that ark alone will go out the dove blessed of the spirit which shall return bringing in the mouth the clive branch of peace, and bearing in its

I ask, does the jurisdiction taken by this commission in this case at bar violate this Constitution? The 5th amendment to the Constitution declares that no person shall be held to answer for a capital or otherwise infamous crime, held to answer for a capital or otherwise intamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the "land and naval forces."—
The prisoners at the bar do not come within that exception. They are civilians, and therefore, according to the JAS. EULTON, EDITOR. A. I., PRICE, ASSOCIATE EDITOR. very terms of the Constitution, cannot be held to answer this commission. From the foundation of the Government to the present time, eave in the commission that tried the assassins at Washington for the murder of President Lincoln, which right to try was based upon the ground that the military had a right to protect by military law the Commander-in-Chief of the Army and Navy, no civilian has ever been held to answer for crime save by presentment or indictment of a grand jury. Has any been found in this case? No; but as a substitute for that solemn act and solemn proceeding of that solemn body which our forefathers regarded as of such vital importance as to inforefathers regarded as of such vital importance as to in-corporate it and make it a part and parcel of the Consti-tution itself, we have the bill of charges and specifications aforementioned, drawn up by one man, the Judge Advo-cate of this Commission. Is this in compliance with the great law of the land, or is it in express violation, in substance and in fact of the spirit and letter of the con-stitution itself? That military tribunals have no other jurisdiction than over persons belonging to the land and paval forces of the United States, has been considered as an axiom by the legal profession in the country. No authese powers went, and there their cognizance ceased. All other offences belong to the civil law, and to such an extent does the civil jurisdiction enlarge itself, that it has been holden-even where a military offence has been committed, if the military law does not provide for its trial and punishment, that a military tribunal cannot take jurisdiction of the offence. In a military court, says O'Brien, p. 235, if the charge does not state a crime, provided for generally, or specifically, by any of the Articles of War, the prisoner must be discharged. Nor is it sufficient that the charge is one known to the military law, for if the person violating that law is not connected with the military, or nother words is a civilian be in not exhibit. in other words, is a civilian, he is not subject to military jurisdiction. For, says the same authority, O'Brien, pp. 26 and 27, that the general law has supreme and undisputed jurisdiction over all. The military law puts forth no ted jurisdiction over all. The military law puts forth no such pretensions; it aims solely to enforce upon the soldier the duties he has assumed. It expetitutes tribunals for the trial of military breaches only. The one code (the civil) embraces all citizens, whether soldiers or not; the other (the military) has no jurisdiction over any citizen as such. But again; the 5th amendment to the Constitution declares that no person shall be deprived of life, liberty or property without due process of law. Now, what is meant by due process of law in the Constitution? It means those proceedings in a criminal prosecution from the beginning to the end of the action, as was known to our forefathers. to the end of the action, as was known to our forefathers, and the common law of England and this country. It means that no person shall be deprived of his life, or liber ty, or property until legal means are used to compel a defendant to appear in court, and in a criminal case by a capias ad dant to appear in court, and his criminal case by a capids and respondendum, based upon an indictment or presentment of a grand jury. It means that the accused are to have the inestimable benefit of trial by jury, which is regarded by us no less than by Englishmen as the bulwark of liberty—a right so valued and esteemed that the celebrated commentator on the English law, Justice Blackstone, does not have that the celebrated commentator on the English law, Justice Blackstone, does commentator on the English law, Justice Blackstons, does not hesitate to say that Rome, Sparta and Carthage lost their liberties because they were strangers to the trial by jury. III. Blackstone, p. 379. This is what is meant by due process of law in the Constitution, every one of which blessings and privileges are denied to the citizen by his trial by mittary commission, thereby violating that Constitution and taking away human life without due process of law. But these are not the only constitutional privile. of law. But these are not the only constitutional of law. But these are not the omy consummonal private-ges that this jurisdiction by military commission violates. It takes from the accused the constitutional rights guaranteed by the fundamental law of the land to every citizen charged with crime. Art. III. of the original Concitizen charged with crime. Art. III. of the original Constitution, sec. 2d, declares the trial of all crimes, except in cases of impeachment, shall be by jury. The right of the citizen to have a jury of his peers to decide all questions that involve his life, has ever been regarded as the most valued privilege that the constitution confers. It is a right that every citizen at some period of his life may desire personally to enjoy; and when charged with crime, it then becomes the dearest grant of all his privileges. Our ancestors who engrafted this clause in the body of this in-strument, were fully sensible of the advantages that were thereby conferred. It had been regarded by the mother country as a privilege of the highest and most beneficial tence for themselves, and creating a country that they were to govern, were determined that this time-honored and inappreciable blessing should be enjoyed by themselves and their posterity. It was, therefore, with pious hands and minds, ever jealous of the liberty of the citizen, that they declared that "no person should be held to answer for a capital crime, unless on presentment or indictment of a grand jury," or "without due process of law be de-prived of their life, liberty or property;" and "that the irial of all crimes should be by the jury." But what are these sacred guarantees but solemn mockeries and gilded bubbles if a military tribunal can exercise jurisdiction that deprives the citizen of his liberty "without due process of law," and can hold him to "answer for a capital crime without presentment or indictment of a grand jury;" and when on trial for crime, takes away from him his "trial by jury." When all these safeguards that hedge the citizen can be thus destroyed, and "life, liberty and property" be thus left naked and defenceless, and open to the assaults of malice, of passion, or of power, then, indeed, is the very name of liberty unknown amongst us, and the

