

**ARGUMENT  
ON THE PLEA TO THE  
JURISDICTION OF THE MILITARY COMMISSION  
BY  
THOMAS EWING, JR.**

June 23, 1865.

*May it please the Court:* The first great question—a question that meets us at the threshold—is, do you, gentlemen, constitute a court, and have you jurisdiction, as a court, of the persons accused, and the crimes with which they are charged? If you have such jurisdiction, it must have been conferred by the Constitution, or some law consistent with it, and carrying out its provisions.

1. The 5th article of the Constitution declares:

“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;” and that “the judges of both Supreme and *inferior courts* shall hold their offices during good behavior.”

Under this provision of the Constitution, none but courts ordained or established by Congress can exercise judicial power, and those courts must be composed of judges who hold their offices during good behavior. They must be independent judges, free from the influence of Executive power. Congress has not “ordained and established” you a court, or authorized you to call these parties before you and sit upon their trial, and you are not “judges” who hold your offices during good behavior. You are, therefore, no court under the Constitution, and have no jurisdiction in these cases, unless you obtain it from some other source, which overrules this constitutional provision.

The President can not confer judicial power upon you, for he has it not. The executive, not the judicial power of the United States, is vested in him. His mandate, no matter to what man or body of men addressed, to try, and if convicted, to sentence to death a citizen, not of the naval or military forces of the United States, carries with it no authority which could be pleaded in justification of the sentence. It were no better than the simple mandate to take A, B, C, D, E, F, and G, H, and put them to death.

2. The President, under the 5th amendment to the Constitution, may constitute courts pursuant to the Articles of War, but he can not give them jurisdiction over citizens. This article provides that “no person shall be held to answer for a capital or otherwise infamous crime, unless on a

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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.

The presentment and indictment of a grand jury is a thing unknown and inconsistent with your commission. You have nothing of the kind. Neither you nor the law officers who control your proceedings seem to have thought of any such thing. These defendants did not and do not belong to “land or naval forces” of the United States—nor were they “militia, in time of war or public danger, in actual service.” The Constitution, therefore, in the article above cited, expressly says: You shall not hold them to answer to any of the capital and infamous crimes with which they are charged.

Is not a single, direct, constitutional prohibition, forbidding you to take jurisdiction in these cases, sufficient? If it be not, read the provisions of the 3d section of the 3d article. It is as follows:

“The trial of all crimes, except in cases of impeachment, shall be *by jury*.”

But lest this should not be enough, in their anxious care to provide against the abuses from which England had recently escaped, and which were still fresh in the memories of men—as the Star Chamber, the High Commission Courts, and their attendant enormities—the framers of the Constitution further provided, in the 6th amendment, that—

“In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed.”

Now, whence, and what is, the authority which overrules these distinct constitutional prohibitions, and empowers you to hold these citizens to answer, *despite the mandate* of the Constitution forbidding you?

Congress has not attempted to grant you the power; Congress could not grant it. A law to that effect, against the constitutional prohibition, would be merely void. Congress has authorized the suspension of the writ of *habeas corpus*, as the Constitution permits (Art. 1, Sec. 9); but the Constitution does not thereby permit the military to try, nor has Congress attempted to deliver over to the military for trial, judgment, and execution, American citizens, not in the land or naval forces or in the militia in actual service, when accused of crime. Congress and the President, the law-making power, were incompetent to this, and have not attempted it. Whence, then comes the dispensation with the constitutional prohibition? Where and whence is the affirmative grant of jurisdiction under which you propose to try, and if convicted, pass sentence upon these men, citizens of the United States—not soldiers, not militia-men,—but citizens engaged in the ordinary

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avocations of life? I am not permitted to know. Congress has not in any form attempted to violate or impair the writ of *habeas corpus*; this goes to imprisonment—the extreme limit to which the law-making power is permitted to go, and it is only in cases of strong necessity that this is permitted. Congress has repealed so much of the 102d section of the act of September 24, 1739, as required that in all capital cases twelve petit jurors would be summoned from the county in which the offense was committed (par. 221, section 102, repealed July 16, 1862, page 1164, sec. 22), but has preserved all other legal provisions made in aid of the Constitution to protect citizens from the oppression of unregulated and unrestrained Executive power. The accused shall be tried upon an indictment or presentment of a grand jury. If two or more crimes of a like nature be charged, they must be set forth in separate counts. (Act of February 26, 1853, sec. 117). You may not compel an accused to answer to a loose story or accusation of several crimes in one count. If the crime charged be treason, which this paper approaches more nearly than anything else, the accused shall have a copy of the indictment, and a list of the jury, and of all the witnesses to be produced on trial for proving said indictment (mentioning the names and places of abode of such witnesses and jurors), delivered unto him at least three entire days before he shall be tried for the same; and in other capital offenses, shall have such copy of indictment and list of the jury two entire days, at least before the trial. (Act of April 30, 1790, sec. 24, p. 221.)

