ADVANCE SHEET– SPECIAL ISSUE

President's Letter

In this difficult time, when so many of our members and readers, particularly those of my generation, are 'shut in', it seemed useful to supply them with links to cultural sites and historical reference sources, as well as to continue our lecture series via Zoom and to supply in our new magazine texts of permanent value that transcend the passions and concerns of the moment. Thus our last two issues contained Vannevar Bush's cautionary words about the abandonment of settled political values to fear in times of crisis, Dean Acheson's reflections on the judicial activism of the 1850s and 1930s, and Walker Lewis' dramatic description of some of the absurdities of the prohibition period. In the same spirit, this issue contains John Connolly's dispassionate discussion of the virtues and defects of judicial elections, and the warnings of a then young Fabian Socialist, Harold J. Laski, against over-reliance on expert advice and the need for weighing it against public concerns, always remembering that the scientific spirit at its best (particularly in the biological sciences) involves a healthy element of skepticism and empiricism. Certainly the present crisis, and the way it has been handled, has promoted new interest in Justice Brandeis' view of the States as 'Laboratories of Democracy.'

When the State's leading newspaper runs a lead editorial identifying a perhaps overly libertarian Congressman with those "using the Nazi 'work sets you free slogan in Chicago" and observes "Maybe some are simply in lockstep with fascism, who knows", (May 5) the prophecy of one of the few outspoken prophets of the epidemic, Laurie Garrett, that society may descend into "collective rage" may be realized. We should remember that the house arrest now imposed exceeds anything known in democratic or even dictatorial countries even in wartime. Those seeking some relief from it can be criticized, but it is useful to be reminded of the consequences of over-heated rhetoric about politics. There has been too much of it, both from the White House and from self-righteous editors. Lawyers and judges provide the institutional memory of society, and should resist these tendencies.

"I believe," Learned Hand wrote in 1952, "that that community is already in process of dissolution where each man begins to eye his neighbor as a possible enemy, where non-conformity with the accepted creed, political as well as religious, is a mark of disaffection; where denunciation, without specification or backing, takes the place of evidence; where orthodoxy chokes freedom of dissent; where faith in the eventual supremacy of reason has become so timid that we dare not enter our convictions in the open lists, to win or to lose....The mutual confidence on which all else depends can be maintained only by an open mind and a brave reliance upon free discussion."

To that end, we include the address of Reverdy Johnson on the inadmissibility of the use of military commissions in peacetime, even in response to the outrage of the Lincoln assassination. Johnson's plea on behalf of his client, Mary Surratt, was in vain. She was hanged, with three others, in the Washington Navy Yard with the support of President Andrew Johnson. The commission device was used to avoid the limitations of the law of conspiracy, and the result is today not regarded as a triumph of American justice. One of those hanged asserted Mrs. Surratt's innocence, several of the commissioners sought clemency for her, and three of her co-defendants were ultimately pardoned by the President.

Unlike virtually all of Baltimore's public and academic libraries, we have maintained both email and borrowing facilities throughout the present crisis, while instituting a new magazine and new zoom events. The crisis has had a significant though modest impact on both our appearance fee revenues and endowment. We had previously planned a capital gift campaign. This is obviously not a good time for it. For those who appreciate our services, we have two more modest suggestions:

a) unbeknownst to most of you, the recent virus relief package contains a new tax law provision allowing non-itemizers claiming the standard deduction to also deduct up to $300 in charitable gifts in 2020. Gifts to the Bar Library from this modest allowance would be welcomed.

b) many stockholders have received small distributions of stock as a result of corporate spin-offs. These can be easily transferred to the Library by a letter to your broker instructing a transfer to Charles Schwab account 1162-6963.

George W. Liebmann

Whatever We Can Do

My son Francis is a fan of the Rocky film series. He is fond of the title character, a simple, decent man, who lives his life much as he fought inside the ring, straight ahead, with courage and without pretense. He particularly likes a quote from the last Rocky film, *Rocky Balboa,* in which the Rock tells his son:

"You, me, or nobody is gonna hit as hard as life. But it ain't about how hard you hit. It's about how hard you can get hit and keep moving forward; how much you can take and keep moving forward. That's how winning is done!"

Over the last several months all of us, some more than others, have learned the truth of these words. Life has, in fact, hit us hard. Some have lost loved ones, some jobs, while all have lost the lives that we had known, but yet, we keep moving forward.

My dad, Joseph Andrew Bennett was born in 1915. He was most likely too young to know that people were dying all around him during the flu pandemic of 1918. As a member of a large and poor family, I am sure he did know and experience the struggles brought on by the Great Depression. Years later he would find out that a day at the beach is not such a great thing when people are shooting at you, as he experienced firsthand in the Pacific from 1942 to 1945. My mother, May Frances Bennett would lose a child to sudden infant death and her first husband who suffered a major heart attack in his early thirties leaving her a widow with four children. They kept moving forward.

I just wanted to let all of you know that we are here and if there is anything we can do to help you "move forward" with your practice, let me know. Our collections and databases are still, as they have ever been, at your service. If you need something call us (410-727-0280) or e-mail us (jwbennett@barlib.org) and I will make sure that you get what you need. Material can be scanned and e-mailed or even picked up at the door of the courthouse.

Let us keep moving forward. As Rocky said "That's how winning is done!"

Joe Bennett

In Defense of Judicial Elections

By John J. Connolly *

As Maryland again contemplates elimination of contested judicial elections,[1] it is worth considering why the state adopted them in the first place, and whether the framers of the state's constitutions would have anything meaningful to say before their judicial system is displaced. To start at the bottom: the white men who drafted the state's constitution in 1867 did not permit African-Americans or women to vote in judicial elections, much less to serve as judges themselves. Nevertheless, the framers of Maryland's three 19th Century constitutions were acutely concerned about the quality and independence of Maryland's judiciary and, in pursuit of those values, they unintentionally fashioned a system that eventually would promote diversity as well. They settled on a hybrid system of appointments followed by elections and long terms in office, which could be terminated by the political branches for misbehavior in office, criminal misconduct, and incompetence. Subsequent generations of constitutional framers have chipped away at the elective component of the judiciary and shifted the principal removal and disciplinary authority from the political branches to the judiciary itself, while simultaneously expanding the grounds for judicial discipline. Eliminating the final elective components of the judiciary will free judges from campaigning and soliciting campaign funds, but the net effect on judicial quality and independence is not so clear. In Maryland's system – which is very different

[1] *See* An Act concerning Judges – Election, Retention, and Mandatory Retirement Age, H.B. 11, Md. Gen. Assembly (pre-filed Oct. 15, 2019).

from the federal system of lifetime appointments during good behavior – the electorate serves as a useful check on abuse of the appointment and removal power.

How We Got Here

1776 to 1850. Maryland's first constitution (in 1776) established an appointed rather than an elected judiciary, as would the federal constitution 13 years later. This was not surprising in that era: the early state constitutions and the original U.S. Constitution were far less committed to direct popular elections than today's versions. An amendment to the constitution in 1805 reconstituted the judiciary into six judicial districts, with three judges (one chief) per district, but the appointive system was retained.[2] The chief judges formed the Court of Appeals and the three district judges formed county courts in the counties of each district. Judges continued to hold office during good behavior, but the 1805 amendment permitted removal "by the governor upon the address of the general assembly, provided that two-thirds of all the members of each house concur in such address."[3] Removal by "address" of the General Assembly was analogous but not identical to impeachment, and eventually removal by both address and impeachment would be authorized.

Direct voting for public officials became more prevalent in the Jacksonian era in the early 19th Century. The 1776 Maryland Constitution was amended in 1837 to provide for direct election of the governor and state senators, for instance, although the judiciary remained appointed by the governor with the advice and consent of the (now-abolished) governor's council.[4]

1851 to 1863. Elections came to the Maryland judiciary through the 1851 Constitution, drafted by convention the preceding year. The 1851 Constitution established four judicial districts and eight judicial circuits. One judge was elected from each district and those four persons formed the Court of Appeals. Separately, one judge was elected from within each circuit to sit as a circuit (or trial-level) court within the jurisdictions that comprised the circuit. Baltimore City had two additional civil courts and one additional criminal court. All judges served ten-year terms and were removable for misbehavior on conviction in a court of law or by the governor "upon the address of the General Assembly."[5]

The debates at the 1850 constitutional convention reflect careful consideration of the merits and the drawbacks of an elected judiciary. Some delegates insisted that their constituents were demanding an elected judiciary while others claimed to have heard no such demands.[6] Judicial independence was a paramount value on all sides of the debate, but the delegates disagreed about whether elections would promote or impede independence. By the time of the 1850 convention, the delegates had ample experience with judges appointed to serve during good

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[2] 1804 Md. Laws ch. 55, § 1.
[3] *Id.*
[4] Md. Const. (1776) § 40; *see id.* § 48; *see generally* Dan Friedman, The Maryland State Constitution: A Reference Guide 3-4 (2011).
[5] Md. Const. (1851) art. IV, §§ 4, 9.
[6] *See* II 1850 Debates 467.

behavior on both the state and federal level, and many were unhappy with that system.[7] They complained that appointed judges were often effectively selected by political parties.[8] The people might be better at selecting judges than the governor, who would be "obliged to rely altogether upon the information he derives from his friends. A little caucus of politicians will meet here and there and send a deputation or petition to the Governor to have a certain person appointed judge, under the influence of political considerations."[9] The delegates seemed to understand that an appointed judge, even one with lifetime tenure, is not necessarily an independent judge. The question is: who is the judge's patron? An appointed judge owed his office to the system that appointed him, which usually meant party officials, and if the judge wanted reappointment he would have to keep an eye on political parties during his term. Lifetime tenure could alleviate that concern, but at a high cost with respect to accountability. By comparison, a judge's integrity and character might be improved by "the public sense of merit, and the public supervision, which all exercise over judicial conduct."[10]

Several delegates observed that the concept of judicial independence was misunderstood: it derived from the British system, where it meant independence from the king, but not from the people.[11] One argued that "I want to make the judges independent, but not independent of the people, not independent of that wholesome restraint and moral sense which belongs to public opinion …. He who wants to make [judges] independent of that, is no republican."[12] Others argued that "public supervision" undermined independence; indeed, some argued that judges needed to be independent of the sovereign, whether that be the king as in England or the people as in the United States.[13] Under this view, the people had a right to frame a constitution that would include elected judges, but they also had a right to frame a constitution that would cede that authority to public officials, and that system was preferable.

Although it is difficult to discern a single, consensus reason why the 1850 delegates adopted judicial elections, it appears that a majority of delegates believed they were "restoring" to the people the right to select the public officials who would govern them. In a republic, where "all government of right originates from the people," the people had a right to select their judges.[14]

1864 to 1866. Maryland's next constitution, drafted and ratified in 1864 during the midst of the Civil War, expanded the Court of Appeals to five judges and revised the judicial circuits but mostly retained the system of judicial elections.[15] The four Baltimore City courts each consisted

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[7] *See Bernstein* v. *State*, 29 A.3d 267, 280-84 (Md. 2011).

[8] II 1850 Debates 490; *see also* Kermit Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary 1846-1860*, 46 The Historian 337 (1983).

[9] II 1850 Debates 464; *see also id.* at 468 "the whole experience of the State had shown, and I supposed that every body would admit it, that the appointing power of Maryland had been influenced by considerations of party feeling[s]."

[10] II 1850 Debates 498.

[11] II 1850 Debates 464-65.

[12] II 1850 Debates 465.

[13] II 1850 Debates 473-74.

[14] II 1850 Debates 468. The delegate in this instance was actually arguing the contrary position, but his view did not prevail.

[15] *See* Md. Const. (1864) art. IV § 3.

of one elected judge who held office for a term of 15 years.[16] The 1864 Constitution also revised the orphan's courts, whose judges were elected but served shorter terms.

The 1864 debates reflect some reconsideration of an elected judiciary, mostly recycling the arguments aired during the 1850 debates.[17] By 1864, however, the delegates had 13 years' experience with an elected judiciary and, for the most part, they were satisfied.[18] "It may be that we have not in general obtained judges so profound in judicial learning as we had under the former system; but we have obtained judges who have in the opinion of our people met the wants of the people."[19] Although a convention committee had recommended return to an appointive system, after floor debate the full assembly voted 51-19 to retain elections.[20]

1867 forward. The 1867 constitutional convention occurred in the politically divisive era immediately after the Civil War, but its delegates consisted entirely of Democrats or affiliated parties after the more progressive Republican party refused to participate. As a result, the delegates did not have bitter debates about the major civil rights issues that were emerging in the post-War era, and the constitution they framed was severely regressive in that respect. Nevertheless, the delegates thoroughly debated the structure of the judiciary and carefully considered most of the issues that drive the debate today: appointment vs. election; length of term; eligibility for reappointment; age limits; and authority to remove for misconduct.