> and a despotism as arbitrary as that of Russia. Now, what are the grounds upon which this furisdiction is assumed and cognizance claimed of this cause? If it rests upon any authority whatever, it is to be found in the acts of Congress, approved July 17, 1862, and March 3rd, 1863, and the proclamations of the late President of the United States, Abraham Lincoln, dated 24th of September, 1862. It is also assumed under the laws and customs of war as known among civilized nations. In the first recited act, for the first time in the history of this country, the name of this court appears, and the appointment of s Judge Advocate General is made, whose duty it is, to "re vise the records of military commissions." As to the powers of this Court, its duties, its mode of proceedings, owhat cases it shall have cognizance, and the rules of evidence that are to govern it, this act is silent. It simply mentions the name of such a Court, and what officer shall revise its records and proceedings, and nothing more. By the act of March 3d, 1862, by the 30th section of that act, we learn again of the existence of this Court; and by that section certain offences by persons in the military service are to be punished by court-martial, or military commis sion. But this act expressly declares that a military com-mission shall have no jurisdiction over any person who shall not be subject to the Articles of War; so that the shall not be subject to the Articles of War; so that the jurisdiction that this section of the act confers, would not extend to embrace the case of the prisoners here, who are charged as citizens, and who, in truth and in fact, are civ ilians, and who have never been soldiers in either army-Rebel or Federal. But the 38th section of this ac confers another jurisdiction. It authorizes military com-missions to try all persons who shall be found lurking or acting as spies in or about any of the fortifications, posts, quarters or encampments of any of the armies of the Unied States. If the jurisdiction that is sought here to-day is attachable to this Court of right and by law, why the necessity of an act of Congress to give to this Court the power to try all such persons as shall be found lurking as spies? The offence is clearly upon its face a military one. Does not the conferring of the power prove that in the opinion of Congress the right did not exist, and to vest it that a special law was necessary. If this be so in the case of a purely military offence, punished among all nations in time of war with death, how much the creater reason is there that this invadiction and the life treater reason is there that this invadiction and the life treater reason is there that this invadiction and the life treater reason is there that this invadiction and the life treater reason is there that this invadiction and the life treater reason is there that this invadiction are life to the treater reason is the conference. the greater reason is there that this jurisdiction shall not attach here, when the crime alleged to have been committed is one sltogether civil, and in nowise military, is respectfully insisted that the Congress of the States have not the power constitutionally, either in time of war or peace, to create a military court for the trial of citizens. That power extends only to the creation of military court for the trial of such persons as belong to 1st article, 12th section of the Constitution, defining powers of Congress, declares that Congress only shall have power "to make rules for the government and regulation of the land and naval forces," thereby declaring that they shall have no power to make rules and regulations thereby declaring that for civilians. It is a rule of interpretation of written instru-ments, that the express mention of one power implies the exclusion of another; and the express mention here of the power confining it to the "land and naval forces," is re-strictive, and therefore was intended and designed to exclude the exercise of every other power which was no enumerated in the instrument. But to place this construction beyond all question in an instrument as important and solemn as the Constitution of the United States, the wise men who framed it out of abundant eaution, introdu-ced the tenth amendment, which declares that "the powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people." This power to create a Military Court for the trial of the citizen, was

proud-title of American citizen, heretofore the representa-tive of all that is glorious of constitutional freedom and

the rights of man, will become but a synonyme for slave.

