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saved him from the punishment due only to a willful offender.

The learned counsel on the other side will not assert that there was war at Indianapolis in 1864, for they have read Coke's *Institutes*, and Judge Grier's opinion in the *prize cases*, and of course they know it to be a settled rule that war can not be said to exist where the civil courts are open. They will not set up the absurd plea of necessity, for they are well aware that it would not be true in point of fact. They will hardly take the ground that any kind of necessity could give legal validity to that which the law forbids.

This, therefore, must be their position: That although there was no war at the place where this commission sat, and no actual necessity for it, yet if there was a war anywhere else, to which the United States were a party, the technical effect of such war was to take the jurisdiction away from the courts, and transfer it to army officers.

General Butler—We do not take that position.

Mr. Black—Then they can take no ground at all, for nothing else is left. I do not wonder to see them recoil at their own doctrine when its nakedness is held up to their eyes. But they must stand upon that or give up their cause. They may not state their proposition precisely as I state it; that is too plain a way of putting it. But, in substance, it is their doctrine—has been the doctrine of the Attorney-general's office ever since the advent of the present incumbent—and is the doctrine of their brief, printed and filed in this case? What else can they say? They will admit that the Constitution is not altogether without a meaning; that at a time of universal peace it imposes some kind of obligation upon those who swear to support it. If no war existed they would not deny the exclusive jurisdiction of the civil courts in criminal cases. How then did the military get jurisdiction in Indiana?

All men who hold the Attorney-general's opinion to be true, answer the question I have put by saying that military jurisdiction comes from the mere existence of war; and it comes in Indiana only as the legal result of a war which is going on in Mississippi, Tennessee or South Carolina. The Constitution is repealed, or its operations suspended in one State, because there is war in another. The courts are open, the organization of society is intact, the judges are on the bench, and their process is not impeded; but their jurisdiction is gone. Why? Because, say our opponents, war exists, and the silent, legal, technical operation of that fact is to deprive all American citizens of their right to a fair trial.

That class of jurists and statesmen who hold that the trial by jury is lost to the citizen during the existence of war, carry out their doctrine theoretically and practically to its ultimate consequences. The right of trial by jury being gone, all other rights are gone with it; therefore a man may be arrested without an accusation and kept in prison during the pleasure of his captors; his papers may be searched without a warrant; his property may be confiscated behind his back, and he has no earthly means of redress. Nay, an attempt to get a just remedy is construed as a new crime. He dare not even complain, for the right of free speech is gone with the rest of his rights. If you sanction that doctrine, what is to be the consequence? I do not speak of what is past and gone, but in case of a future war what results will follow from your decision indorsing the Attorney-general's views? They are very obvious. At the instant when the war begins, our whole system of legal government will tumble into ruin, and if we are not all robbed, and kidnapped, and hanged, and drawn, and quartered, we will owe our immunity, not to the Constitution and laws, but to the mere mercy or policy of those persons who may then happen to control the organized physical force of the country.

This certainly puts us in a most precarious condition; we must have war about half the time, do what we may to avoid it. The President or Congress can wantonly provoke a war whenever it suits the purpose of either to do so; and they can keep it going as long as they please, even after the actual conflict of arms is over. When peace woos them they can ignore her existence; and thus they can make the war a chronic condition of the country, and the slavery of the people perpetual. Nay, we are at the mercy of any foreign potentate who may envy us the possession of those liberties which we boast of so much; he can shatter our Constitution without striking a single blow or bringing a gun to bear upon us. A

simple declaration of hostilities is more terrible to us than any army with banners.

To me, this seems the wildest delusion that ever took possession of the human brain. If there be one principle of political ethics more universally acknowledged than another, it is that war, and especially civil war, can be justified only when it is undertaken to vindicate and uphold the legal and constitutional rights of the people; not to trample them down. He who carries on a system of wholesale slaughter for any other purpose, must stand without excuse before God and man. In a time of war, more than at any other time, public liberty is in the hands of public officers. And she is there in double trust; first, as they are citizens and therefore bound to defend her, by the common obligations of citizens; and next as they are her special guardians—

"Who should against her murderers
Shut the door,
Not bear the knife themselves."

The opposing argument, when turned into plain English, means this, and this only; that when the Constitution is attacked upon one side, its official guardian may assail it upon the other; when rebellion strikes it in the face, they may take advantage of the blindness produced by the blow, to sneak behind it and stab it in the back.