By their own reports, the 1867 delegates were "nearly equally divided between the appointive and elective system."[21] Many delegates wanted to return to the original design of appointments with terms that lasted during good behavior,[22] while many others contended, in the Jacksonian spirit, that the people deserved to select their public officials and had done a decent job of it in the preceding 16 years.[23] Some argued for elections followed by terms during good behavior, or appointments followed by shorter, fixed terms.[24] After lengthy and mostly high-minded debate, the delegates retained an elective system but extended judicial terms to 15 years (excepting orphan's court judges). They also included an appointive component that would become significant if the 1867 Constitution endured (unlike its two immediate predecessors): when a judge's term expired, or when a judge left office during the term, the governor appointed a replacement who served until the next general election for members of the General Assembly. At that point the position would be filled by an open election.[25] Assuming the appointed judge ran for election, he or (much later) she would have been an incumbent for a maximum of two years at the time of the election. Thus, the governor's appointive role would become substantial when the first post-ratification election cycle ended. Most judicial positions would then be filled

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[16] Md. Const. (1864) art. IV § 31.

[17] *See, e.g.*, I 1864 Debates at 1384-92.

[18] *See id.* at 1390 ("The experience I have had in the last fourteen years has confirmed in my mind the fitness and propriety of my vote in the convention of 1850, to make this system an elective system ….").

[19] *Id.*

[20] *Id.* at 1391.

[21] John J. Connolly, Republican Press at a Democratic Convention 62 (2018).

[22] *E.g.*, Republican Press, *supra* n.21, at 547.

[23] Republican Press, *supra* n.21, at 551-52; *id.* at 574 ("The independence of the judiciary was that it should be free from the power of the Legislative and Executive, but not from the power of the people.").

[24] Republican Press, *supra* n.21, at 547-48.

[25] *See* Md. Const. (1867) art. IV, § 5. This provision has been modified slightly in terms of when the election is held. *See* Md. Const. art. IV, § 5.

by the governor, and the electorate would effectively ratify or reject those judges after they served a short period on the bench. Of course, nothing prohibited an unappointed candidate from running against the incumbent.

The 1867 delegates thought long terms were necessary to encourage skilled lawyers to give up their law practices to serve on the bench.[26] But they were not sure that elections at years 2 and 17 were sufficient to restrain misbehaving judges, so they included several means of removing judges during their terms. The governor was required to remove a judge "on conviction in a Court of Law, of incompetency, of willful neglect of duty, misbehavior in office, or any other crime"; or on impeachment by the General Assembly; or on "the address of the General Assembly."[27] In addition, judges became ineligible at age 70, although the General Assembly by resolution could continue a judge's pending term when a judge reached that age.[28] The General Assembly also had authority to "retire" a judge from office for sickness or physical or mental infirmity."[29]

The 1867 appointive/elective system largely prevails today for circuit court and orphans court judges (who were elected for shorter terms).[30] The system was later amended for appellate judges, who are now appointed by the governor and face "retention elections" – i.e., up or down votes to retain the judge rather than a selection among competing candidates – approximately two years after appointment and every ten years thereafter.[31] District court judges, who did not exist in 1867, are wholly appointive.[32]

The current constitution retains the manifold grounds for removing judges: conviction, impeachment, "address," term expiration without reappointment, compelled retirement for infirmity, age limits and, for circuit court judges, rejection by the electorate. Yet these grounds were deemed insufficient and the Constitution was amended in the late 20th Century to permit removal or discipline of judges by the Court of Appeals, acting through a judicial disabilities commission.[33] This is a radical change to the 19th Century model and is a much greater threat to judicial independence than judicial elections. To be sure, legislative removal of judges was historically very rare – never by impeachment and once, in the 1860s, by address.[34] Conviction in a court of law, or the threat of conviction, had been slightly more common. Election losses were more common but still relatively rare, and term expirations and aging out have been quite common.[35] All these methods contrast with the federal system, where service is for life and removal is available only by impeachment.

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[26] *E.g.*, Republican Press, *supra* n.21, at 558.
[27] Md. Const. (1867) art. IV § 4.
[28] Md. Const. (1867) art. IV, § 3. The exception was later eliminated. 1931 Md. Laws ch. 479 (ratified Nov. 8, 1932).
[29] *Id.*
[30] Md. Const. art. IV, §§ 3, 5, 40.
[31] Md. Const. art. IV, § 5A.
[32] Md. Const. art. IV, § 41D.
[33] Md. Const. art. IV, §§ 4A, 4B.
[34] *See* John J. Connolly, *The Maryland Constitution and Federal Impeachment* 3-4 (Feb. 2020) (available at: https://sites.google.com/site/connoljohn/).
[35] *See Bernstein* v. *State*, 29 A.3d 267, 285 (Md. 2011).

Although the delegates to the surviving 1867 constitutional convention were all members of one political party, their debates reflected a robust concern of party influence on the judiciary. Some delegates thought popular elections promoted impartiality rather than partiality: "To be respected and popular, a Judge must be impartial."[36] Lifetime tenure was both lauded and disparaged. One delegate explained that "[t]he people of Maryland had lost faith in the Supreme Court of the United States, and had ceased to look to it for redress of grievances."[37] Other delegates argued that "electing a Judge for fifteen years, and making him re-eligible, was the worst that could be devised" because "[h]e would have to be elected by nominating conventions and the machinery of politics."[38]

In the end, the debates of the 1867 convention (which were not recorded verbatim) do not clearly establish which arguments concerning judicial elections were persuasive to a majority of the delegates. Perhaps they were content to retain the status quo, which for them would have meant the 1851 Constitution rather than the 1864 "Republican" Constitution. But the 1867 debates do make clear that the delegates thoroughly aired the issues in good faith; that they carefully considered the history of the Maryland judiciary and the views of their predecessors in Maryland and in other states; and that they chose a system that they thought would best promote an independent, nonpartisan, and skilled judiciary.

Why Elections Matter

In modern times, the elective component of the judiciary is often seen as an embarrassing anachronism, particularly at the circuit court level where elections can be contested.[39] The standard criticism is that campaigning and fundraising are incompatible with independence on the bench. These criticisms could apply as easily to elected officials in the executive and legislative branches – perhaps more easily because terms in office are much shorter. But most people tolerate campaign promises and fund-raising in the political branches as necessary evils in a democracy, and they are content to draw the line at bribery. Judges, on the other hand, should not be political. What could be worse than a judge hearing a case where one of the attorneys donated to the judge's campaign or, perhaps worse, where a sitting judge up for re-election hopes that one of the attorneys will donate to her campaign?

These are serious questions, but they are not self-answering, and the delegates at each of the 19th Century constitutional conventions gave them thoughtful consideration.[40] Virtually all the delegates had the same overriding objectives: independence and quality on the bench without bankrupting the State. Although the 19th Century debates did not reflect concern about fundraising per se, they showed great concern about the influence of political parties. Of course,

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[36] *E.g.*, Republican Press, *supra* n.21, at 551.

[37] Republican Press, *supra* n.21, at 554. The concern seemed to be with the case of *Ex parte Milligan*, 71 U.S. 2 (1866), which held that civilians were not subject to trial by military commission while the civil courts were functioning. The Supreme Court announced its judgment in April 1866 but did not release the written opinions in the case until December.

[38] Republican Press, *supra* n.21, at 548.

[39] *E.g.* Editorial, *Ending judicial elections*, The Baltimore Sun (Mar. 4, 2015); *see also* John J. Connolly, *Does Maryland Need More Oversight of Judges* (Dec. 2017) (analyzing *Sun* editorial calling for additional judicial oversight and complaining again about judicial elections) (available at https://sites.google.com/site/connoljohn/).

[40] *E.g.*, Republican Press, *supra* n.21, at 549-57.

the delegates were not concerned about racial or gender diversity, but they were concerned about political and geographical diversity, as well as the right of the electorate to select their public officials.

Before we trash their system, consider two reasons why judicial elections make sense in the modern environment. First, judicial elections serve as a check on the governor's appointive power, which, for circuit court judges, does not require the advice and consent of the senate.[41] The present governor is a Republican who won election and re-election with wide support across the state. Yet he has very little support in heavily Democratic Baltimore City, the state's largest judicial district by number of circuit court judges. The governor would be within his rights to fill the Baltimore bench with white, male, law-and-order conservatives. But under the current system, appointments in that vein would draw serious challengers at the next general election and the governor might well lose his appointees. That possibility encourages the governor to appoint judges who will reflect the values of the local communities in which they serve.

Of course, the electoral pendulum swings both ways, and occasionally the governor has appointed an African-American judge who was promptly ousted by the electorate. This is a serious problem if race (or gender, etc.) is the motivating factor in ousting a sitting judge, but that concern seems to have lessened substantially in recent decades. Many people of good faith argue that this salutary trend is a reason to eliminate judicial elections. This argument is why we should recall the framers' rationale. Although racial and gender prejudices in appointing judges have abated over time, anecdotal evidence suggests that partisanship in appointments has increased, at least at the federal level. Maryland's system tends to moderate extremes of all types, including partisanship and ideology.

Second, judicial elections serve as a check on what has become an exceedingly broad disciplinary power that now resides in large measure with the judiciary itself, and thus permits discipline and removal of a judge by persons who themselves are (mostly) not accountable to the electorate. Under the current state constitution, the Court of Appeals upon recommendation of the judicial disabilities commission may remove any member of the judiciary for, among other things, "conduct prejudicial to the proper administration of justice," a vague and open-ended term that has caused problems of application in other areas of law.[42] In one recent case, the commission recommended discipline against a district court judge who was performing a core judicial function.[43] Although the Court of Appeals properly declined to impose discipline, the judge had to retain counsel, defend herself at an adversarial commission hearing, and defend herself again before the state's highest court – all because an interest group complained that the judge had treated female litigants brusquely in two routine protective-order cases. The

[41] As introduced, the bill pending before the General Assembly would not have added an advice-and-consent requirement to the governor's power of appointing circuit court judges. As this article was going to press (March 6, 2020), there was some discussion that a compromise had been reached among interested parties in which an advice-and-consent provision would replace at least some elections. An advice and consent requirement would allay some but not all of the concerns about eliminating elections. Presumably the local jurisdiction's senate delegation would moderate gubernatorial appointments that were significantly out of tune with the local jurisdiction's populace.

[42] *See, e.g.*, 2 Geoffrey Hazard et al., The Law of Lawyering § 69.06 (2016-2 Supp.) (discussing ABA Model R. Prof'l Cond. 8.4(d)).

[43] *See In re Reese*, 193 A.3d 187 (Md. 2018); *see also In re White*, 181 A.3d 750 (Md. 2018) (recounting the procedural complexity, and doubtless expense, in a judicial discipline case before the commission).

commission has also filed a string of cases that are founded partly on judicial discourtesy; while courtesy among the judiciary is a valued quality, the authority to police it is a real threat to judicial independence.[44]

Nevertheless, neither the Court of Appeals nor the judicial disabilities commission has authority under the current system to disqualify a removed judge from standing for election. Thus, before removing a judge, the Court of Appeals must consider whether removal will solve the problem, or whether it will create a new one by engendering a judicial election between the removed judge and a sitting judge. And while most of the State would be willing to rely upon the good faith of the Court of Appeals, the activities of the judicial disabilities commission have created substantial grounds for concern about judicial independence.[45]

To be sure, campaigning and fundraising create concerns about judicial independence. But those concerns are managed by a code of judicial conduct and a robust body of law on judicial recusal in individual cases, and more serious line-crossing would be subject to Maryland's many methods of removing judges. While it is easy to poke fun at the awkwardness of judicial campaigning, where the candidates' usual objective is to say nothing controversial or even specific, the effect of judicial campaigning is not all bad. Judges are pushed out of their chambers to hear the concerns of people outside the judge's normal social circles. The danger of extreme independence is extreme insularity, and campaigning surely tempers that concern.

Judicial elections are also criticized on the ground that the governor, advised by nominating commissions who vet the candidates,[46] is better at choosing judges than the electorate. That is basically the position of constitutional framers in the pre-Jacksonian era – that too much democracy is bad for the people – except the earliest framers applied that philosophy to the executive and the upper house of the legislature as well as to the judiciary. The post-Jacksonian framers in Maryland debated these concepts and, in the end, decided the people had a useful role in the selection of judges. That system produced a respected judiciary for 150 years and eventually it would ensure a diverse bench as well.

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At the 1867 constitutional convention, the Democratic delegates often disparaged Hugh Lennox Bond, a Republican and an abolitionist who was then sitting as a judge of the criminal court of Baltimore City.[47] The delegates apparently believed Judge Bond owed his office to an elective system that had been corrupted by federal military presence during the War era. They accurately predicted that he would not retain his position under the new constitution,[48] which

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[44] *See* John J. Connolly, *Courts and Courtesy* (Feb. 2017) (available at https://sites.google.com/site/connoljohn/); *see also* John J. Connolly, *Delay and Secrecy in Judicial Discipline – Case Study* (March 2017).

[45] *See* John J. Connolly, *Does Maryland Need More Oversight of Judges?* (Dec. 2017) (available at: https://sites.google.com/site/connoljohn/).

[46] There is no constitutional requirement that the governor use nominating commissions, but that has been the practice since the 1970s. See Gov. of Md. Exec. Order 01.01.2019.05 (Judicial Nominating Commissions).

[47] *See* Republican Press, *supra* n.21, at 563 & n.359; *id.* at 567, 710-11 & n.428; *but see id.* at 729 & n.435.