bosom the seeds of liberty to untold millions." And now, States, in the case of the assassing of the late President of the President of September 24th, 1862, let us enquire if the United States, Abraham Lincoln, in reply to the question propounded and submitted to him by His Excellency upon Congress or the military under which such a tribu-Andrew Johnson, "whether the persons charged with the fall, in peace or war, can be established. It is most re-Andrew Johnson, "whether the persons charged with the offence of having assessinated the President, can be tried specifully contended that there is not, and that any court, before a Military Court," he says, on pp. 4 and 5, "In time of peace, neither Congress, or the military can excate say the peace, neither Congress of the military tribunals except such as are made in pursuance military tribunals except such as are made in pursuance in conflict whenever it was in opposition to and in conflict whenever it was in opposition to and in conflict with the written constitution of the country. and naval forces.' I do not think that Congress care in time of war or peace, under this clause of the constitution. create military tribunals for the adjudication of offences committed by persons not engaged in or belonging to such forces." It is conceded here that the accused belong not to either of these forces, for they are arraigned ascitizens, and admitted in the charges and specifications to be civilians. Here, then, is an opinion on this point from the constitutional adviser of the Executive, and should therefore satisfy this Court that the jurisdiction assumed in this case cannot arise by virtue of any act of Congress, as there is no such power resident in Congress to create the

from hindering this messure, and from giving aid and comfort in various ways to the insurrection: Now, therefore, be it ordered, that during the existing insurrection and as a necessary means for suppressing the same, a and as a necessary means for suppressing the same, all rebels and insurgents, their salers and abottors, within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any dis-loyal practice, affording aid and comfort to rebels against the authority of the United States, shall be subject to martial law, and liable to trial and punishment by courts martial or military commissions. Second. That the writ of habeas corpus is suspended in respect to all persons ar-rested and who are now or hereafter device the resulting rested, and who are now, or hereafter during the rebellion shall be imprisoned in any fort, camp, araenal, military prison, or other place of confinement, by any military au-thority, or by the sentence of a court martial or military

"In witness whereof, I have hereunto set my hand, and caused the seal of the United States to be affixed. Done at the City of Washington this 24th day of September, A. D. 1862, and of the independence of the United States the

D. 1892, and of the independence of the United States ine eighty-ninth.

Passing by the question whether the President of the United States has the right constitutionally to declare martial law, and assuming that that power for the present is resident in the Executive during actual rebellion, it is respectfully insisted that the jurisdiction here sought is not conferred by this proclamation. This proclamation was promulgated with the intent and design to suppress the promulgated with the lines and design to suppress the insurrection, and to punish all persons giving aid and confort to the same, against the authority of the United States. The persons to be punished were disloyal persons, "who were not adequately restrained by the ordinary processes of the law" from offending against the government, such "rebels and insurgents, their aiders and abettors, persons discouraging "volunteer enlistments, and resisting militia drafts, or guilty of any disloyal practices affording aid and comfort to rebels against the authority of the United States. These, by the very terms of the Proclama tion, are the only persons who "shall be subject to mar-tial law, and liable to trial and punishment by military commissions." It does not embrace civil offenders for civil crime against the laws of the State of North Corolina or any other State. It was not promulgated with the in-tent to take jurisdiction of, or give jurisdiction to, military commissions for rape, or arson, or burglary, or murder. The laws of the respective States wherein such crimes were committed, were fully adequate for the suppressic and punishment of such offences. Of these the gener government had no concern, but left them where the con-stitution placed them, to be disposed of by "public trial, by an impartial jury of the State and district wherein the crime shall have been committed," in accordance with article six of the amendment to the constitution. But when offences were of a political character, and obnoxious when offences were of a political character, and obnexious to the government, for "opposing, restraining," or "aiding and abetting" any of the objects mentioned in the prodamation, military commissions were to take jurisdiction of them, and try and punish the offenders, for the reason assigned in the preamble of the prodamation, "that they were not adequately restrained by the ordinary processes of law." Therefore it became necessary, as them, and to appoint some tribunal by which they could be reached. There was a rebellion in the land. Insurrection was rife and rampant, and in order to suppress it it was necessary to call out volunteers and a portion of the militia. All persons sympathizing with this insurrection were to be punished; but now? The ordinary laws provi-ded for no such cases, or ever made such sympathy punishable; extraordinary laws were therefore necessary to meet-the emergency of the occasion and the crisis of the times, and that extraordinary law took the form of the

