UNITED STATES SUPREME COURT.

MILITARY TRIALS OF CIVILIANS.—THE INDIANA CONSPIRACY CASE.—ARGUMENT OF THE HON. JEREMIAH S. BLACK.

In September, 1864, L. P. Milligan, W. A. Bowles, Stephen Horsey, and others, were arrested and brought before a military commission at Indianapolis, Indiana, charged with being members of the order of "American Knights," or "Sons of Liberty," in league with armed rebels, and with having conspired to release the rebel prisoners of war confined in the United States military prisons at Indianapolis, Chicago, and Rock Island. The three parties named, after a protracted trial, were found guilty of the charges and specifications preferred against them, and condemned to death. The findings and sentence were approved by the President and promulgated by the War Department on the 2d day of May, 1865, and the 19th day of the same month was fixed for the execution. On the 10th of May, however, they applied by petition to the Circuit Court of the United States for the district of Indiana (Judges Davis and McDonald) for a writ of *habeas corpus*, or for an order of discharge, under the act of Congress approved March 3, 1863, entitled "An act relating to *habeas corpus*, and regulating judicial proceedings in certain cases." The judges of the Circuit Court were divided in opinion upon this application, and certified the following questions, on which they differed, to the Supreme Court for decision:

1. "On the fact stated in said petition and exhibits, ought a writ of *habeas corpus* to be issued according to the prayer of said petition?"

2. "On the facts stated in said petition and exhibits, ought the said parties to be discharged from custody, as in said petition prayed?"

3. "Whether, upon the facts stated in said petition and exhibits, the military commission mentioned therein had jurisdiction legally to try and sentence said parties in manner and form as in said petition and exhibits is stated?"

After the action of the Circuit Court, certifying the case to the Supreme Court for final decision, the President commuted the sentence of the petitioners to imprisonment for life.

The arguments of these questions, which commenced on the 5th and terminated on the 13th of March, 1866, was conducted on the part of the petitioners by J. E. McDONALD, Esq., of Indiana, Hon. J. A. GARFIELD, of Ohio, Hon. J. S. BLACK, of Pennsylvania, and DAVID DUDLEY FIELD, of New York; and on behalf of the United States by B. F. BUTLER, Esq., of Massachusetts, Hon. H. STANBERRY, of Ohio, and Hon. JAS. SPEED, Attorney-general of the United States. The argument of Mr. BLACK for the petitioners was taken in shorthand by Mr. D. F. MURPHY, one of the conductors of the *Reporter*, a periodical published in Washington, and devoted to "Religion, Law, Legislation and Public Events." Mr. BLACK said, in addressing the Court:

May it Please Your Honors:—I am not afraid you will underrate this case. It concerns the right of the whole people. Such questions have generally been settled by arms. But since the beginning of the world no battle has ever been lost or won upon which the liberties of a nation were so distinctly staked as they are on the result of this argument. The pen that writes the judgment of the Court will be mightier for good or for evil than any sword that ever was wielded by mortal arm.

As might be expected from the nature of the subject, it has been a good deal discussed elsewhere, in legislative bodies, in public assemblies, and in the newspaper press of the country. But there it has been mingled with interests of feelings not very friendly to a correct conclusion. Here we are in a higher atmosphere where no passion can disturb the judgment or shake the even balance in which the scales of reason are held. Here it is purely a judicial question; and I can speak for my colleagues as well as myself, when I say that we have no thought to suggest which we do not suppose to be a fair element in the strict legal judgment which you are required to make up.

In performing the duty assigned to me in the case, I shall necessarily refer to the mere rudiments of Constitutional law; to the most common place topics of history, and to those plain rules of justice and right which pervade all our institutions. I beg your honors to believe that this is not done because I think that the Court, or any member of it, is less familiar with these things than I am, or less sensible of their value; but simply and only because, according to my view of the subject, there is absolutely no other way of dealing with it. If the fundamental principles of American liberty are attacked, and we are driven within the inner walls of the Constitution to defend them, we can repel the assult only with those same old weapons which our ancestors used a hundred years ago. You must not think the worse of our armor because it happens to be old-fashioned and looks a little rusty from long disuse.

The case before you presents but a single point, and that an exceedingly plain one. It is not incumbered with any of those vexed questions that might be expected to arise out of a great war. You are not called upon to decide what kind of a rule a military commander may impose upon the inhabitants of a hostile country which he occupies as a conqueror, or what punishment he may inflict upon the soldiers of his own army or the followers of his camp; or yet how he may deal with civilians in a beleagured city or other place in a state of actual siege, which he is required to defend against a public enemy. This contest covers no such ground as that. The men whose acts we complain of erected themselves into a tribunal for the trial and punishment of citizens who were connected in no way whatever with the army or navy. And this they did in the midst of a community whose social and legal organization had never been disturbed by any war or insurrection, where the courts were wide open, where judicial process was executed every day without interruption, and where all the civil authorities, both State and national, were in the full exercise of their functions.