[48] In fact, in 1867 Bond ran not for judge but for governor. He lost to Oden Bowie, who had been one of the state's largest slaveholders prior to emancipation. Bond went on to a distinguished career on what became the Court of

would void all existing state offices in favor of new elections. In the delegates' view, Judge Bond was out of touch with the "true" Baltimore City electorate, which was largely Democratic and, it went without saying, all white and all male.[49] The delegates contrasted Judge Bond with an iconic judge they considered to be so above reproach that he could win election regardless of party: Chief Justice Roger Taney.

One lesson that could be drawn today from this hypothetical 1867 election campaign between Bond and Taney is that the electorate can make the wrong choice, particularly with respect to an office as inscrutable to the public as judge. But that would be the wrong lesson for modern times because the 1867 election results would have been warped by the inability of African-Americans or women to vote. When the right of suffrage was expanded – and the 1867 delegates foresaw the right coming to African-Americans, if not to women – the 1867 judicial system ultimately would produce judges that reflected the demography and the values of the communities they served. To be sure, this took too long, but not as long as it took in the lifetime-tenured federal judiciary in Maryland. Maryland's first black judge, E. Everett Lane, was appointed in 1952 as a police magistrate and in 1957 as a People's Court judge, winning re-election in 1958.[50] Maryland's first female judge was appointed to the Circuit Court for Montgomery County in 1955 and won election to a 15-year term the next year.[51] Maryland's federal district court did not have a black or female member until 1979 – and both had previously served in the state judiciary. Judge Joseph C. Howard Sr., Maryland's first black federal district judge, is credited with forcing Maryland governors to appoint more blacks when he won a 1968 contested judicial election in Baltimore City.

This outcome illustrates both the irony and the majesty of democratic processes. By putting some measure of faith in the electorate, the many racist delegates of the 1867 constitutional convention planted the seeds of their own comeuppance. To be sure, the electorate probably is not very good at evaluating judicial nominees. There is certainly much to be disliked about judicial campaigning and fundraising. But the electorate is reasonably good at recognizing and correcting major injustices. And the electorate's occasional acts of recalcitrance, and more importantly the possibility of such acts, have moderated and improved Maryland's judiciary over the very long term. The federal system has many merits in judicial independence, but it has also led to appointment of many partisan and polarizing judges who are not accountable to the public. Perhaps the time to abandon contested judicial elections in Maryland has come. But in a democracy, removing power from the people always comes at a price.

* John J. Connolly has been a member of the Bar Library Board of Directors since 1996. A Member of the American Law Institute and Fellow of the American Bar Foundation, he is the author or editor of two books on the Maryland Constitution and a number of articles on Maryland law and legal history and legal ethics. Mr. Connolly's publications are collected at https://sites.google.com/site/connoljohn/. As part of the Bar Library Lecture series, Mr.

Appeals for the Fourth Circuit, and is remembered more favorably today than all or virtually all of the 1867 delegates, as well as Chief Justice Taney.

[49] *See* Republican Press, *supra* n.21, at 475 & n.328.

[50] *E.E. Lane, 1st Md. Black judge, dies*, The Sun (Baltimore), Mar. 15, 1984, at C5.

[51] Matt Schudel, *Pioneering Judge Kathryn DuFour Dies*, Wash. Post, Feb. 10, 2005, at B7.

Connolly will be presenting Maryland Federal Courts During The Civil War era on May 21 at 6:00 P.M.

The Raw Materials of History

For the benefit of those shut in to their homes or denied access during the current crisis to less enterprising libraries than ours, we offer the following guide of links to historical sources online. While secondary sources are difficult to access at this time, that is not true of the digitally-accessible primary source collections listed below:

Legal collections:

United States Supreme Court briefs and oral arguments since 1955: www.oyez.org/cases/[year]

Fourth Circuit briefs and oral arguments since 2011: www.ca4.uscourts.gov/oral-argument

Maryland Court of Appeals briefs and oral arguments since 2006: www.courts.state.md.us/coappeals/webcasts/webcastarchive

United States District Court oral histories of 14 recent judges including our friend the late Honorable James F. Schneider: www.mdd.uscourts.gov/oral-histories

Public documents

American history manuscripts: www.loc.gov/collections/?fa=subject:american+history

CIA declassified documents: www.cia.gov/library/readingroom/historical-colections

FBI historical documents: https://vault.fbi.gov/

State Department historical documents: www.foia.state.gov/search/search.aspx

National security documents: https://nsarchive.gwu.edu/project/able-archer-83-sourcebookOral H**istories**

United States Foreign Service: www.loc.gov/collections/foreign-affairs-oral-history/about-this-collection

British foreign office: www.chu.cam.ac.uk/archives/collections/bdohp/

United States history: www.library.columbia.edu/libraries/ccoh.html

Maryland history: https://collections.digitalmaryland.org/

www.mdhs.org/oral-history-collection-inventory (list only)

www. jscholarship.library.jhu.edu/handle/1774.2

Newspaper archives

New York Times:
https://archive.nytimes.com/www.nytimes.com/ref/membercenter/nytarchive.html

London Times: www.thetimes.co.uk/archive/

Maryland newspapers: http://speccol.msa.maryland.gov/pages/newspaper/digitized.aspx

Maryland maps:

www.lib.umd.edu/mdmap

My thanks to the President of the Bar Library Board Mr. George W. Liebmann for the above links.

Maryland Federal Courts During The Civil War Era

The Bar Library lecture series is back by way of **Zoom**. If you would like to join us for what should be a fascinating evening, please e-mail me at **jwbennett@barlib.org** and I will forward the **Zoom Link** to you the day of the program. If technology is not your cup of tea, do not let that stop you. Zoom is incredibly easy to use and we will send you the very simple instructions to use Zoom should you need them. Stay safe and we hope to see you with us on May 21.

On **Thursday, May 21, 2020**, at **6:00 p.m.**, John J. Connolly, a Library board member and a partner at Zuckerman Spaeder LLP, will present **"Maryland Federal Courts During The Civil War Era."** We invite those that will be watching to participate by contributing their questions. Zoom is an interactive platform.

The United States District Court for the District of Maryland recently installed on the Court's 7th floor a museum-quality exhibit on the work of Maryland's federal courts (district and circuit) during the Civil War era. Because you cannot currently go to the exhibit, we will bring the exhibit to you via Zoom. Mr. Connolly, who served on the committee that prepared the exhibit, will show slides of the exhibit and will speak about the functions of Maryland's federal courts as they transitioned from enforcement of the Fugitive Slave Act before the War to enforcement of the Reconstruction Amendments and civil rights laws afterward; considered allegations of treason against Marylanders who supported or fought for the Confederacy; and generally grappled with the authority of civil and military courts during wartime.

John J. Connolly has been a member of the Bar Library Board of Directors since 1996. A Member of the American Law Institute and Fellow of the American Bar Foundation, he is the author or editor of two books on the Maryland Constitution and a number of articles on Maryland law and legal history and legal ethics. Mr. Connolly's publications are collected at https://sites.google.com/site/connoljohn/.

Time: 6:00 p.m., Thursday, May 21, 2020.

Fabian Tract No. 235.

THE LIMITATIONS OF THE EXPERT

BY

HAROLD J. LASKI

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The Limitations of the Expert.

By **Harold J. Laski.**

The day of the plain man has passed. No criticism of democracy is more fashionable in our time than that which lays emphasis upon his incompetence. This is, we are told, a big and complex world, about which we have to find our way at our peril. The plain man is too ignorant and too uninterested to be able to judge the adequacy of the answers suggested to our problems. As in medicine we go to a doctor, or in bridge-building to an engineer, so in matters of social policy we should go to an expert in social questions. He alone, we are told with increasing emphasis, can find his way about the labyrinthine intricacies of modern life. He alone knows how to find the facts and determine what they mean. The plain man is simply obsolete in a world he has never been trained to understand. Either we must trust the making of fundamental decisions to experts, or there will be a breakdown in the machinery of government.

Now much of this sceptism is a natural and justifiable reaction from the facile and romantic optimism of the nineteenth century. Jefferson in America, Bentham in England did too easily assume not only an inherent rightness in the opinions of the multitude but also an instinctive wisdom in its choices. They did tend to think that social problems could be easily understood and that public interest in their solution would be widespread and passionate. From their philosophy was born the dangerous inference that any man, without training in affairs, could hope usefully to control their operation. They did not see that merely to formulate rightly the nature of a social problem is far more difficult than to formulate rightly a problem in physics or chemistry. No one assumes that the plain man is entitled to an opinion about the ether or vitamins or the historicity of the Donation of Constantine. Why should it be assumed that he has competence about the rates of taxation, or the validity of tariff-schedules, or the principles of a penal code? Here, as in the fields of pure and applied science, his well-being, it is argued, depends essentially upon accepting the advice of the disinterested expert. The more elbow-room the latter possesses, the more likely we are to arrive at adequate decisions.

No one, I think, could seriously deny to-day that in fact none of our social problems are capable of wise resolution without formulation of its content by an expert mind. A Congressman at Washington, a Member of Parliament at Westminster cannot hope to understand the policy necessary to a proper understand-

ing of Soviet Russia merely by the light of nature. The facts must be gathered by men who have been trained to a special knowledge of the new Russia, and the possible inferences from those facts must be set out by them. The plain man cannot plan a town, or devise a drainage system, or decide upon the wisdom of compulsory vaccination without aid and knowledge at every turn from men who have specialised in those themes. He will make grave mistakes about them, possibly even fatal mistakes. He will not know what to look for; he may easily miss the significance of what he is told. That the contours of any subject must be defined by the expert before the plain man can see its full significance will, I believe, be obvious to anyone who has reflected upon the social process in the modern world.

II.

But it is one thing to urge the need for expert consultation at every stage in making policy; it is another thing, and a very different thing, to insist that the expert's judgment must be final. For special knowledge and the highly trained mind produce their own limitations which, in the realm of statesmanship, are of decisive importance. *Expertise,* it may be argued, sacrifices the insight of common sense to intensity of experience. It breeds an inability to accept new views from the very depth of its preoccupation with its own conclusions. It too often fails to see round its subject. It sees its results out of perspective by making them the centre of relevance to which all other results must be related. Too often, also, it lacks humility; and this breeds in its possessors a failure in proportion which makes them fail to see the obvious which is before their very noses. It has, also, a certain caste-spirit about it, so that experts tend to neglect all evidence which does not come from those who belong to their own ranks. Above all, perhaps, and this most urgently where human problems are concerned, the expert fails to see that every judgment he makes not purely factual in nature brings with it a scheme of values which has no special validity about it. He tends to confuse the importance of his facts with the importance of what he proposes to do about them.

Each one of these views needs illustration, if we are to see the relation of *expertise* to statesmanship in proper perspective. The expert, I suggest, sacrifices the insight of common sense to the intensity of his experience. No one can read the writings of Mr. F. W. Taylor, the efficiency-engineer, without seeing that his concentration upon the problem of reaching the maximum output of pig-iron per man per day made him come to see the labourer simply as a machine for the production of pig-iron. He forgot the complexities of human nature, the fact that the subject of his experiments had a will of his own whose consent was essential

to effective success. Business men prophesied the rapid breakdown of the Russian experiment because it had eliminated that profit-making motive which experience had taught them was at the root of Western civilization. But they failed to see that Russia might call into play new motives and new emotions not less powerful, even if different in their operation, from the old. The economic experts of the early nineteenth century were fairly unanimous in insisting that the limitation of the hours of labour must necessarily result in a decrease of prosperity. They lacked the common sense to see that a prohibition upon one avenue of profit would necessarily lead to so intense an exploration of others as to provide a more than adequate compensation for the effort they deplored.

The expert, again, dislikes the appearance of novel views. Here, perhaps, the experience of science is most suggestive since the possibility of proof in this realm avoids the chief difficulties of human material. Everyone knows of the difficulties encountered by Jenner in his effort to convince his medical contemporaries of the importance of vaccination. The Royal Society refused to print one of Joule's most seminal papers. The opposition of men like Sir Richard Owen and Adam Sedgwick to Darwin resembled nothing so much as that of Rome to Galileo. Not even so great a surgeon as Simpson could see merit in Lister's discovery of antiseptic treatment. The opposition to Pasteur among medical men was so vehement that he declared regretfully that he did not know he had so many enemies. Lacroix and Poisson reported to the French Academy of Sciences that Galois' work on the theory of groups, which Cayley later put among the great mathematical achievements of the nineteenth century, was quite unintelligible. Everyone knows how biologists and physicists failed to perceive for long years the significance of Gregor Mendel and Willard Gibbs.

These are instances from realms where, in almost every case, measurable proof of truth was immediately obtainable; and, in each case, novelty of outlook was fatal to a perception of its importance. In social matters, where the problem of measurement is infinitely more difficult, the expert is entitled to far less assurance. He can hardly claim that any of his fundamental questions have been so formulated that he can be sure that the answer is capable of a certainly right interpretation. The student of race, for instance, is wise only if he admits that his knowledge of his subject is mainly a measure of his ignorance of its boundaries. The student of eugenics can do little more than insist that certain hereditary traits, deaf-mutism, for example, or hæmophilia, make breeding from the stocks tainted by them undesirable; he cannot tell us what fitness means nor show us how to breed the qualities upon which racial adequacy depends. It would be folly

to say that we are destined never to know the laws which govern life; but, equally certainly, it would be folly to argue that our knowledge is sufficient to justify any expert, in any realm of social importance, claiming finality for his outlook.