proclamation. No proposition, I think, can be made more self-evider than this, that this Court cannot maintain its jurisdiction under this proclamation. But if this construction that have put upon this proclamation be erroneous, (although I have no doubt of its justness and propriety,) it is re-spectfully insisted that the legal effect of this proclamatio expired with the rebellion, and that as soon as that wa crushed and suppressed, military commissions raised b virtue of this proclamation also collapsed. And this I sa upon the authority of the proclamation itself, for that de clares that it is only to be "in force during the existing rebellion," and to "continue as a means for suppressing the same." It limits, therefore, its own vitality indefines the same." It limits, therefore, its own vitality; indefine accurately up to what period of time it is to be obligatory and as soon, therefore, as these things are accomplished tpse facto, it expires. It therefore becomes necessary to quire if in North Carolina the rebellion is at an end, fo if it be, all the powers and functions of this Court, derived

under this proclamation, is also at an end.
On the 27th of April, 1865, Major General Schofield Commanding Department of North Carolina, issued the following order :

GENERAL ORDER 31. The Commanding General has the great satisfaction of announcing to the army and people of North Carolina that hostilities within this State have definitely ceased; that for us the war is ended, and it is hoped that peace will soon be restored throughout the country. Between the government of the United States

and the people of North Carolina, there is peace.

This order, I apprehend, emanating from the highes military authority in the State, settles the question that there is no "existing insurrection" in this State. As th legal effect of this proclamation is only co-existent with the rebellion, it follows that when the one was over the other ceased also. No military commissions can therefor be held in this State, by virtue of this proclamation. Bu it is further insisted that by this proclamation martia law has never been proclaimed to the extent of interfering with the due administration of the civil law for the sup pression of orime; or of vesting in any other tribuna save those known to the constitution and the commo law; the jurisdiction to try and punish offenders for a vic lation of the civil law of the land. I know that there has been a general impression that by this proclamation martial law prevailed within the United States; but that im pression is founded in error, and is without warrant fo its declaration. The proclamation does not proclaim mar-tial law to exist within the United States generally. It simply declares that certain persons and certain disloyal practices are not adequate restrained by the ordinary processes of law, and that "these persons" who commit these acts shall be subject to martial law, and liable to

trial and punishment by military commission.

There has been no abrogation or suspension of the or dinary administration of the law by the civil authorities. These have been in the full exercise of all their power and functions throughout the United States, and in all the States through them and by them alone has crime been punished and offenders brought to justice. If martial law did prevail beyond the exter that I have mentioned, why the necessity of President Locoln, on July 5th, 1864, issuing his proclamation to establish martial law in Kentucky, the "more effectually to jut down rebellion" in that State?" Mask the phraseology of that proclamation when State? Mass necessary to put that State under mar-tial law, and contrast it with the words used in this: "I. Abraham Lincoln, President of the United States, by vir ue of the authority vested the laws, do hereby declare that in my judgment the pub-lic safety especially requires that the suspension of the writ of habeas corpus, so proclaimed in the proclamation of the 15th of September, 1953, be made effectual, and be duly enforced in and throughout the said State of Kentucky, and that martial law be for the present established

This proclamation makes manifest the position that is no other State had that law been proclaimed, and that the proclamation of September 24th, 1862, had not subjected he United States to the operation of that law. From the above position it unquestionably follows that the civil law remained intset in all the States, (save in Kentucky, which as lately been relieved from the effect of that law,) and