The Convention, when it framed the Constitution, and the people, when they adopted it, could have had no thought like that. If they had supposed that it would operate only while perfect peace continued, they would certainly have given us some other rule to go by in time of war; they would not have left us to wonder about in a howling wilderness of anarchy, without a lamp to our feet, or a guide to our path. Another thing proves their actual intent still more strikingly. They require that every man in any kind of public employment, State or National, civil or military, should swear without reserve or qualification, that he would support the Constitution. Surely our ancestors had too much regard for the moral and religious welfare of their posterity to impose upon them an oath like that, if they intended and expected it to be broken half the time. The oath of an officer to support the Constitution is as simple as that of a witness to tell the truth in a court of justice. What would you think of a witness who should attempt to justify perjury upon the ground that he had testified when civil war was raging, and he thought that by swearing to a lie he might promote some public or private object connected with the strife?

No, no, the great men who made this country what it is—the heroes who won her independence, and the statesmen who settled her institutions—had no such notions in their minds. Washington deserved the lofty praise bestowed upon him by the President of Congress when he resigned his commission—that he had always regarded the rights of the civil authority through all changes and through all disasters. When his duty as President afterward required him to arm the public force to suppress a rebellion in Western Pennsylvania, he never thought that the Constitution was abolished, by virtue of this fact, in New Jersey, or Maryland, or Virginia. It would have been a dangerous experiment for an adviser of his at that time, or at any time, to propose that he should deny a citizen his right to be tried by a jury, and substitute in place of it a trial before a tribunal composed of men elected by himself from among his own creatures and dependents.

You can well imagine how that great heart would have swelled with indignation at the bare thought of such an insulting outrage upon the liberty and law of his country. In the war of 1812, the man emphatically called the Father of the Constitution was the supreme Executive Magistrate. Talk of perilous times! there was the severest trial this Union ever saw.

That was no half-organized rebellion on the one side of the conflict, to be crushed by the hostile millions and unbounded resources of the other. The existence of the nation was threatened by the most formidable military and naval power then upon the face of the earth. Every town upon the northern frontier, upon the Atlantic seaboard and upon the Gulf coast was in daily and hourly danger. The enemy had penetrated into the heart of Ohio. New York, Pennsylvania and Virginia were all of them threatened from the west as well as the east. This capital was taken, and burned, pillaged, and every member of the Federal Administration was a fugitive before the invading army. Meanwhile, party spirit was breaking out into actual treason all over New England. Four of those States refused

to furnish a man or a dollar even for their own defense. Their public authorities were plotting the dismemberment of the Union, and individuals among them were burning blue lights upon the coast as a signal to the enemy's ships. But in all this storm of disaster, with foreign war in his front, and domestic treason on his flank, Madison gave out no sign that he would aid old England and New England to break up this government of laws. On the contrary, he and all his supporters, though compassed round with darkness and with danger, stood faithfully between the Constitution and its enemies.

"To shield it, and save it, or perish there too."

The framers of the Constitution and all their cotemporaries died and were buried; their children succeeded them and continued on the stage of public affairs until they, too,

"Lived out their lease of life, and paid their

Breath to time and mortal custom;" and a third generation was already far on its way to the grave before this monstrous doctrine was conceived or thought of, that public officers all over the country might disregard their oaths whenever a war or a rebellion was commenced.

Our friends on the other side are quite conscious that when they deny the binding obligation of the Constitution they must put some other system of law in its place. Their brief gives us notice that, while the Constitution, and the acts of Congress, and *Magna Charta*, and the common law, and all the rules of natural justice shall remain under foot, they will try American citizens according to the law of nations! But the law of nations shall take no notice of the subject. If that system did contain a special provision that a government might hang one of its own citizens without judge or jury, it would still be competent for the American people to say, as they have said, that no such thing should ever be done here. That is my answer to the law of nations.

But then they tell us that the laws of war must be treated as paramount. Here they become mysterious. Do they mean that code of public law which defines the duties of two belligerent parties to one another, and regulates the intercourse of neutrals with both? If yes, then it is simply a recurrence to the law of nations, which has nothing on earth to do with the subject. Do they mean the portion of our municipal code which defines our duties to the Government in war as well as in peace? Then they are speaking of the Constitution and laws, which declare in plain words that the Government owes every citizen a fair legal trial, as much as the citizen owes obedience to the Government. They are in search of an argument under difficulties. When they appeal to international law, it is silent; and when they interrogate the law of the land the answer is an unequivocal contradiction of their whole theory.