He too often, also, fails to see his results in their proper perspective. Anyone who examines the conclusions built, for example, upon the use of intelligence tests will see that this is the case. For until we know exactly how much of the ability to answer the questions used as their foundation is related to differentiated home environment, how effectively, that is, the experiment is really pure, they cannot tell us anything. Yet the psychologists who accept their results have built upon them vast and glittering generalisations as, for instance, about the inferior mental quality of the Italian immigrant in America; as though a little common sense would not make us suspect conclusions indicating mental inferiority in the people which produced Dante and Petrarch, Vico and Machiavelli. Generalisations of this kind are merely arrogant; and their failure to see, as experts, the *a priori* dubiety of their results, obviously raises grave issues about their competence to pronounce upon policy.

Vital, too, and dangerous, is the expert's caste-spirit. The inability of doctors to see light from without is notorious; and a reforming lawyer is at least as strange a spectacle as one prepared to welcome criticism of his profession from men who do not practise it. There is, in fact, no expert group which does not tend to deny that truth may possibly be found outside the boundary of its private Pyrenees. Yet, clearly enough, to accept its dicta as final, without examination of their implications, would be to accept grave error as truth in almost every department of social effort. Every expert's conclusion is a philosophy of the second best until it has been examined in terms of a scheme of values not special to the subject matter of which he is an exponent.

Everyone knows, for example, that admirals invariably fail to judge naval policy in adequate terms; and in Great Britain, at any rate, the great military organisers, men like Cardwell and Haldane, have had to pursue their task in face of organised opposition from the professional soldier. The Duke of Wellington was never brought to see the advantage of the breech-loading rifle, and the history of the tank in the last war is largely a history of civilian enterprise the value of which the professional soldier was brought to see only with difficulty.

The expert, in fact, simply by reason of his immersion in a routine, tends to lack flexibility of mind once he approaches the margins of his special theme. He is incapable of rapid adaptation to novel situations. He unduly discounts experience which does not tally with his own. He is hostile to views which are not set out in terms he has been accustomed to handle. No man is so

adept at realising difficulties within the field that he knows; but, also, few are so incapable of meeting situations outside that field. Specialism seems to breed a horror of unwonted experiment, a weakness in achieving adaptability, both of which make the expert of dubious value when he is in supreme command of a situation.

This is, perhaps, above all because the expert rarely understands the plain man. What he knows, he knows so thoroughly that he is impatient with men to whom it has to be explained. Because he practises a mystery, he tends to assume that, within his allotted field, men must accept without question the conclusions at which he has arrived. He too often lacks that emollient quality which makes him see that conclusions to which men assent are far better than conclusions which they are bidden, without persuasion, to decline at their peril. Everyone knows how easily human personality becomes a unit in a statistical table for the bureaucrat; and there must be few who have not sometimes sympathised with the poor man's indignation at the social worker. People like Jane Addams, who can retain, amid their labours, a sense of the permanent humanity of the poor are rare enough to become notable figures in contemporary life.

The expert, in fact, tends to develop a certain condescension towards the plain man which goes far towards the invalidation of his *expertise*. Men in India who have become accustomed to the exercise of power, cannot believe, without an imaginative effort of which few of them are capable, that the Indian is entitled to his own ideas of how he should be governed. Civil servants tend easily to think that Members of Parliament or Congress are an ignorant impediment to their labours. Professional historians, who cultivate some minute fragment of an epoch's history, cannot appreciate the superb incursions of a brilliant amateur like Mr. H. G. Wells. It has taken professional economists more than a generation to realise that the trade unions have a contribution to make to the understanding of industrial phenomena without which their own interpretation is painfully incomplete.

There is, in fact, not less in the expert's mind than in that of the plain man what Mr. Justice Holmes has termed an " inarticulate major premise " quite fundamental to his work. I have known an expert in the British Foreign Office whose advice upon China was built upon the assumption that the Chinese have a different human nature from that of the Englishmen; and what was, in fact, an obvious private prejudice was, for him, the equally obvious outcome of a special experience which could not brook contradiction. Judges of the Supreme Court have had no difficulty in making the Fourteenth Amendment the embodiment of the *laissez-faire* philosophy of the nineteenth century; and few of them have realised that they were simply making the law express their unconscious dislike of governmental experiment. The his-

tory of trade-union law in England is largely an attempt, of course mainly unconscious, by judicial experts to disguise their dislike of working-men's organisation in terms of a mythology to which the convenient name of "public policy" could be attached. The attitude of the British High Command to the death penalty, of lawyers like Lord Eldon to the relaxation of penal severity, of business men to secrecy in finance, of statesmen to proposals for institutional reconstruction are all revelations of the expert's dislike of abandoning premises which, because he has grown accustomed to them, he tends to equate with the inevitable foundations of truth.

The expert tends, that is to say, to make his subject the measure of life, instead of making life the measure of his subject. The result, only too often, is an inability to discriminate, a confuson of learning with wisdom. "The fixed person for the fixed duties," Professor Whitehead has written, "who in older societies was such a godsend, in the future will be a public danger." In a sense, indeed, the more expert such fixed persons are, the more dangerous they are likely to be. For your great chemist, or doctor, or engineer, or mathematician is not an expert about life; he is precisely an expert in chemistry or medicine, engineering or mathematics. And the more highly expert he is, the more profoundly he is immersed in his routine, the less he is likely to know of the life about him. He cannot afford the time or the energy to give to life what his subject demands from him. He restrains his best intellectual effort within the routine about which he is a specialist. He does not co-ordinate his knowledge of a part with an attempt at wisdom about the whole.

This can be seen from many angles. Lord Kelvin was a great physicist, and his discoveries in cable-laying were of supreme importance to its development; but when he sought to act as a director of a cable-laying company, his complete inability to judge men resulted in serious financial loss. Faraday was obviously one of the half-dozen outstanding physicists of modern times; but in the field of theological belief, he retained convictions which no man of common sense could accept. Mr. Henry Ford is obviously a business man of genius; but, equally obviously, his table talk upon themes outside his special sphere reveals a mentality which is mediocre in the extreme. Charles Babbage rendered immense service to the development of statistical science; but when he came to judge one of Tennyson's most famous poems he missed its beauty through an over-vivid sense of its failure to conform to the revelations of the census returns.

The expert, in short, remains expert upon the condition that he does not seek to co-ordinate his specialism with the total sum of human knowledge. The moment that he seeks that co-ordina-

tion he ceases to be an expert. A doctor, a lawyer, an engineer who sought to act in terms of his specialism as President or Prime Minister would inevitably fail; to succeed, he must cease to be an expert. The wisdom that is needed for the direction of affairs is not an expert technic but a balanced equilibrium. It is a knowledge of how to use men, a faculty of judgment about the practicability of principles. It consists not in the possession of specialised knowledge, but in a power to utilise its results at the right moment, and in the right direction.

III.

My point may, perhaps, be made by saying that *expertise* consists in such an analytic comprehension of a special realm of facts that the power to see that realm in the perspective of totality is lost. Such analytic comprehension is purchased at the cost of the kind of wisdom essential to the conduct of affairs. The doctor tends to think of men as patients; the teacher sees them as pupils; the statistician as units in a table. Bankers too often fail to realise that there is humanity even in men who have no cheque-books; Marxian socialists see sinister economic motive in the simplest expressions of the universal appetite for power. To live differently is to think differently; and to live as an expert in a small division of human knowledge is to make its principles commensurate with the ultimate deposit of historic experience. Not in that way does wisdom come.

Because a man is an expert on medieval French history, that does not make him the best judge of the disposition of the Saar Valley in 1919. Because a man is a brilliant prison doctor, that does not make him the person who ought to determine the principles of a penal code. The skill of the great soldier does not entitle him to decide upon the scale of military armament; just as no anthropologist, simply as an anthropologist, would be a fitting governor for a colonial territory peopled by native races. To decide wisely, problems must be looked at from an eminence. Intensity of vision destroys the sense of proportion. There is no illusion quite so fatal to good government as that of the man who makes his expert insight the measure of social need. We do not get progress in naval disarmament when admirals confer. We do not get legal progress from meetings of Bar associations. Congresses of teachers seem rarely to provide the means of educational advance. The knowledge of what can be done with the results obtained in special disciplines seems to require a type of co-ordinating mind to which the expert, as such, is simply irrelevant.

This may be looked at from two points of view. "Political heads of departments are necessary," said Sir William Harcourt,

" to tell the civil service what the public will not stand." That is, indeed, an essential picture of the place of the expert in public affairs. He is an invaluable servant and an impossible master. He can explain the consequences of a proposed policy, indicate its wisdom, measure its danger. He can point out possibilities in a proposed line of action. But it is of the essence of public wisdom to take the final initiative out of his hands.

For any political system in which a wide initiative belongs to the expert is bound to develop the vices of bureaucracy. It will lack insight into the movement and temper of the public mind. It will push its private nostrums in disregard of public wants. It will become self-satisfied and self-complacent. It will mistake its technical results for social wisdom, and it will fail to see the limits within which its measures are capable of effective application. For the expert, by definition, lacks contact with the plain man. He not only does not know what the plain man is thinking; he rarely knows how to discover his thoughts. He has dwelt so austerely in his laboratory or his study that the content of the average mind is a closed book to him. He is at a loss how to manipulate the opinions and prejudices which he encounters. He has never learned the art of persuading men into acceptance of a thing they only half understand. He is remote from the substance of their lives. Their interests and hopes and fears have never been the counters with which he has played. He does not realise that, for them, his technical formulæ do not carry conviction because they are, as formulæ, incapable of translation into terms of popular speech. For the plain man, he is remote, abstract, alien. It is only the juxtaposition of the statesman between the expert and the public which makes specialist conclusions capable of application.

That, indeed, is the statesman's basic task. He represents, at his best, supreme common sense in relation to *expertise*. He indicates the limits of the possible. He measures what can be done in terms of the material at his disposal. A man who has been for long years in public affairs learns the art of handling men so as to utilise their talents without participating in their experience. He discovers how to persuade antagonistic views. He finds how to make decisions without giving reasons for them. He can judge almost by intuition the probable results of giving legislative effect to a principle. He comes to office able to co-ordinate varied aspects of *expertise* into something which looks like a coherent programme. He learns to take risks, to trust to sub-conscious insight instead of remaining dependent upon reasoned analysis. The expert's training is, as a rule, fatal to these habits which are essential to the leadership of a multitude. That is why, for example, the teacher and the scholar are rarely a success in politics. For they have little experience of the need

for rapid decision; and their type of mental discipline leads them to consider truth in general rather than the truth of popular discussion. They have not been trained to the business of convincing the plain man, and modern government is impossible to those who do not possess this art.

Nothing, indeed, is more remarkable in a great public department than to watch a really first-rate public man drive his team of expert officials. He knows far less than they do of the affairs of the Department. He has to guess at every stage the validity of their conclusions. On occasion, he must either choose between alternatives which seem equally balanced or decide upon a policy of which his officials disapprove. Not seldom, he must quicken their doubts into certainties; not seldom, also, he must persuade them into paths they have thus far refused to tread. The whole difference between a great Minister and a poor one lies in his ability to utilise his officials as instruments. His success depends upon weaving a policy from the discrete threads of their *expertise*. He must discover certain large principles of policy and employ them in finding the conditions of its successful operation. He must have the power to see things in a big way, to simplify, to co-ordinate, to generalise. Anyone who knows the work of Lord Haldane at the British War Office from 1906 to 1911, or of Mr. Arthur Henderson as Foreign Secretary in the last eighteen months, can understand the relation between the statesman and his expert which makes, and which alone can make, for successful administration.

Its essence, as a relation, is that the ultimate decisions are made by the amateur and not by the specialist. It is that fact which gives them coherence and proportion. A cabinet of experts would never devise a great policy. Either their competing specialisms would clash, if their *expertise* was various in kind, or its perspective would be futile because it was similar. The amateur brings to them the relevance of the outer world and the knowledge of men. He disposes of private idiosyncrasy and technical prejudice. In convincing the non-specialist Minister that a policy propounded is either right or wrong, the expert is already half-way to convincing the public of his plans; and if he fails in that effort to convince, the chances are that his plans are, for the environment he seeks to control, inadequate or mistaken. For politics by its nature is not a philosophy of technical ideals, but an art of the immediately practical. And the statesman is pivotal to its organisation because he acts as the broker of ideas without whom no bridges can be built between the expert and the multitude. It is no accident, but an inherent quality of his character, that the expert distrusts his fellow-specialist when the latter can reach that multitude. For him the gift of popular

explanation is a proof of failure in the grasp of the discipline. His intensity of gaze makes him suspect the man who can state the elements of his mystery in general terms. He knows too much of minutiæ to be comfortable upon the heights of generalisation.

Nor must we neglect the other aspect of the matter. "The guest," said Aristotle with his homely wisdom, "will judge better of a feast than the cook." However much we may rely upon the expert in formulating the materials for decision, what ultimately matters is the judgment passed upon the results of policy by those who are to live by them. Things done by government must not only appear right to the expert; their consequences must seem right to the plain and average man. And there is no way known of discovering his judgment save by deliberately seeking it. This, after all, is the really final test of government; for, at least over any considerable period, we cannot maintain a social policy which runs counter to the wishes of the multitude.