mental regulation that determines the manner in which the public cuthority is to be executed," - Vattel, p. 67. The public authority, under our constitution, is ledged in the Congress, the Indiciary, and the President. Article 1st declares that all legislative powers herein granted shall be a President; and Article 2d. "the executive powers in and "Article 3d, the judicial powers in certain designated courts, and in courts to be thereafter con-stituted by Congress." Nothing can be clearer than from the segregation and division of these powers it was never designed by the framers of this instrument to suffer any one of them to exercise the functions and offices of the other. The creation of a court, whether civil or military, great law of the land, or is it in express violation, in substance and in fact of the spirit and letter of the constitution itself? That military tribunals have no other jurisdiction than over persons belonging to the land and naval forces of the United States, has been considered as an axiom by the legal profession in the country. No authority whatever can be shown to the country, while it has again and again been declared that to that extent these powers went, and there their cognizance ceased. All other offences belong in the contrary processes of law to proceed. I shall now examine whether this partition of a court, whether civil or military is an exclusive legislative function, and belongs to the third partition of a court, therefore, constitutionally can belong to no other body but to Congress. But Congress itself on other body but to Congress the insurrection that over persons are located as an exclusive legislative function, and belongs to the declared. The partition of a court, whether civil or military, is an exclusive legislative function, and belongs to the declared. The partition of a court, therefore, constitutionally can belong to no other body but to Congress. But Congress itself on other body but to Congress the law to the tests the power of creating courts in Congress that the vests the power of creating of the unities of the exercise of that power of creating courts in Congress that and and naval forces." Beyond this, Congress itself the exercise of the exercise of that power of creating courts in Congress arising in the United States; and disloyal persons are land and other the legislative power is conferred. The creation of a court, whether civil or military, in an exclusive legislative function, and belong to the force of a court, therefore, constitutions of the partition of a court, whether civil or military, in the legislative power is conferred. The court is an exclusive legislative function of a court, therefore, constitution and exclusive power is conferred. Congress, then, has no such power, is there any othe branch of the government in which this power resides? That it is not in the Judiciary will be readily conceded. Does it rest in the President? That no such power resides in the President is expressly declared in Article 1st of the in the President is expressly declared in Article 1st of the constitution, and if such power is exercised by him it is a manifest infringement of the prerogatives and peculiar privileges of the Congress. If the President, to institute this Court, can usure the jurisdiction of the Congress, he can with the same propriety, without right, possess himself of all the functions and powers of the judiciary, and there would then be blended in one man, (the President,) the entire powers of all the three co-ordinate branches of the government, and that state of things would be brought about which it was the express aim and object of the founder of this government particularly to provide against and avoid. If this position be true, then the President can by his own will convert this government into an absolute one, and himself into an autocrat, a conclusion that must be admitted or the position abandoned. Whatever powers the President possesses is derived from the Constitution, he has no other, and that power is "executive," and not "legislative," and legisla-tive powers he cannot exercise until he first destroys the foundation from which all his functions and proroga-tives are derived. It essentially belongs to the society to make laws, both in relation to the manner in which it desires to be governed, and to the conduct of the citizen. The nation may entrust the exercise of it to the Prince of to an assembly, or to that assembly and the Prince jointly. It is here domanded whether this power extends so far as to the fundamental laws they may change the constitution of the State. The principles we have laid down lead us to declare this point with certainty, that the authority does not extend so far, and that they ought to consider the fun-damental law as sacred if the nation has not given these in very express terms the power to change them. For the constitution of the State ought to be fixed, and since this was first established by the nation which afterwards trust-ed certain persons with power, the fundamental laws are excepted from their commission."—Vattel's Law of Na-tions, pp. 69 and 70. If the President of the United States cannot change the Constitution, he cannot create this Court; and if he cannot create this Court, it cannot be Court; and if he cannot create this Court, it cannot be created by "the laws and mages of war;" for under our Constitution the President is the Commander-in-Chief of the whole military power of the Government, and in peace or war he cannot exercise any power in conflict with the fundamental law of the land, from which he derives all his powers. "The laws and mages of war" do not antherize the Commander-in-Chief of the land and naval forces of a country to violate the "public authority" of that country. On the contrary, the law of nations that defines the "laws and usages of war," makes that public authority obligatory upon him, and demands that he should conform all his actions in conformity therewith. Says Vattel, p. 65, "The Constitution and its laws are the basis of the public tranquility, the firmest support of the public authority. tranquility, the firmest support of the public authority and piedge of the liberty of the citizen. But this Consti tution is a vain phantom, and the best laws are nacless if they are not religiously observed. The nation ought, equally respected by those who govern and the people de-stined to obey. To attack the Constitution of the State, and violate its laws, is a capital crime against society, and if these guilty of it are invested with authority, they add to the crime a perfidious abuse of the power with which they are intrusted. The nation ought constantly to sup pross these abuses with its utmost vigor and vigilance a the importance of the case requires." It is, therefore, manifest, that by the laws and usages of war, this power cannot be exercised by the President. For the laws and usages of war are part and parcel of the laws of nations and according to the authority I have just recited, the law of nations, so far far from authorizing the creation of a Court like this, under our Constitution, declares that the institution of such a tribunal would be a public crime against the nation. If, then, the President cannot create this Court, it cannot have its origin in the laws, and mages of war, for as the head of the army and navy, nothing can of war, for as the head of the army and navy, nothing can be sention and authority; and the President be done without his sanction and authority; and the President is bound to obey the fundamental law of the country and the laws of nations, which is a part of the land. law of nations, although not specifically adopted by the Constitution, is essentially a part of the law of the land.— Its obligation commences and runs with the existence of a nation, subject to modification." See opinion of Attorney General Randolph, vol. 1, p. 27. But to proceed: If the "laws and usages of war" are a part of the law of nations, and the laws of nations are a part of the law of the and, does it follow that a power can be exercised unde the "laws and usages of war as known among civilized of our own country?