Against this array of constitutional and legal prohibition and regulation, I know of nothing that can be adduced, except perhaps, an Executive order authorizing, by direct mandate or implication, the thing to be done which the Constitution forbids you to do. If you be proceeding in obedience to such Executive mandate, and if that give jurisdiction, still you proceed in a form and manner which the Constitution and law expressly forbid. If my clients be charged with treason or murder (and I conjecture they are charged with murder, at least), they must be proved to have been *present, aiding in or actually committing the overt act, or alleged murder*. The Judge Advocate has been unable, in the cases of Arnold and Mudd, to present any evidence *remotely approaching* that prescribed by the Constitution and the laws as the condition of conviction; and yet I am led to infer that he will claim a conviction of one or both of them on the proof presented. What is the profession, on this and on the other side of the Atlantic, to think of such administration of criminal jurisprudence?—for this, the first of our State trials, will be read with avidity everywhere. I ask the officers of the Government to think of this carefully *now*, lest two or three years hence they may not like to hear it named.

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But we may mistake the whole case as it presents itself to the mind of the Judge Advocate. We are here as counsel for the accused, but are not allowed to know explicitly with what crime, defined by law, any one of them is charged, or what we are here to defend. No crime known to the law is legally charged in the paper which is here substituted for an indictment. In this paper three distinct crimes are strongly hinted at in a single charge, to each of which different rules of law and evidence are applicable, and different penalties are attached; and I had wished to know, so accordingly, which alleged or intimated crime any one, or each, or all of them, are to be tried. The information has been denied us. The Judge Advocate puts these parties on trial, and refuses (in the most courteous terms) to advise their counsel on what law or authority he rests his claim to jurisdiction; of what crime he intends to convict each or any of the defendants; in what laws the crimes are defined and punishments prescribed; or on what proof, out of the wild jungle of testimony, he intends to rest his claim to convictions.

But it has been said, and will perhaps be said again, in support of this jurisdiction, that the necessities of war justify it—and “*silent leges inter arma.*” So said the Roman orator when Rome had become a military despotism, and ceased forever to have liberty, and when she retained law only as the gift or by the permission of the ruling despot. “*The law is silent amid arms.*” Yes, it is so in a conquered country, when the victorious general chooses to put the law to silence; for he is an autocrat, and may, if he chooses, be a despot. But how extravagant is the pretense that a bold, and spirited, and patriotic people, because they rise in their majesty and send forth conquering armies to rescue the republic, thereby forfeit all constitutional and legal protection of life, liberty, and property!

Cases have often arisen, in which robber bands, whose vocation is piracy on the high seas, or promiscuous robbery and murder on land—*hostes humani generis*—may be lawfully put to the sword without quarter, in battle, or hung on the yard-arm, or otherwise put to death, when captured, according to the necessities of the case, without trial or other conviction, except the knowledge of the commanding general that they were taken *flagrante bello*, and that they are pirates or land robbers. A military court may be called, but it is *advisory* merely; the general acts, condemns, and executes. But the *Constitution* of the United States has nothing to do with this. It does not protect pirates or marauders who are enemies of the human race; or spies, or even enemies taken in battle. It protects, not belligerent enemies, but only citizens and those persons not citizens who, in civil life, seek and claim its protection, or aliens who are engaged in its military or other service. The power of the commanding general over these classes is restrained only by the *usages*

of war among civilized nations. But these defendants are not charged as spies or pirates, or armed and organized marauders, or enemies captured in war, or persons in the land or naval service of the United States. They belong to none of these classes, over whom military discretion or martial law extends, unless they extend over and embrace *all* the people of the United States.

But, if the jurisdiction in this case exist, whether by law or by the power of arms, I regret that a Military Commission should be charged with the trial of these causes. The crimes are, as far as hinted at and written about in the charge and specifications, all cognizable in our civil courts. Those courts are open, unobstructed, without a single impediment to the full and perfect administration of justice—ready and prompt, as they always are, to perform the high duties which the well-known principles of law under the Constitution devolve on them. What good reason can be given in a case like this, to a people jealous of their rights, for a resort here and now to military trials and military executions? We are at the advent of a new, and I trust a successful, Administration. A taint such as this—namely, the needless violation of the constitutional rights of the citizen—ought not to be permitted to attach to and infect it. The jurisdiction of this Commission has to be sought *dehors* the Constitution, and against its express prohibition. It is, therefore, at least of doubtful validity. If that jurisdiction do not exist; if the doubt be resolved against it by our judicial tribunals, when the law shall again speak, the form of trial by this unauthorized Commission can not be pleaded in justification of the seizure of property or arrest of person, much less the infliction of the death penalty. In that event, however fully the recorded evidence may sustain your findings, however moderate may seem your sentences, however favorable to the accused your rulings on the evidence, your sentence will be held *in law* no better than the rulings of Judge Lynch's courts in the administration of lynch law. When the party now in favor falls—as in the vicissitudes of things it must one day fall, and all the sooner for a reckless use of its present power—so it will be viewed by that party which succeeds it. This is to be expected, and, indeed, hoped; but if, unfortunately, this proceeding be then accepted and recorded as a precedent, we may have fastened on us a military despotism. If we concede that the exercise of jurisdiction claimed is now necessary, and for the best possible object, before we consent that it stand as a precedent in our jurisprudence, we should recall to mind the statesmanlike and almost prophetic remarks of Julius Ceasar, in the Roman Senate, on the trial of Lentulus and his accomplices in Catiline's conspiracy: "*Abuses often grow from precedents good in principle; but when the power falls into hands of men less enlightened or less honest, a just a reasonable precedent receives an application contrary to justice and reason.*" It is to be remembered that