It is not the least of our dangers that we tend, from our sense of the complexity of affairs, to underestimate both the relevance and the significance of those wishes. We are so impressed by the plain man's ignorance that we tend to think his views may be put aside as unimportant. Not a little of the literature upon the art of government to-day is built upon the supposition that the plain man has no longer any place in social economy. We know, for example, that he does not understand the technicalities of the gold standard. It is clear that it would be folly to consult him upon matters like the proper area for the generation of electricity supply, or the amount that it is wise for a government to spend in testing the action of pavements under changing temperatures and variations of load. But the inference from a knowledge that the plain man is ignorant of technical detail and, broadly speaking, uninterested in the methods by which its results are attained, is certainly not the conclusion that the expert can be left to make his own decisions.

For the results of the gold standard are written plain in the life of the average man. The consequences of an inefficient electricity supply are apparent to him every day. It is his motor-car which uses the roads, and he makes up his mind about the quality of the road service with which he is provided. Every degree by which he is separated from consultation about decisions is a weakening of the governmental process. Neither goodwill in the expert nor efficiency in the performance of his function ever compensates in a state for failure to elicit the interest of the plain man in what is being done. For the nature of the result is largely unknown save as he reports his judgment upon it; and

only as he reports that judgment can the expert determine in what direction his plans must move. Every failure in consultation, moreover, separates the mind of the governors from those who are governed; this is the most fertile source of misunderstanding in the state. It is the real root of the impermanence of autocracies which fail from their inability to plumb the minds of those by whose opinions, ultimately, they must live.

The importance of the plain man's judgment is, in short, the foundation upon which the expert, if he is to be successful, must seek to build. It is out of that judgment, in its massive totality, that every society forms its schemes of values. The limits of possible action in society are always set by that scheme. What can be done is not what the expert thinks ought to be done. What can be done is what the plain man's scheme of values permits him to consider as just. His likes and dislikes, his indifference and his inertia, circumscribe at every stage the possibilities of administration. That is why a great expert like Sir Arthur Salter has always insisted upon the importance of advisory committees in the process of government. He has seen that the more closely the public is related to the work of *expertise*, the more likely is that work to be successful. For the relation of proximity of itself produces conviction. The public learns confidence, on the one hand, and the expert learns proportion on the other. Confidence in government is the secret of stability, and a sense of proportion in the expert is the safeguard against bureaucracy.

At no time in modern history was it more important than now that we should scrutinise the claims of the expert more critically; at no time, also, was it more important that he himself should be sceptical about his claims. Scientific invention has given us a material power of which the possible malignancy is at least as great as its contingent benefits. The danger which confronts us is the quite fatal one that, by the increase of complexity in civilisation, we may come to forget the humanity of men. A mental climate so perverted as this would demonstrate at a stroke the fragility of our social institutions. For it would reveal an abyss between rulers and subjects which no amount of technical ingenuity could bridge. The material power that our experts multiply brings with it no system of values. It can only be given a system related to the lives of ordinary people to the degree that they are associated with its use. To exclude them from a share in its direction is quite certainly to exclude them also from a share in its benefits; for no men have been able in the history of past societies exclusively to exercise its authority without employing it ultimately for their own ends. Government by experts would, however ardent their original zeal for the public welfare, mean after a time government in the interest of

experts. Of that the outcome would be either stagnation, on the one hand, or social antagonism, upon the other.

IV

Our business, in the years which lie ahead, is clearly to safeguard ourselves against this prospect. We must ceaselessly remember that no body of experts is wise enough, or good enough, to be charged with the destiny of mankind. Just because they are experts, the whole of life is, for them, in constant danger of being sacrificed to a part; and they are saved from disaster only by the need of deference to the plain man's common sense. It is, I believe, upon the perpetuation of this deference that our safety very largely depends.

But it will be no easy thing to perpetuate it. The expert, to-day, is accustomed to a veneration not very different from that of the priest in primitive societies; for the plain man he, like the priest, exercises a mystery into which the uninitiated cannot enter. To strike a balance between necessary respect and sceptical attack is a difficult task. The experience of the expert is so different, his approach to life so dissimilar, that expert and plain man are often impatient of each other's values. Until we can somehow harmonise them, our feet will be near to the abyss.

Nor must we forget that to attain such harmony immense changes in our social habits will be necessary. We shall have to revolutionise our educational methods. We shall have to reconstruct the whole fabric of our institutions. For the first time, perhaps, in the history of mankind, we shall have, as a civilisation, deliberately to determine what kind of life we desire to live. We must so determine it remembering that the success of our effort will depend upon harnessing to its fortunes the profounder idealism of ordinary men and women. We shall appeal to that idealism only as we give it knowledge and persuade it that the end we seek is one in which it, too, can hope to share.

Reverdy Johnson (1796-1876)

Reverdy Johnson was a Senator from Maryland (Whig, Democrat, 1845-49, 1863-68), Attorney General (1849-50) under President Zachary Taylor and Minister to Great Britain (1868-1869). A key supporter of Stephen Douglas in 1860, Johnson became a proponent of emancipation although at the outset of the Civil War, he was a pro-slavery Democrat and opposed emancipation in District of Colombia in 1862.

Johnson was a conservative Unionist who "favored moderate measures," noted biographer Bernard C. Steiner.[1] He wrote: "After Lincoln's election and the secession of South Carolina, Johnson, without a moment's hesitation, took his place among the foremost advocates of union and opponents of secession. That position he never left. At the close of the war, he stated that he never had referred to the Confederates but as 'traitors, rebels or insurrectionists.'"[2]

Johnson's stature as a constitutional scholar was useful to the President. "With a delegation of prominent Baltimoreans, Johnson came to Lincoln to learn if he meditated invasion of the South, and thought the contents of Lincoln's confidential answer of April 24, that he intended merely to protect the capital, were speedily transmitted to the Confederate authorities, through Johnson's incautiousness, yet relations of cordial support of Lincoln by Johnson were established for the time. This led Lincoln to request Johnson to answer [Roger B.] Taney's opinion in *Ex parte Merryman*, as to the right of the President to suspend the writ of *habeas corpus*."[3] Johnson, supported President Lincoln against Chief Justice Roger Taney on the dispute over the suspension of *habeas corpus*. But he fought the administration on its dismissal of General Fitz John Porter after the Second Battle of Bull Run.

In the summer of 1862, Johnson served as Secretary of State William H. Seward's representative in New Orleans to resolve diplomatic disputes over seizure of foreign property. The actions had been taken by New Orleans' commander, General Benjamin Butler, who considered the Marylander a secessionist at heart. Butler was furious at Johnson's interference and wrote Seward: "Another such commissioner as Mr. Johnson sent to New Orleans would render the city untenable. The town got itself into such a state, while Mr. Johnson was here, that he confessed to me he could hardly sleep for nervousness, from a fear of a rising, and hurried

away, hardly completing his work, as soon as he heard Bull Run was to be attacked. The result of his mission here has caused it to be understood that I am not supported by the government and that I am soon to be relieved."[4]

Johnson also complained to President Lincoln about Union policies in Louisiana, writing on July 16, 1861: At a consultation, in which I was invited to participate, between Major Genl. Butler, Govr. Shepley, & myself, it was deemed all important that the Govr. should, at once, proceed to Washington to consult with you on the condition of this [state and] military department. The views which he will present are entirely concurred in by the Major Genl & myself, and are, as we jointly think, vital to the restoration of the State to the Union. So far[, for want, mainly,] of adequate military force, little has been done here to obtain the possession of this City, & the country, immediately surrounding it, and these even are not so secure as they should be. Whatever Union feeling (& it is said to be [to] have been extensive) there was at first in City & [state] has mainly [nearly] subsided, & [principally] from … an impression that it is the purpose of the Govt [to force the] Emancipation of the slaves. This impression grows, in a great measure from the course of Gen. Phelps, which by conduct and declaration, is calculated to [create] it; Depend upon it, my dear Sir, that unless this is at once, [corrected] this State can not be, for years, if ever, re-instated in the Union. [The presence] … of twenty or thirty thousand additional troops, at the earliest moment, is also required to hold the [state] & the City, & I trust that in both [respects,] that of slavery & troops, the views of the military authorities here, & the hopes of the Union citizens will be promptly & efficiently carried out."[5] President Lincoln responded:

Yours of the 16th by the hand of Governor Shepley is received. It seems the Union feeling in Louisiana is being crushed out by the course of General Phelps. Please pardon me for believing that is a false pretense. The people of Louisiana — all intelligent people everywhere — know full well, that I never had a wish to touch the foundations of their society or any right of theirs. With perfect knowledge of this, they forced a necessity upon me to send armies among them, and it is their own fault, not mine, that they are annoyed by the presence of General Phelps. They also know the remedy — know how to be cured of General Phelps. Remove the necessity of his presence. And might it not be well for them to consider whether they have not already had time enough to do this? If they can conceive of anything worse than General Phelps, within my power, would they not better be looking out for it? They very well know the way to avert all this is simply to take their place in the Union upon the old terms. If they will not do this, should they not receive harder blows rather than lighter ones?
You are ready to say I apply to friends what is due only to enemies. I distrust the wisdom if not the sincerity of friends, who would hold my hands while my enemies stab me. This appeal of professed friends has paralyzed me more in this struggle than any other one thing. You remember telling me the day after the Baltimore mob in April 1861, that it would crush all Union feeling in Maryland for me to attempt bringing troops over Maryland soil to Washington. I brought the troops notwithstanding, and yet there was Union feeling enough left to elect a Legislature the next autumn which in turn elected a very excellent Union U. S. Senator!
I am a patient man — always willing to forgive on the Christian terms of repentance; and also to give ample time for repentance. Still I must save this government if possible. What I cannot, will not do; but it may as well be understood, once for all, that I shall not surrender this game leaving any available card unplayed.[6]

Johnson's positions on slavery were hard to predict. He was defense counsel in the Dred Scott case, decided by the U.S. Supreme Court in 1857. But Lincoln aide William O. Stoddard reported in May 1862 after the President had signed a law ending slavery in the District of Columbia: "The little band of local slave-owners are still loud in their complaints at being 'plundered of their property,' and roundly assert their determination to test the Emancipation Act before the Supreme Court, with Reverdy Johnson for their counsel."[7] Johnson opposed congressional sanction of segregation on the capital's streetcars, arguing: "If a black man proposed to ride in a first class car upon any of the railroads, where there is no State statute preventing it, he has just as much right….to be transported upon that car as a white man. There is no more right to exclude a black man from a car designed for the transportation of white persons than there is a right to refuse to transport in a car designed for black persons, white men."[8]

Senator Johnson had doubts about the wisdom of black military recruitment but did not oppose it. During 1863, he was one of those Maryland politicians who quarreled with General Robert Schenck in his recruitment of Maryland slaves for the Army. John Hay recalled a visit in October 1862 by Johnson and presidential physician Robert Stone: "They think if the President will withdraw his [emancipation] proclamation the South would at once come back to the Union as soon as they could arrange the necessary machinery. Stone said if he did so he would be elected Presdt. by acclamation & Reverdy said if he did not, he was ruined." Hay called the comments: "Blind and childish groping after a fact which has been buried."[9]

Nevertheless, Johnson's support for the 13th Amendment abolishing slavery was instrumental in helping win Senate approval in April 1864. He told the Senate in an earlier debate: "I thank God that, as compensation for the blood, the treasure, and the agony, which have been brought into our households and into yours, it has stricken, now and forever, this institution from its place among our States."[10] In the April debate, he said: "I never doubted that the day must come, when human slavery would be terminated by a conclusive effort on the part of the bondsmen, unless that other and better reason and influence which might bring it about should be successful – the mild, though powerful, influences of that higher and elevated morality which the Christian religion teaches."[11]

Johnson had a distinctive and not very attractive appearance. Journalist Noah Brooks wrote "a very repellent, dishonest face he has, though it may be slander to say so. He is short, stout, round-shouldered, his white hair, a long head, pursed out lips, and a 'cockeye,' as the vulgar have it….He is a good lawyer, a dignified, sententious speaker, and, in the opinion of people other than General Ben F. Butler, very much of an old rat."[12]

Johnson was respected in the Senate, however, according to biographer Bernard C. Steiner: "In repartee, he was quick, his memory was so sure that he could easily refute careless statements; his acuteness was so great that he saw the real point at issue and aimed directly at it, or, if he thought that he might throw his antagonists off the true scent, he 'wandered' into discussion of themes more or less closely related. His relations to all the members were friendly and in debate he was most courteous. However emphatic his words might be in characterizing the policy of his opponents on the hustings, in the Senate his urbanity was almost unperturbed."[13]

Nevertheless, noted Steiner, Johnson came "to be an opponent of Lincoln" on many matters and "thought Lincoln, though he had done his best, yet had been largely responsible for the errors of other [military] officers through his interference."[14] Attorney General Edward Bates noted in his diary during the 1864 presidential campaign that a Washington had reported Senator Johnson's letter to a McClellan campaign meeting: "It is not long, but more terse and pointed than his letters usually are, and is, in fact, more calculated to damage Mr. Lincoln, than any one document that I have seen."[15]

Johnson later supported President Andrew Johnson on Reconstruction. President Johnson then appointed Senator Johnson as U.S. Minister to England. Johnson had been opposing counsel in McCormick patent case in which Mr. Lincoln participated. He was also counsel for Mary Surratt in the assassination conspiracy trial until he resigned over an insult to his character from the military tribunal that were acting as judges in the case.