The laws of Congress are a part of the laws of the land, but will any lawyer say that if that body should pass an act in conflict with the fundamental law, that it would be operative and obligatory upon the citizens, or give author ty for anything to be done under it?

In 1801, the Congress passed, in February of that y en act declaring "that there shall be appointed in and for each of the said counties such number of discreet person o be Justices of the Peace as the President of the states shall from time to time think expedient, to continu in office for five years." Yet the Supreme Court of the United States, in Marberry vs. Madison, [I. Cranch, p. 137, did not beginned to pronounce the said act unconstitution al and void, as being repugnant to the Constitution; and that Courte, as well as the President and other Depart-ments, were bound by the instrument. Says Justice Marshall, in delivering the opinion in that case, "The ques-tion wifether an act repugnant to the Constitution can become the law of the land, is a question deeply interesting to the United States, but properly not of an intricacy proportioned to its interest. It seems only secessary to recognize certain principles supposed to have seen long and well-established to decide it. That the peo-le have an original right to establish for their future government such principles as in their opinion shall most conduce to their happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, or ought it to be very frequently repeated. The principles, thereore, so established are deemed fundamental. And sa the authority from which they proceed is supreme, and can soldom act, they are designed to be permanent. The ori-ginal and supreme will organize the Government, and assigns to different departments their respective powers. It may either stop here or establish certain limits not to be transcended by those departments. The Governmen of the United States is of the latter description. The pow ers of the legislature are defined and limited, and those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited and to what purpose is that limitation committed to writ ing if these limits may at any time be passed by those in-tended to be restrained? The distinction between a Gov-ernment with limited and unlimited powers, is abolished if these limits do not confine the powers on whom they are acts prohibited and acts allowed are of ual obligation? It is a position too plain to be contested, that the Constitution controls any legislative act re-pugnant to it, or that the legislature may alter the conitution by an ordinary act.

It was also further declared by the Supreme Court of the United States in the case of Vandhorn's Lessee, vs. Denace, 2d Dallas, p. 304. "If any act of the Congress is repugnant to the Constitution, it is ipso facto void, and it is the duty of the Court so to declare." And for the same position there is the authority of Colder et uz vs. Bull et uz in & Dallas, Cond. Beps., 172. It therefore follows, that if by the laws and usages of war as known and practiced among the civilized nations of the earth, other nations may hav the power to create a Court like this, this power cannot b exercised by any of the Departments of the United States that therefore there is no martial law in this State, by virtue of which a military commission can take jurisdiction of any offence not set forth and described within that proclamation.

Having shown that the jurisdiction of this Court has no of war, it could take no jurisdiction over the civilian. The never delegated to the United States, and therefore resides and abides "in the people." Congress therefore never delegated to the United States, and therefore resides and abides "in the people." Congress therefore never could constitutionally exercise that power.