My clients were dragged before this strange tribunal, and after a proceeding, which it would be mere mockery to call a trial, they were oredred to be hung. The charge against them was put into writing and is found on this record, but you will not be able to decipher its meaning. The relators were not accused of treason; for no act is imputed to them which, if true, would come within the definition of that crime. It was not conspiracy under the act of 1861; for all concerned in this business must have known that conspiracy was not a capital offense. If the commissioners were able to read English, they *could not help but see that it was made* punishable even by fine and imprisonment, only upon condition that the *parties should first be convicted before* a Circuit or District Court of the United States. The judge-advocate must have meant to charge them with some offense unknown to the laws, which he chose to make capital by legislation of his own, and the commissioners were so profoundly ignorant as to think that the legal innocence of the parties made no difference in the case. I do not say what Sir James Mackintosh said of a similar proceeding; that the trial was a mere conspiracy to commit wilful murder upon three innocent men. The commissioners are not on trial; they are absent and undefended; and they are entitled to the benefit of that charity which presumes them to be wholly unacquainted with just principles of natural justice, and quite unable to comprehend either the law or the facts of a criminal cause.

Keeping the character of the charges in mind, let us come at once to the simple question upon which the court below divided in opinion: Had the commissioners jurisdiction—were they invested with legal authority to try the relators and put them to death for the offense of which they were accused? We answer no; and therefore the whole proceeding from beginning to end was utterly null and void. On the other hand, it is absolutely necessary for those who oppose us to assert, and they do assert, that the commissioners had complete legal jurisdiction both of the subject-matter and of the parties, so that their judgment upon the law and the facts is absolutely conclusive and binding, not subject to correction nor open to inquiry in any court whatever. Of these two opposite views, you must adopt one or the other; for there is no middle ground on which you can possibly stand.

I need not say (for it is the law of the horn books) that where a court (whatever may be its power in other respects) presumes to try a man for an offense of which it has no right to take judicial cognizance, all its proceedings in that case are null and void. If the party is acquitted, he can not plead the acquittal afterwards in bar of another prosecution; if he is found guilty and sentenced, he is entitled to be relieved from the punishment. If a Circuit Court of the United States should undertake to try a party for an offense clearly within the exclusive jurisdiction of the State courts, the judgement could have no effect. If a country court in the interior of a State should arrest an officer of the Federal navy, try him, and order him to be hung for some offence against the law of nations, committed upon the high seas or in a foreign port, nobody would treat such judgement otherwise than with mere derision. The Federal courts have jurisdiction to try offenses against the laws of the United States, and the authority of the State courts is confined to the punishment of acts which are made penal by State laws. It follows that where the accusation does not amount to an offense against the law of either the State or the Federal Government, no court can have jurisdiction to try it. Suppose for example that the judges of this court should organize themselves into a tribunal to try a man for witchcraft, or heresy, or treason against the Confederate States of America, would any body say that your judgment had the least validity?

I care not, therefore, whether the relators were intended to be charged with treason or conspiracy or with some offense of which the law takes no notice. Either or any way, the men who undertook to try them had no jurisdiction of the subjec-tmatter.

Nor had they jurisdiction of the parties. It is not intended that this was a case of impeachment, or a case arising in the land or naval forces. It is either nothing at all or else it is a simple crime against the United States, committed by private individuals not in the public service, civil or military. Persons standing in that relation to the Government are answerable for the offenses which they may commit only to the civil courts of the country. So says the Constitution, as we read it; and the act of Congress of March 3, 1863, which was passed with express reference to persons precisely in the situation of these men, declares that they shall be delivered up for trial to the proper civil authorities.