The Attorney-general tells us that all persons whom he and his associates choose to denounce for giving aid to the rebellion, are to be treated as being themselves a part of the rebellion—they are public enemies, and therefore they may be punished without being found guilty by a competent court or a jury. This convenient rule would outlaw every citizen the moment he is charged with political offense. But political offenders are precisely the class of persons who most need the protection of a court and jury, for the prosecutions against them are most unlikely to be unfounded, both in fact and in law. Whether innocent or guilty, to accuse is to convict them before the ignorant and bigoted men who generally sit in military courts. But this court decided in the prize cases that all who live in the enemy's territory are public enemies, without regard to their personal sentiments or conduct; and the converse of the proposition is equally true—that all who reside inside of our own territory are to be treated as under the protection of the law. If they help the enemy they are criminals, but they cannot be punished without conviction.

You have heard much (and you will hear more very soon) concerning the natural and inherent right of the Government to defend itself without regard to law. This is wholly fallacious. In a despotism the autocrat is unrestricted in the means he may use for the defense of his authority against the opposition of his own subjects or others; and that is precisely what makes him a despot. But in a limited monarchy the prince must confine himself to a legal defense of his Government. If he goes beyond that, and commits aggressions on the rights of the people, he breaks the social compact, releases his subjects from all their obligations to him, renders himself liable to be hurled from his throne and dragged to the block or driven into

exile. This principle was sternly enforced in the cases of Charles I. and James II., and we have it announced on the highest official authority here, that the Queen of England can not ring a little bell on her table and cause a man by her arbitrary power to be arrested under any pretense whatever. If that be true there, how much more true must it be here, where we have no personal sovereign, and where our only Government is the Constitution and laws. A violation of law on pretense of saving such a Government as ours is not self-preservation, but suicide.

Salus populi suprema lex—observe, it is not *salus regis*; the safety of the people, not the safety of the ruler, is the supreme law. When those who hold the authority of the Government in their hands behave in such manner as to put the liberties and rights of the people in jeopardy, the people may rise against them and overthrow them without regard to that law which requires obedience to them. The maxim is revolutionary, and expresses simply the right to resist tyranny without regard to prescribed forms. It can never be used to stretch the powers of Government against the people.

If this Government of ours has no power to defend itself without violating its own laws, it carries the seeds of destruction in its own bosom; it is a poor, weak, blind, staggering thing, and the sooner it tumbles over the better. But it has a most efficient legal mode of protecting itself against all possible danger. It is clothed from head to foot in a complete panoply of defensive armor. What are the perils which may threaten its existence? I am not able at this moment to think of more than these which I am about to mention; foreign invasion, domestic insurrection, mutiny in the army and navy, corruption in the civil administration, and last but not least criminal violations of its laws committed by individuals among the body of the people. Have we not a legal mode of defense against all these? Yes! Military force repels invasion and suppresses insurrection; you preserve discipline in the army and navy by means of courts-martial; you preserve the purity of the civil administration by impeaching dishonest magistrates; and crimes are prevented and punished by the regular judicial authorities. You are not merely compelled to use these weapons against your enemies, because they and they only are justified by the law; you ought to use them because they are more efficient than any other and less liable to be abused.

There is another view of the subject which settles all controversy about it. No human being in this country can exercise any kind of public authority which is not conferred by law; and under the United States it must be given by the express words of a written statute. Whatever is not so given is withheld, and the exercise of it is positively prohibited. Courts-martial in the army and navy are authorized; they are legal institutions; their jurisdiction is limited, and their whole code of procedure is regulated by act of Congress. Upon the civil courts all the jurisdiction they have or can have is bestowed by law, and if one of them goes beyond what is written its action is *ultra vires* and void. But a military commission is not a court-martial, and it is not a civil court. It is not governed by the law which is made for either, and it has no law of its own. Within the last five years we have seen, for the first time, self-constituted tribunals not only assuming power which the law did not give them, but thrusting aside the regular courts to which the power was exclusively given.

What is the consequence? This terrible authority is wholly undefined, and its exercise is without any legal control. Undelegated power is always unlimited. The field that lies outside of the Constitution and laws has no boundary. Thierry, the French historian of England, says that when the crown and sceptre were offered to Cromwell, he hesitated for several days and answered: "Do not make me a king, for then my hands will be tied up by the laws which define the duties of that office; but make me protector of the commonwealth and I can do what I please—no statute restraining and limiting the royal prerogative will apply to me." So these commissions have no legal origin and no legal name by which they are known among the children of men; no law applies to them, and they exercise all power for the paradoxical reason that none belongs to them rightfully.

Ask the Attorney-general what rules apply to military commissions in the exercise of their assumed authority over civilians. Come, Mr. Attorney, "gird up thy loins now like a man; I will demand of thee, and thou shalt declare unto me if thou hast understanding."