Footnotes

1. Bernard C. Steiner, *Life of Reverdy Johnson*, p. 50.
2. Steiner, *Life of Reverdy Johnson*, p. 44.
3. Steiner, *Life of Reverdy Johnson*, p. 51.
4. Steiner, *Life of Reverdy Johnson*, p. 58 (Letter from Benjamin Butler to William H. Seward, September 19, 1862).
5. Annotated by the Lincoln Studies Center, Knox College. Galesburg, Illinois (Letter from Reverdy Johnson to Abraham Lincoln, July 16, 1862).
6. Abraham Lincoln Papers at the Library of Congress. Transcribed and Annotated by the Lincoln Studies Center, Knox College. Galesburg, Illinois (Letter from Abraham Lincoln to Reverdy Johnson, Saturday, July 26, 1862).
7. Michael Burlingame, editor, *Dispatches from Lincoln's White House: The Anonymous Civil War Journalism of Presidential Secretary William O. Stoddard*, p. 77 (May 5, 1862).
8. Steiner, *Life of Reverdy Johnson*, p. 94.
9. Michael Burlingame and John R. Turner Ettlinger, editors, *Inside Lincoln's White House: The Complete Civil War Diary of John Hay*, p. 98 (October 23, 1863).
10. Steiner, *Life of Reverdy Johnson*, p. 75 (February 9, 1864).
11. Steiner, *Life of Reverdy Johnson*, p. 78 (April 4, 1864).
12. Noah Brooks, *Mr. Lincoln's Washington*, p. 136 (March 13, 1863).
13. Steiner, *Life of Reverdy Johnson*, p. 61.
14. Steiner, *Life of Reverdy Johnson*, pp. 81-82.
15. Howard K. Beale, editor, *The Diary of Edward Bates, 1859-1866*, p. 413 (September 29, 1864).

The preceding biographical sketch is reprinted from Mr. Lincoln's White House (www.mrlincolnswhitehouse.org): "Visitors from Congress: Reverdy Johnson (1796-1876).

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

Mr. President and Gentlemen of the Commission:

Has the Commission jurisdiction of the cases before it, is the question which I propose to discuss. That question, in all courts, civil, criminal, and military, must be considered and answered affirmatively before judgment can be pronounced. And it must be answered correctly, or the judgment pronounced is void. Ever an interesting and vital inquiry, it is of engrossing interest and of awful importance when error may lead to the unauthorized taking of human life. In such a case, the court called upon to render, and the officer who is to approve its judgment and have it executed, have a concern peculiar to themselves. As to each, a responsibility is involved which, however conscientiously and firmly met, is calculated and cannot fail to awaken great solicitude and induce the most mature consideration. The nature of the duty is such that even honest error affords no impunity. The legal personal consequences, even in a case of honest, mistaken judgment, can not be avoided. That this is no exaggeration, the Commission will, I think, be satisfied before I shall have concluded. I refer to it now, and shall again, with no view to shake your firmness. Such an attempt would be alike discourteous and unprofitable. Every member comprising the Commission will, I am sure, meet all the responsibility that belongs to it as becomes gentlemen and soldiers. I therefore repeat that my sole object in adverting to it is to obtain a well-considered and matured judgment. So far the question of jurisdiction has not been discussed. The pleas which specially present it, as soon as filed, were overruled. But that will not, because properly it should not, prevent your considering it with the deliberation that its grave nature demands. And it is for you to decide it, and, at this time, for you alone. The commission you are acting under of itself does not and could not decide it. If unauthorized it is a mere nullity, usurpation of a power not vested in the Executive, and conferring no authority whatever upon you. To hold otherwise would be to make the Executive the exclusive and conclusive judge of its own powers, and that would be to make that department omnipotent. The powers of the President under the Constitution are great, and amply sufficient to give all needed sufficiency to the office. The convention that formed the Constitution, and the people who adopted it, considered those powers sufficient, and granted no others. In the minds of both (and subsequent history has served to strengthen the impression) danger to liberty was no more to be dreaded from the Executive than from any other department of the Government. So far, therefore, from meaning to extend its powers beyond what was deemed necessary to the wholesome operation of the Government, they were studious to place them beyond the reach of abuse. With this view, before entering "on the execution of his office," the President is required to take an oath "faithfully" to discharge its duties, and to best of his "ability, preserve, protect, and defend the Constitution of the United States." He is also liable to "be removed from office on

impeachment for and conviction of treason, bribery, or other high crimes or misdemeanors." If he violates the Constitution; if he fails to preserve it; and, above all, if he usurps powers not granted, he is false to his official oath, and liable to be indicted and convicted, and to be impeached. For such an offense his removal from office is the necessary consequence. In such a contingency, "he shall be removed" is the command of the Constitution. What stronger evidence could there be that his powers, all of them, in peace and in war, are only such as the Constitution confers? But if this was not evident from the instrument itself, the character of the men who composed the Convention, and the spirit of the American people at that period, would prove it. Hatred of a monarchy, made the more intense by the conduct of the monarch from whose government they had recently separated, and a deep-seated love of constitutional liberty, made the more keen and active by the sacrifices which had illustrated their revolutionary career, constituted them a people who could never be induced to delegate any executive authority not so carefully restricted and guarded as to render its abuse or usurpation almost impossible. If these observations are well founded— and I suppose they will not be denied— it follows that an executive act beyond executive authority can furnish no defense against the legal consequences of what is done under it. I have said that the question of jurisdiction is ever open. It may be raised by counsel at any stage of the trial, and if it is not, the Court not only may, but is bound to notice it. Unless jurisdiction then exists, the authority to try does not exist, and whatever is done is "*coram no judice*," and utterly void. This doctrine is as applicable to military as to other courts.

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

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

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

the trial of breaches of military duty only." *O'Brien*, 26, 27. "The one code (the civil) embraces all citizens, whether soldiers or not; the other (the military) has no jurisdiction over any citizens as such." *Ibid*.

The provisions of the Constitution clearly maintain the same doctrine. The Executive has no authority "to declare war, to raise and support armies, to provide and maintain a navy," or to make "rules for the government and regulation" of either force. These powers are exclusively in Congress. An army can not be raised or have law for its government and regulation except as Congress shall provide. This power of Congress to govern and regulate the army and navy, was granted by the convention without objection. In England, the King, as the generalissimo of the whole kingdom, has this sole power, though Parliament has frequently interposed and regulated for itself. But with us, it was thought safest to give the entire power to Congress, "since otherwise summary and severe punishments might be inflicted at the mere will of the Executive." 3 *Story's Com., sect*. 1192. No member of the Convention, or any commentator on the Constitution since, has intimated that even this Congressional power could be applied to citizens not belonging to the army or navy. In respect, too, to the latter class, the power was conferred exclusively on Congress to prevent that class being made the object of abuse by the Executive—to guard them especially from "summary and severe punishments" inflicted by mere Executive will. The existence of such a power being vital to discipline, it was necessary to provide for it. But no member suggested that it should be or could be made to apply to citizens not in the military service, or be given to any other department, in whole or in part, than Congress. Citizens not belonging to the army or navy were not made liable to military law, or under any circumstances to be deprived of any of the guaranties of personal liberty provided by the Constitution. Independent of the consideration that the very nature of the Government is inconsistent with such a pretension, the power is conferred upon Congress in terms that exclude all who do not belong to "the land and naval forces." It is a rule of interpretation coeval with its existence, that the Government, in no department of it, possesses powers not granted by express delegation or necessarily to be implied from those that are granted. This would be the rule incident to the very nature of the Constitution, but to place it beyond doubt, and to make it an imperative rule, the 10th amendment declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The power given to Congress, "is to make rules for the government and regulation of the land and naval forces." No artifice of ingenuity can make these words include those who do not belong to the army and navy; all others, as if negative words to that effect had been added. And this is not only the obvious meaning of the terms, considered by themselves, but is demonstrable from other provisions of the Constitution. So jealous were our ancestors of ungranted power, and so vigilant to protect the citizen against it, that they were unwilling to leave him to the safeguards which a proper construction of the Constitution, as originally adopted, furnished. In this they resolved that nothing should be left in doubt. They determined, therefore, not only to guard him against executive and judicial, but against Congressional abuse. With that view, they adopted the fifth constitutional amendment, which declares that "no persons shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, EXCEPT in *cases arising in the land or naval forces, or in the militia when in active service in time of war or public danger*." This exception is designed to leave in force, not to enlarge the power vested in Congress by the original Constitution, "to make rules for the government and regulation of the land and naval forces." "The land or naval forces" are

the terms used in both, have the same meaning, and until lately, have been supposed by every commentator and judge, to exclude from military jurisdiction offenses committed by citizens not belonging to such forces. Kent, in a note to his 1 Coms., p. 341, states, and with accuracy, that "military and naval crimes, and offenses committed while the party is attached to and under the immediate authority of the army and navy of the United States and in actual service, are not cognizable under the common law jurisdiction of the civil courts of the United States." According to this great authority every other class of persons and every other species of offense, are within the jurisdiction of the civil courts, and entitled to the protection of the proceeding by presentment or indictment, and a public trial; a right to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to compulsory process for his witnesses, and the assistance of counsel. The exception in the 5th amendment of cases arising in the land or naval forces applies by necessary implication, at least in part, to this. To construe this as not containing the exception would defeat the purpose of the exception; for the provisions of the 6th amendment, unless they are subject to the exceptions of the 5th, would be inconsistent with the 5th. The 6th is therefore to be construed as if it in words contained the exception. It is submitted that this is evident. The consequence is, that if the exception can be made to include those who, in the language of Kent, are not, when the offense was committed, "attached to under the immediate authority of the army or navy, and in actual service," the securities designed for other citizens by the 6th article are wholly nugatory. If a military commission, created by the mere authority of the President, can deprive a citizen of the benefit of the guaranties secured by the 5th amendment, it can deprive him of those secured by the 6th. It may deny him the right to a "speedy and public trial," information "of the nature and cause of the accusation," of the right "to be confronted with the witnesses against him," of compulsory process for his witnesses," and of "the assistance of counsel for his defense." That this can be done no one has as yet maintained; no opinion, however latitudinarian, of executive power, of the effect of public necessity, in war or peace to enlarge its sphere, and authorize a disregard of its limitations; no one, however convinced he may be of the policy of protecting accusing witnesses from a public examination, under the idea that their testimony can not otherwise be obtained, and that crime may consequently go unpublished, has to this time been found to go to that extent. Certainly, no writer has ever maintained such a doctrine. Argument to refute it, is unnecessary. It refutes itself. For, if sound, the 6th amendment, which our fathers thought so vital to individual liberty when assailed by governmental prosecution, is but a dead letter, totally inefficient for its purpose whenever the Government shall deem it proper to try a citizen by a military commission. Against such a doctrine the very instincts of freemen revolt. It has no foundation but in the principle of unrestrained, tyrannic power, and passive obedience. If it be well founded, then are we indeed a nation of slaves, and not of freemen. If the Executive can legally decide whether a citizen is to enjoy the guaranties of liberty afforded by the Constitution, what are we but slaves? If the President, or any of his subordinates, upon any pretence whatever, can deprive a citizen of such guaranties, liberty with us, however loved, is not enjoyed. But the Constitution is not so fatally defective. It is subject to no such reproach. In war and in peace, it is equally potential for the promotion of the general welfare, and as involved in and necessary to such welfare, for the protection of the individual citizen. Certainly, until this rebellion, this has been the proud and cherished conviction of the country. And it is to this conviction and the assurance that it could never be shaken that our past prosperity is to be referred. God forbid that mere power, dependent for its exercise on Executive will (a condition destructive of political happiness), shall ever be substituted in its place. Should that unfortunately ever occur, unless it was soon corrected by the

authority of the people, the objects of our Revolutionary struggle, the sacrifices of our ancestors, and the design of the Constitution will all have been in vain.