The position for which I am now contending has lately been conceded by the government of the United States to be correct. In an opinion filed in July, A. D. 1865, by the

Hon. James Speed, the Atterney General of the United that this jurisdiction is not created by the proclamation of tuted. It is the soldier, not the civilian, that is amenable, so its tribunals.

the only power that the laws of nations confers upon the military under the laws and usages of war regarding the civilian, is the right to make them prisoners, either to prevent them from taking up arms against them, or to effect some negotiations by which peace may be secured. Says Vattel, Law of Nations, pp. 420 and -21, "At present war is carried on by regular troops; the people, the inhabitants of towns and villages do not concern themselves in it, and have nothing to fear from the enemy's arms. If the inhabitants submit to him who is master of the country, they live as safe as if they were friends; they even contry, they live as safe as if they were friends; they even continue in possession of what belongs to them. But all these enemies thus subdued or disarmed, who, from the principles of humanity are to be spared belonging to the oppopular site party may lawfully be secured and made prisoners, either that they may not take up arms against him, or that the enemy may be weakened; or likely, that by getting into any power some person or child for whom the sovereign may have affection, the deliverance of these valuable pledges may induce him to equitable conditions

of peace. Thus, according to this great authority upon interna-tional law, it will be seen that, by the "laws and usages of war," the civilian is not liable for trial or punishment by a military law, but his person and his property both are to be respected. And here I deem it is proper for me to say to this commission, that the case we have here at bar is not a parallel one to the case of the assassins and conspirators of the late President that was held in Washington. There were principles involved in that case that do not enter into this; and as every case must stand upon its own merits, the decision of the Court there is no authority for the rendition of a similar judgment here.

There the assassins introduced themselves into the heart and espitol of the country, within the fortifications and encompment of the army; some of them were in disguise, most of them were enlisted men in the rebel service. They were emissaries of the robel government, and spics according to the rules of war; their object was assassination, cording to the rules of war; their object was assassination, and their victim the heart and soul—the life and head of the army. Mrs. Surratt was a conspirator—an aider and abeter of this assassination. This crime was clearly committed by them for political purposes, and for the supposed effect it would have in ending the war or facilitating the independence of the so-called Confederate States. It was done with no personal metive against the Prasident, but in aid of the rebel cause; it was the government, the light of the rebel cause; it was the government. the reservence of the United States they were striking at, not the man; and it was as the representative of the government that they sacruced him. These facts clearly brought the case within the rule recognized by all writers upon International law, that it is not lawful or in accordance with the laws and manges of war to assessmanate or pelson enemies of your government, and that an attempt even to accomplish any such act, is "infamous and execrable both in those who execute it, and in those who enjoin it. p. 127. And says the Attorney General Speed in his opinion upon the question of jurisdiction filed in this case—p. 16. "that Booth and his associates were secret, active, public enemics no mind that contemplates the facts can doubt. The exclamation used by him when he escaped from the box on the stage after he had fired the fatal shot. Sic Semper Tyronnis, and his dying message—say to my mother that I died for my country—show that he was not an assassin from private motive, but that he acted as a puban assassin from private motive, but that he acted as a public foe." The jurisdiction taken in this case was put upon the ground that the military had a right to protect by military law, and before a military tribunal, the head of the military from assassination, and to punish the assassins; not only because assassinations of this character was an offence against the law of nations, but because the parties guilty of it were spice and secret emissaries and in the service and pay of the rebel governmentand, as such were amenable to trial before a military court. Here the party charged to have been killed was an obscure citizen of the county of Bladen, within the limits of the so-called Confeperate to have been killed was an obscure citizen of the county of Bladen, within the limits of the so-called Confeperate States, unconnected with the Federal army and a volunteer in the rebel service until corporeal infirmity induced his discharge. The killing of such a person could not be said to be an offence against the United States or that the act was done with the intent to injure or even effect the interest of the government. If the parties charged with the commission of this homicide did effect the deed, they must have been induced to its perpetration by private mothe commission of this homicide did effect the deed, they must have been induced to its perpetration by private motives, and to gratify some personal feelings of revenge, certainly no public good was arrived at or could result by depriving him of his life. But again suppose we assume that the deceased was in sentiment and sympathy a loyal citizen, and that the accused we're rebels (neither the one or the other belonged to either army) what other logical deduction can be drawn from the premises but that the one was a Union man and the other Confederates.