There being no jurisdiction of the subject matter or of the parties, you are bound to relieve the petitioners. It is as much the duty of a judge to protect the innocent as it is to punish the guilty. Suppose that the Secretary of some department should take it into his head to establish an ecclesiastical tribunal here in the city of Washington, composed of clergymen *"organized to convict"* every body who prays after a fashion inconsistent with the supposed safety of the State. If he would select members with a proper regard to the *odium theologicum*, I think I could insure him a commission that would hang every man and woman who might be brought before it. But would you, the judges of the land, stand by and see their sentences executed? No; you would interpose your *writ of prohibition*, your *habeas corpus*, or any other process that might be at your command, between them and their victims. And you would do that for precisely the reason which requires your intervention here—because religious errors, like political errors, are not crimes which anybody in this country has jurisdiction to punish, and because ecclesiastical commissions, like military commissions, are not among the judicial institutions of this people. Our fathers long ago cast them both aside, among the rubbish of the dark ages; and they intended that we, their children, should know them only that we might blush and shudder at the shameless injustice and the brutal cruelties which they were allowed to perpetrate in other times and other countries.

But our friends on the other side, are not at all impressed with these views. The brief corresponds exactly with the doctrines prepounded by the Attorney-general, in a very elaborate official paper which he published last July, upon this same subject. He then avowed it to be his settled and deliberate opinion that the military might "take and kill, try and execute" (I use his own words) persons who had no sort of connection with the army or navy. And though this be done in the face of the open courts, the judicial authorities, according to him, are utterly powerless to prevent the slaughter which may thus be carried on. That is the thesis of the Attorney-general and his assistant counselors are to maintain this day, if they can maintain it, with all the power of their artful eloquence.

We, on the other hand, submit that a person not in the military or naval service can not be punished at all until he has had a fair, open, public trial before an impartial jury, in an ordained and established court, to which the jurisdiction has been given by law to try him for that specific offense. There is our proposition. Between the ground we take and the ground they occupy there is and there can be no compromise. It is one way or the other.

Our proposition ought to be received as true without any argumet to support it; because if that, or some thing precisely equivalent to it, be not a part of our law, this is not what we have always supposed it to be, a free country. Nevertheless I take upon myself the burden of showing affirmatively not only that it is true, but that it is immovably fixed in the framework of the Government, so that it is utterly impossible to detach it without destroying the whole political structure under which we live. By removing it you would destroy the life of this nation as completely as you would destroy the life of an individual by cutting the heart out of his body. I proceed to the proof.

In the first place, the self-evident truth will not be denied that the trial and punishment of an offender against the Governmen is the exercise of judicial authority. That is a kind of authority which would be lost by being diffused among the masses of the people. A judge would be no judge if every body else were a judge as well as he. Therefore in every society, however rude or however perfect its organization, the judicial authority is always committed to the hands of particular persons, who are trusted to use it wisely and well; and their authority is exclusive; they can not share it with others to whom it has not been committed. Where, then, is the judicial power in this country? Who are the depositaries of it here? The federal constitution answers that question in very plain words, by declaring that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish." Congress has, from time to time, ordained and established certain inferior courts; and in them, together with the one Supreme Court to which they are subordinate, is vested all the judicial power, properly so called, which the United States could legally exercise. That was the compact made with the General Government at the time it was created. The States and the people agreed to bestow upon that Government a certain portion of the judicial power which otherwise would have remained in their own hands, but gave it on a solemn trust and *coupled the grant of it with this express* condition that it should never be used in any way but one—that is, by means of ordained and established courts. Any person, therefore, who undertakes to exercise judicial power in any other way not only violates the law of the land, but he treacherously tramples upon the most important part of that sacred covenant which holds these States together.

May it please your honors, you know, and I know, and everybody else knows that it was the intention of the men who founded this Republic, to put the life, liberty and property of every person in it under the protection of a regular and permanent judiciary, separate, apart, distinct, from all other branches of the Government, whose sole and exclusive business it should be to distribute justice among the people according to the wants and needs of each individual. It was to consist of courts, always open to the complaint of the injured, and always ready to hear criminal accusations when founded upon probable cause; surrounded with all the machinery necessary for the investigation of truth, and clothed with sufficient power to carry their decrees into execution. In these courts it was expected that judges would sit who would be upright, honest and sober men, learned in the laws of their country, and lovers of justice from the habitual practice of that virtue; independent because their salaries could not be reduced, and free from party passion because their tenure of office was for life. Although this would place them above the clamors of the mere mob, and beyond the reach of Executive influence, it was not intended that they should be wholly irresponsible. For any willful or corrupt violation of their duty, they are liable to be impeached; and they cannot escape the control of an enlightened public opinion, for they must sit with open doors, listen to full discussion, and give satisfactory reasons for the judgments they pronounce. In ordinary tranquil times the citizen might feel himself safe under a judicial system so organized.

But our wise forefathers knew that tranquility was not to be always anticipated in a republic; the spirit of a free people is often turbulent. They expected that strife would rise between classes and sections, and even civil war might come, and they supposed, that in such times, judges themselves might not be