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

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

I. That power, whatever be its extent, is exclusively in the Congress. War can only be declared by that body. With its origin the President has no concern whatever. Armies, when necessary, can only be raised by the same body. Not a soldier, without its authority, can be brought into service by the Executive. He is as impotent to that end as a private citizen. And armies, too, when raised by Congressional authority, can only be governed and regulated by "rules" prescribed by the same authority. The Executive possesses no power over the soldier except such as Congress may, by legislation, confer upon him. If, then, it was true that the creation of a military commission like the present is incidental to the war power, it must be authorized by the department to which that power belongs, and not by the Executive, to whom no portion of it belongs. And, if it be said to be involved in the power "to make rules for the government and regulation of the land and naval forces," the result is the same. It must be done by Congress, to whom that power also exclusively belongs, and not by the Executive. Has Congress, then, under either power, authorized such a commission as this to try such cases as these? It is confidently asserted that it has not. If it has, let the statute be produced. It is certainly not done by that of the 10th of April, 1806, "establishing articles for the government of the armies of the United States." No military courts are there mentioned or provided for but courts-martial and courts of inquiry. And their mode of appointment and organization, and of proceeding, and the authority vested in them are also prescribed. Military commissions are not only not authorized, but are not even alluded to. And, consequently, the parties, whoever these may be, who, under that act, can be tried by courts-martial or courts of inquiry, are not made subject to trial by a military commission. Nor is such a tribunal mentioned in any prior statute, or in any subsequent one, until those of the 17th of July, 1862, and the 3d of March, 1863. In the 5th section of the first, the records of "military commissions are to be returned for revision to the Judge Advocate General," whose appointment it also provides for. But how such commissions are to be constituted, what powers they are to have, how their proceedings are to be conducted, or what cases or parties they are to try, is not provided for. In the 38th section of the second, they are mentioned as competent to try persons "lurking or acting as spies." The same absence in the particulars stated in respect to the first is true of this. And as regards this act of 1863, this reflection forcibly presents itself. If military commissions can be created, and from their very nature possess jurisdiction to try all alleged military offenses (the ground on which your jurisdiction, it is said, in part rests), why was it necessary to give them the power, by express words to try persons "lurking or acting as spies?" The military character of such an offense could not have been doubted. What reason, then, can be suggested for conferring the power to express language than that without it it would not be possessed? Before these statutes a commission, called a military commission, had been issued by the Executive to Messrs. Davis, Holt, and Campbell, to examine into certain military claims against the Western Department, and Congress, by its resolution of the 11th of March 1862 (No. 18), provided for the payment of its awards. Against a commission of that character no objection can be made. It is but ancillary to

the auditing of demands upon the Government, and in no way interferes with any constitutional right of the citizen. But until this rebellion a military commission like the present, organized in a loyal State or Territory where the courts are open and their proceedings unobstructed, clothed with the jurisdiction attempted to be conferred upon you— a jurisdiction involving not only the liberty, but the lives of the parties on trial— it is confidently stated, is not to be found sanctioned, or the most remotely recognized, or even alluded to, by any writer on military law in England or the United States, or in any legislation of either country. It has its origin in the rebellion, and like the dangerous heresy of secession, out of which that sprung, nothing is more certain in my opinion that that, however pure the motives of its origin, it will be considered, as it is, an almost equally dangerous heresy to constitutional liberty, and the rebellion ended, perish with the other, then and forever. But to proceed; such commissions were authorized by Lieutenant-General Scott in his Mexican campaign. When he obtained possession of the City of Mexico, he, on the 17th of September, 1847, re-published, with additions, his order of the 19th of February preceding, declaring martial law. By this order, he authorized the trial of certain offenses by military commissions, regulated their proceedings, and limited the punishments they might inflict. From their jurisdiction, however, he excepts cases "clearly cognizable by court-martial," and in words limits the cases to be tried to such as are (I quote) "not provided for in the act of Congress establishing rules and articles for the government of the armies of the United States," of the 10th of April, 1806. The second clause of the order mentions, among other offenses to be so tried, "assassination, murder, poisoning, " and in the fourth (correctly, as I submit, with all respect for a contrary opinion), he states that "the rules and articles of war" do not provide for the punishment of any one of the designated offenses, "even when committed by individuals of the army upon the persons or property of other individuals of the same, except in the very restricted case in the 9th of the articles." The authority, too, for even this restricted commission— Scott— not more eminent as soldier than civilian— placed entirely upon the ground that named offenses if committed in a foreign country by American troops, could not be punished under any law of the United States then in force. "The Constitution of the United States and the rules and articles of war," he said, and said correctly, provided no court for their trial or punishment, "no matter by whom, or on whom" committed. *Scott's Autobiography*, 392.

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

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

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

II. Innocent parties, sometimes by private malice, sometimes for a mere partisan purpose, sometimes from a supposed public policy, have been made the subjects of a criminal accusation. History is full of such instances. How are such parties to be protected if a public trial, at the option of the Executive, can be denied them, and a secret one, in whole, or in part, substituted? If the names of witnesses, and their evidence, are not published, what obstacles does it not interpose to establish their innocence? The character of the witnesses against them may be all important to that end. Kept in prison, with no means of consulting the outer world, how can they make the necessary inquiries? How can those who may know the witnesses be able to communicate with them on the subject? A trial so conducted, though it may not, as, no doubt is the case in the present instance, be intended to procure the punishment of any but the guilty, it is obvious, subjects the innocent to great danger. It partakes more of the character of the Inquisition, which the enlightened civilization of the age has driven almost wholly out of existence, than a tribunal suited to a free people. In the palmiest days of the tribunal, kings, as well as people, stood abashed in its presence, and dreaded its power. The accused was never informed of the names of his accusers; heresy, suspected was ample grounds for arrest; accomplices and criminals were received as witnesses, and the whole trial was secret, and conducted in a chamber almost as silent as the grave. It was long since denounced by the civilized world, not because it might not at times punish the heretic (then, in violation of all rightful human power, deemed a criminal), but because it was as likely to punish the innocent as the guilty. A public trial, therefore, by which the names of witnesses and the testimony are given, even in monarchical and despotic Governments, is now esteemed and amply adequate to the punishment of guilt, and essential to the protection of innocence. Can it be that a secret trial,

wholly or partially, if the Executive so decides, is all that an American citizen is entitled to? Such a doctrine, if maintained by an English monarch, would shake his government to its very center, and, if persevered in, would lose him his crown. It will be no answer to these observations to say that this particular trial has been only in part of a secret one, and that secrecy will never be resorted to, except for purposes of justice. The reply is, that the principle itself is inconsistent with American liberty, as recognized and secured by constitutional guaranties. It supposes that, whether these guaranties are to be enjoyed in the particular case, and to what extent, is dependent on Executive will. The Constitution, in this regard, is designed to secure them in spite of such will. Its patriotic authors intended to place the citizen, in this particular, wholly beyond the power, not only of the Executive, but of every department of the Government. They deemed the right to a public trial vital to the security of the citizen, and especially and absolutely necessary to his protection against Executive power. A public trial of all criminal prosecutions they, therefore, secured by general and unqualified terms. What would these great men have said, had they been asked so to qualify the terms as to warrant his refusal, under any circumstances, and make it dependent upon Executive discretion? The member who made the inquiry would have been deemed by them a traitor to liberty, or insane. What would they have said if told that, without such qualification, the Executive would be able legally to impose it as incidental to Executive power? If not received with derision, it would have been indignantly rejected as an imputation upon those who, at any time thereafter, should legally fill the office.

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

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

has for that purpose no legal existence or authority. The Executive, whose functions are altogether executive, cannot confer it. The offenses to be tried by it, the laws to govern its proceedings, the punishment it may award, can not, for the same reason, be prescribed by the Executive. These, as well as the mere constitution of the Court, all exclusively belong to Congress. If it be contended that the Executive has the powers in question, because by implication they are involved in the war power, or in the President's constitutional function as commander-in-chief of the army, then this consequence would follow, that they would not be subject to Congressional control, as that department has no more right to interfere with the constitutional power of the Executive than that power has a right to interfere with that of Congress. If, by implication, the powers in question belong to the Executive, he may not only constitute and regulate military commissions, and prescribe the laws for their government, but all legislation upon the subject by Congress would be a usurpation. That the proposition leads to this result would seem so inconsistent with all previous legislation, and all executive practice, and so repugnant to every principal of constitutional liberty, that it demonstrates its utter unsoundness. Under the power given to Congress, "to make rules for the government and regulation of land" forces, they have, from time to time, up to and including the act of the 10th of April, 1806, and since, enacted such rules as they deemed to be necessary, as well in war as in peace, and their authority to do so has never been denied. This power, too, to govern and regulate, from its very nature, is exclusive. Whatever is not done under it, is to be considered as purposely omitted. The words used in the delegation of the power, "govern and regulate," necessarily embrace the entire subject and exclude all like authority in others. The end of such a power can not be attained, except through a uniformity of government and regulation, and this is not to be attained if the power is in two hands. To be effective, therefore, it must be in one, and the Constitution gives it to one— to Congress— in express terms, and nowhere intimates a purpose to bestow it, or any portion of it, upon any other department. In the absence then, of all mention of military commissions in the Constitution, and in the presence of the sole authority it confers on Congress, by rules of its own enacting, to govern and regulate the army, and, in the absence of mention of such commissions in the act of the 10th of April, 1806, and a single word in that act, or in any other, how can the power be considered as in the President? Further, upon what ground, other than those I have examined, can this authority be placed?

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

be chaos; government without law, anarchy or despotism. Against both these last, in war and in peace, the Constitution happily protects us.

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

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

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

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

III Art. This definition, not only tells us what treason is, but tells us that no other crime than the defined one shall be considered the offense. And the same section provides that "no person shall be convicted of treason, except on the testimony of two witnesses to the same overt act, or on confession in open court," and gives to Congress the power to declare what its

punishment shall be. The offense in the general is the same in England. In that country, at no period since its freedom became settled, has any other treason been recognized. During the pendency of this rebellion (never before), it has been alleged that there exists with us the offense of military treason, punishable by the laws of war. It is so stated in the instructions of General Halleck to the end commanding officer in Tennessee, of the 5th of March, 1863. *Lawrence's Wheaton, Suppt. p. 41*. But Halleck confines it to acts committed against the army of a belligerent, when occupying the territory of the enemy. And he says what is certainly true, if such an offense can be committed, that it "is broadly distinguished from the treason defined in the constitutional and statutory laws, and made punishable by the civil courts." But the term *military treason* is not to be found in any English work or military order, or before this rebellion, in any American authority.

It has evidently been adopted during the rebellion as a doctrine of military law on the authority of continental writers in governments less free than those of England and the United States, and in which, because they are less free, treason is made to consist of certain specific acts, and no others. But if Halleck is right, and all our prior practices, and that of England, from whom we derive ours, is to be abandoned, the cases before you are not cases of "military treason," as he defines it. When the offense here alleged is stated to have occurred in this District, the United States were not and did not claim to be in its occupation as a belligerent, nor is it pretended that the people of this District were, in a belligerent sense, enemies. On the contrary, they were citizens entitled to every right of citizenship. Nor were the parties on trial enemies. They were either citizens of the District, or of Maryland, and under the protection of the Constitution. The offense charged, then, being treason, it is treason as known to the Constitution and laws, and can only be tried and punished as they provide. To consider these parties belligerents, and their alleged offense military treason, is not only unwarranted by the authority of Halleck, but is in direction conflict with the Constitution and laws which the President and all of us are bound to support and defend. The offense, then, being treason, as known to the Constitution, its trial by a military court is clearly illegal. And this for obvious reasons. Under the Constitution no conviction of such an offense can be had, "unless on the testimony of two witnesses to the same overt act, or on confession in open court." And under the laws the parties are entitled to have "a copy of the indictment and a list of the jury and witnesses, with the names and places of abode of both, at least three entire days before the trial." They also have the right to challenge peremptorily thirty-five of the jury, and to challenge for cause without limitation. And finally, unless the indictment shall be found by a grand jury within three years next after the treason done or committed, they shall not be prosecuted, tried or punished. *Act. 30, April,* 1790, *stat. at large*, 118, 119. Upon what possible ground, therefore, can this Commission possess the jurisdiction claimed for it? It is not alleged that it is subject to the provisions stated, and in its very nature it is impossible that it should be. The very safeguards designed by the Constitution, if it has such jurisdiction, are wholly unavailing. Trial by jury in all cases, our English ancestors deemed (as Story correctly tells us), "the great bulwark of their civil and political liberties, and watched with an unceasing jealousy and solicitude." It constituted one of the fundamental articles of Magna Charta— "*Nullus liber homo capiatur nec imprisonetur aut exulet, aut aliquo modo, destruator, etc.; nisi per legae judicium parium suorum, vel per legem terrea*." This great right the American colonists brought with them as their birth-right and inheritance. It landed with them at Jamestown and on the rock of Plymouth, and was equally prized by Cavalier and Puritan; and ever since, to the breaking out of the rebellion, has been

enjoyed and esteemed the protection and proud privilege of their posterity. At times, during the rebellion, it has been disregarded and denied. The momentous nature of the crisis, brought about by that stupendous crime, involving, as it did, the very life of the nation, has caused the people to tolerate such disregard and denial. But the crisis, thank God, has passed. The authority of the Government throughout our territorial limits is reinstated so firmly that reflecting men, here and elsewhere, are convinced that the danger has passed never to return. The result proves that the principles on which the government rests have imparted to it a vitality that will cause it to endure for all time, in spite of foreign invasion or domestic insurrection; and one of those principles— the choicest one— is the right in cases of "criminal prosecutions to a speedy and public trial by an impartial jury," and in cases of treason to the additional securities before adverted to. The great purpose of the Magna Charta and the Constitution was (to quote Story again) "to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people." The appeal for safety can, under such circumstances, scarcely be made by innocence in any other manner than by the severe control of courts of justice, and by the firm and impartial verdict of a jury sworn to do right and guided solely by legal evidence and a sense of duty. In such a course there is a double security against the prejudices of judges, who may partake of the wishes and opinions of the government, and against the passions of the multitude, who may demand their victim with a clamorous precipitancy." And Mr. Justice Blackstone, with the same deep sense of its value, meets the prediction of a foreign writer, "that because Rome, Sparta, and Carthage, at the time when their liberties were lost, were *strangers to the trial by jury*." 3 *Bla*., 379. That a right so valued, and esteemed by our fathers to be so necessary to civil liberty, so important to the very existence of a free government, was designed by them to depend for its enjoyment upon the war power, or upon any power intrusted to any department of our Government, is a reflection on their intelligence and patriotism.