The party killed was a robel and volunteered to enter the rabel army and was refused admission in consequence of

a corporeal infirmity that rendered him unfit for military

duty. Subsequently he applied to another command to enter the service, and so great was his anxiety to effect

enter the service, and so great was his anxiety to enact his object that he concealed his disease, which if known, would have again excluded him. This deed therefore could not have been committed by the accused as public enemies of the government, for the person who was killed was himself a public enemy of the government and for two years and upwards, until discharged in consequence of bodily disease, was in arms as a volunteer against the government. If therefore he was killed by the accused, it was a killing upon some private grudge and personal incitive, and does not differ in any other way or in any parti-It was just such a killing between civillian and civillian. It was just such a killing and from such motivos as would have induced the act if there had been no war, no public foe, but peace had prevailed in the land, and is therefore in no way connected with war, and can consequently be no violation of the rules and customs of war. In the second count of the charges and specifications against the accused, they are charged with murder in violation of the rules and customs of war. I readily understand why this charge was made. It is an attempt to give jurisdiction to the court by making it appear that the accused were as-sassine, and as assassination of an enemy is a violation of the rules and customs of war, according to the law of na-tions, therefore the killing of this man was a violation of the rules and enstoms of war. But this rule only applies to enemies who are in arms against the government, and there is no evidence in this case that the deceased was ev-er in the service of the Federal forces. What does not ap-pear in law is said not to exist, for when the court cannot take judicial notice of the fact, it is the same as if the fact had not existed, according to the well known rule." non apparentibus et non existentibus sadem est rutio." What proof there is upon this subject shows that he was hostile to this government, for he was a volunteer and in the rebel service, and in arms against the United States and there is no evidence, although the allegation is made that he ever was a guide to the Federal troops, or had evthat he ever was a guide to the Federal troops, or had ev-er been acting in concert with them. But admitting that he had been acting as a guide to the Federal troops, and in that capacity had conducted them to the private residence of the accused; and suppose for that act on his part the accused had become incensed and outraged, and de-termined to take his life, and did take his life from person-al feelings of malice and revenge, the deceased at that and no other time being in the military service of the United States—would that make it murder in violation of the rules of war? Clearly not, and for the reason that the deceased was not a part of the army of the United States, and the rules and usages of war do not therefore apply to him.

An army is an organized body of men, and the military may have a right to protect it individually and collective ly, and to sustain its existence as a whole it is necessary to sustain the existence of all its parts. Any attack, therefore, made upon any member of that army, contrary to the rules and usages of war, by secret active enemies of that army, might be cognizable before a military tribunal. But to destroy a man not a constituent part of that army or in any manner connected therewith, for private motives and for personal wrongs, is not murder in violation of the rules of war, for it is not done in aid or prosecution of the war, or for anything connected therewith. The me for destruction is outside of the question for which The motive war is carried on, and is in no way referrable to it. The party destroyed is not killed because he is a public foe or political enemy, but because he is a personal foe, a private enemy, and the reasons that induce the homicide is private malice and revenge.

But again; suppose we assume that the deceased was

in sentiment and sympathy a loyal citizen, and that the scensed were rebels—(neither the one nor the other belonged to either army)—what other logical deduction can be drawn from these premises, but that the one was a Union man and the others Confederates. If two men who agree in their political opinions, kill and murder a third who differ from them in his faith, does that constitute a breach of the laws and usages of war? It could be said with the same propriety that if two democrats killed a whig, or a mussulman a christian, that the laws and usa-ges of war were violated. The fact is the laws and usages. of war have no bearing upon any such case as this com-mission has now before it. If murder has been perpetra-ted here as is alleged, it has been a killing by two civilians upon another civilian for private reasons and from person-al matice. The laws and usages of war have nothing to do with the homicide. There is nothing military in the act, or that savors of the military, and the laws and customs of war, as used in this connection, are meaningless

and senseless.

In the conduct and management of this cause, I have In the conduct and management of this cause, I have deemed it advisable for the interests of the accused to bring forward this plea to the jurisdiction of the court at the close of this testimony, instead of regularly filing it before that testimony was opened. For the plea to the jurisdiction, though generally pleaded before the trial is had, may be heard at any time, for if the court have no jurisdiction, (and censent of parties cannot even confer it,) the trial is void, and whalever is done is coronn non judios, and without authority. O'Brien, page

[See Fourth Page.]