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

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

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

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

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

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

1. The character of the pleadings. The offense charged is a conspiracy with persons not within the reach of the Court, and some of them in a foreign country, to commit the alleged crime. To give you jurisdiction, the design of the accused and their co-conspirators is averred to have been to aid the rebellion, and to accomplish that end not only by the murder of the President and Lieutenant-General Grant, but of the Vice-President and Secretary of State. It is further averred that the President being murdered, the Vice-President becoming thereby President, and as such, Commander-in-Chief, the purpose as to murder him; and as, in the contingency of the death of both, it would be the duty of the Secretary of State to cause an election to be held for President and Vice-President, he was to be murdered in order to prevent a "lawful election" of these officers; and that by all these means, "aid and comfort" were to be given "the insurgents

engaged in armed rebellion against the United States," and "the subversion and overthrow of the Constitution and the laws of the United States," thereby effected. That such pleading as this would not be tolerated in a civil court, I suppose every lawyer will concede. It is argumentative, and even in that character unsound. The continuance of our Government does not depend on the lives of any or all of its public servants. As fact, or law, therefore, the pleading is fatally defective. The Government has an inherent power to preserve itself, which no conspiracy to murder, or murder, can in the slightest degree impair. And the result which we have just witnessed proves this, and shows the folly of this madman and fiend by whose hands our late lamented President fell. He, doubtless, thought that he had done a deed that would subvert the "Constitution and laws." We know that it has not had even a tendency to that result. Not a power of the Government was suspended; all progressed as before the dire catastrophe. A cherished and almost idolized citizen was snatched from us by the assassin's arm, but there was no halt in the march of the government. That continued in all its majesty wholly unimpeded. The only effect was to place the nation in tears, and drape it in mourning, and to awake the sympathy, and excite the indignation of the world.

II. But this mode of pleading renders, it would seem, inapplicable, the rules of evidence known to the civil courts. It justifies, in the opinion of the Judge Advocate and the Court (or what has been done would not been done), a latitude that no civil court would allow, as in the judgment of such a court the accused, however, innocent, could not be supposed able to meet it. Proof has been received, not only of distinct offenses from those charged, but of such offenses committed by others than the parties on trial. Even in regard to the party himself, other offenses alleged to have been previously committed by him can not be proved. At one time a different practice prevailed in England, and does now, it is believed, in some of the Continental governments. But since the days of Lord Holt (a name venerated by lawyers and all admirers of enlightened jurisprudence), it has not prevailed in England. In the case of Harrison, tried before the judge for murder, the counsel for the government offered a witness to prove some felonious design of the prisoner three years before. Holt indignantly exclaimed, "Hold! hold! what are you doing now? How can he defend himself away from charges of which he has no notice? And how many issues are to be raised to perplex and the jury? Away! away! that ought not to be— that is nothing of the matter." 12 *State Trials*, 833-874. I refer to this case, not to assail what has been done in these cases contrary to this rule, because I am bound to infer that before such a commission as this the rule has no legal force. If, in a civil court, then, these parties would be entitled to the benefit of this rule, one never departed from in such courts, they would not have had proved against them crimes alleged to have committed by others, and having no necessary or legal connection with those charged. With the same view, and not denying the right of the Commission in the particular case I am about to refer to, but to show that the Constitution could not have designed to subject citizens to the practice, I cite the same judge to prove that in a civil court those parties could not have been legally fettered during their trial. In the case of Cranbum, accused as implicated in the "assassination plot," on trial before the same judge, Holt put an end to what Lord Campbell terms "the revolting practice of trying prisoners in fetters." Hearing the clanking of chains, though no complaint was made to him, he said, "I should like to know why the prisoner is brought in ironed." "Let them be instantly knocked off. When prisoners are tried they should stand at their ease." (13 State Trails, 221, 2d Campbell, *Lives Chief Justices*, 140). Finally, I deny the jurisdiction of the Commission, not only because neither Constitution or laws justify, but, on the contrary, repudiate it, but on the ground that all the experience of the past is

against it. Jefferson, ardent in the prosecution of Burr, and solicitous for his conviction, from a firm belief of his guilt, never suggested that he should be tried before any other than a civil court. And in that trial, so ably presided over by Marshall, the prisoner was allowed to "stand at his ease;" was granted every constitutional privilege, and no evidence was permitted to be given against him but such as a civil court recognizes; and in that case, as in this, the overthrow of the Government was the alleged purpose, and yet it was not intimated in any quarter that he could be tried by a military tribunal. In England, too, the doctrine on which this prosecution is placed is unknown. Attempts were made to assassinate George the Third and the present Queen, and Mr. Percival, then Prime Minister, was assassinated as he entered the House of Commons. In the first two instances, the design was to murder the commander-in-chief of England's army and navy, in whom, too, the whole war power of the Government was also vested; in the last, a secretary, clothed with powers so great, at least, as those than belong to our Secretary of State; and yet, in each, the parties accused were tried before a civil court, no one suggesting any other. And during the period of the French Revolution, when its principles, if principles they can be termed, were being inculcated in England to an extent that alarmed the Government, and caused it to exert every power it was thought to possess to frustrate their effect, when the writ of *habeas corpus* was suspended, and arrests and prosecutions resorted to almost without limit, no one suggested a trial, except in the civil courts. And yet the apprehension of the Government was, that the object of the alleged conspirators was to subvert its authority, bring about its overthrow, and subject the kingdom to the horrors of the French Revolution, then shocking the nations of the world. Hardy, Horne, Tooke, and others, were tried by civil courts, and their names are remembered for the principles of freedom that were made triumphant mainly through the efforts of "that great genius," in the words of a modern English statesman (Earl Russell), "whose sword and buckler protected justice and freedom during the disastrous period;" having "the tongue of Cicero and the soul of Hampden, an invincible orator and an undaunted patriot." *Erskine*.

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

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

Responsibility to personal danger can never alarm soldiers who have faced, and will ever be willing in their country's defense to face, death on the battle-field. But there is a responsibility that every gentleman, be he soldier or citizen, will constantly hold before him, and make him ponder— responsibility to the Constitution and laws of his country and an intelligent public opinion— and prevent his doing anything knowingly that can justly subject him to censure of either. I have said that your responsibility is great. If the commission under which you act is void and confers no authority, whatever you may do may involve the most serious personal liability. Cases have occurred that prove this. It is sufficient to refer to one. Joseph Wall, at the time the offense charged against him was committed, was Governor and commander of the garrison of Goree, a dependency of England, in Africa. The indictment was for the murder of Benjamin Armstrong, and the trial was had in January, 1802, before a special court, consisting of Sir Archibald McDonald, Chief Baron of the Exchequer; Lawrence, of the King's bench, and Rocke, of the Common Pleas. The prosecution was conducted by Law, then Attorney General,

afterward Lord Ellenborough. The crime was committed in 1782, and under a military order of the accused, and the sentence of a regimental court-martial. The defense relied upon was, that at the time the garrison was in a state of mutiny, and that the deceased took a prominent part in it, that because of the mutiny, the order for the court-martial was made, and that the punishment which was inflicted and said to have caused the death, was under its sentence. The offense was purely a military one, and belonged to the jurisdiction of a military court, if the facts relied upon by the accused were true, and its judgment constituted a valid defense. The court, however, charged the jury, that if they found that there was no mutiny to justify such a court-martial or its sentence, they were void, and furnished no defense whatever. The jury so finding, found the accused guilty, and he was soon after executed. (28 *St. Tr.*, 51, 178). The application of the principle of this case to the question I have considered is obvious. In that instance want of jurisdiction in the court-martial was held to be fatal to its judgment as a defense for the death that ensued under it. In this, if the Commission has no jurisdiction, its judgment for the same reason will be of no avail, either to Judges, Secretary of War, or President, if either shall be called to a responsibility for what may be done under it. Again, upon the point of jurisdiction, I beg leave to add that the opinion I have endeavored to maintain is believed to be the almost unanimous opinion of the profession, and certainly is of every judge or court who has expressed any.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Even in France, during the consulship of Napoleon, the institution of a military commission for the trial of Prince Due d'Enhein, for alleged conspiracy against his life, was, to the irreparable injury of his reputation, ordered by Napoleon. The trial was had, and the prince was at once convicted and executed. It brought upon Napoleon the condemnation of the word, and is one of the blackest spots on his character. The case of the Duke, says the eminent historian

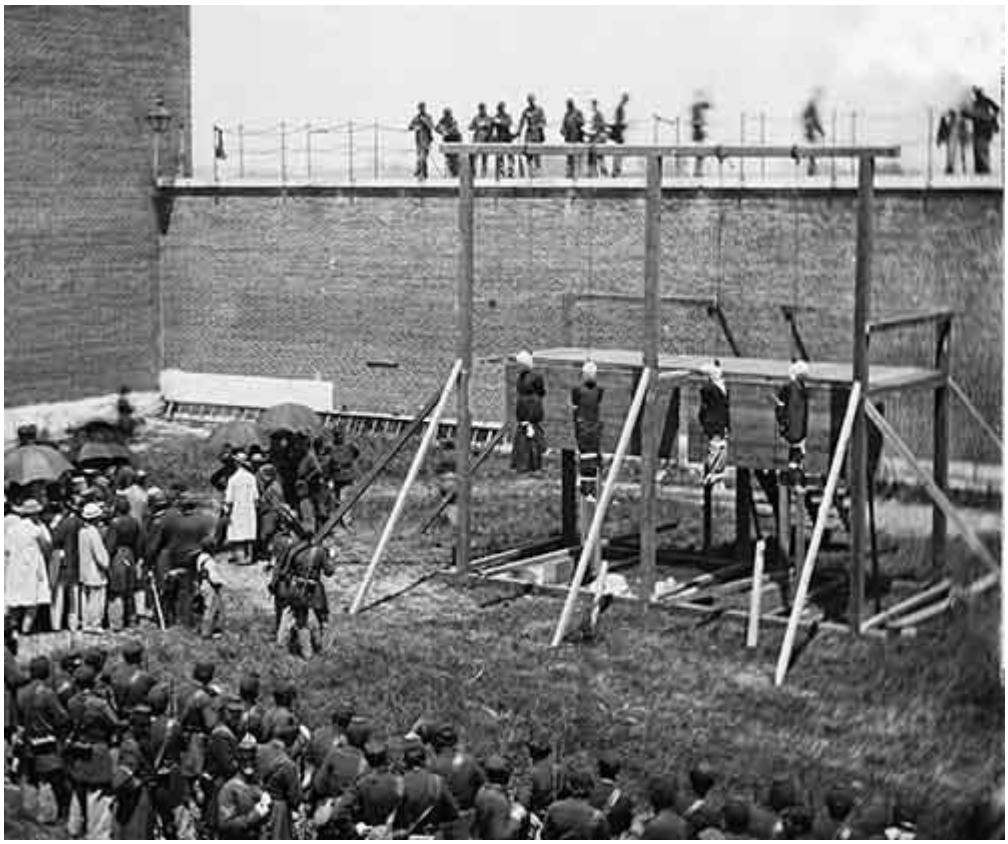
of the Consulate and the Empire, furnished Napoleon "a happy opportunity of saving his glory from a stain," which he lost, and adds, with philosophic truth, that it was "a deplorable consequence of *violating the ordinary forms of justice*," and further adds, "to defend social order by conforming *to the strict rules and forms of justice*, without allowing any feeling of revenge to operate, is the great lesson to be drawn from these tragical events." *Thier's History, etc.*, 4 *vol*., 318, 322.

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

A word more, gentlemen, and, thanking you for your kind attention, I shall have done. As you have discovered, I have not remarked on the evidence in the case of Mrs. Surratt, nor is it my purpose; but it is proper that I refer to her case, in particular, for a single moment. That a woman, well educated, and, as far as we can judge from all her past life, as we have it in evidence, a devout Christian, ever kind, affectionate and charitable, with no motive disclosed to us that could have caused a total change in her very nature, could have participated in the crimes in question it is almost impossible to believe. Such a belief can only be forced upon a reasonable, unsuspecting, unprejudiced mind, by direct and uncontradicted evidence, coming from pure and perfectly unsuspected sources. Have we these? Is the evidence uncontradicted? Are the two witnesses, Weichmann and Lloyd, pure and unsuspected? Of the particulars of their evidence I say nothing. They will be brought before you by my associates. But this conclusion in regard to these witnesses must be, in the minds of the Court, and is certainly strongly impressed upon my own, that, if the facts which they themselves state as to their connection and intimacy with Booth and Payne are satisfactorily established than the alleged knowledge and participation of Mrs. Surratt. As far, gentlemen, as I am concerned, her case is now in your hands.

REVERDY JOHNSON.

June 16, 1865.



On July 7, 1865, the four Lincoln conspirators: David Herold, Lewis Powell, George Atzerodt and Mary Surratt were executed.