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criminal trials involving capital punishment were not then within the competency of the Roman Senate; and neither the Consul nor the Senate, nor both of them, had the right to condemn a Roman citizen without the concurrence of the people.\*

If you believe you possess the power of life and death over the citizens of the United States in State where the regular tribunals can be safely appealed to, still, for the sake of our common country and its cherished institutions, do not press that power too far. Our judicial tribunals, at some future day, I have no doubt, will be again in the full exercise of their constitutional powers, and may think, as a large proportion of the legal profession think now, that your jurisdiction in these cases is an unwarranted assumption; and they may treat the judgment which you pronounce, and the sentence you cause to be executed, as your own unauthorized acts.

The assumption of jurisdiction, or this use of a legitimate jurisdiction, not created by law, and not known to the law or to legal men, has not or its sanction even the plea of necessity. It may be convenient. Conviction may be easier and more certain in this Military Commission than in our constitutional courts. Inexperienced as most of you are in judicial investigations, you can admit evidence which the courts would reject, and reject what they would admit, and you may convict and sentence on evidence which those courts would hold to be wholly insufficient. Means, too, may be resorted to by detectives, acting under promise or hope of reward, and operating on the fears or the cupidity of the witnesses, to obtain and introduce evidence, which can not be detected and exposed in this military trial, but be readily in the free, but guarded, course of investigation before our regular judicial tribunals. The Judge Advocate, with whom chiefly rests the fate of these citizens, is learned in the law, but from his position he can not be an impartial judge, unless he be more than man. He is the PROSECUTOR, in the most extended sense of the word. As in duty bound, before this Court was called, he received the reports of detectives, pre-examined the witnesses, prepared and officially signed the charges, and as principal counsel for the Government, controlled on the trial the presentation, admission and rejection of evidence. In our courts of law, a lawyer who has heard his client's story, if transferred from the bar to the bench, may not sit in the trial of the cause, lest the ermine be sullied through the partiality of counsel. This is no mere theoretical objection—for the union of prosecutor and judge works practical injustice to the accused. The Judge Advocate controls the admission and rejection of evidence—knows what will aid and what will injure the cause of the prosecution, and inclines favorably to the one, and

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\* Cicero, who was Consul, Cato, Silanus, and others of their associates in the Senate were afterwards tried for the murder of the conspirators, convicted, and banished.

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unfavorably to the other. The defense is met with a bias of feeling and opinion on the part of the judge who controls the proceedings of the Court, and on whom, in great measure, the fate of the accused depends, which morals and law alike reject. Let it not be supposed I censure or reflect on any one, for I do not. The wrong suffered by the parties accused has its root in the vice of this system of trial, which I have endeavored to expose.

Because our Chief, so venerated and beloved (and no one venerated and love him more than I), has fallen by the hand of a ruthless assassin, it ought not to follow that the Constitution and law should be violated in punishing men suspected of having compassed his death, or that men not *legally* found guilty should be sacrificed in vengeance as victims generally because of the crime.

There may be a lurking feeling among men which tends to this harshness of retribution, regardless of the innocence of those on whom vengeance may fall. Tending to this feeling, exciting or ministering to it, was the two days' testimony which, without other apparent point or purpose, detailed the horrors of the Libby Prison; and the evidence that, in 1861, one of my clients took part in the rebellion; and the further testimony (which we showed was utterly fabulous) that another of my clients, in 1863 or 1864, entertained rebel officers and soldiers, and corresponded with rebels in Richmond. As if to say: "What matters it how we try, or whether we legally try at all, provided we convict and execute men who have associated with, or in sympathy with, monsters such as those?" Homer makes Achilles immolate, at the funeral pyre of Patroclus, twelve Trojan captives, simply because they *were* Trojans, and because Patroclus had fallen by a Trojan hand. If that principle of judicial action be adopted here, it were surely not too much to sacrifice to the manes of one so beloved and honored as our late Chief Magistrate a little lot of rebel sympathizers, because, like the assassin, some of them, at some time, participated in the rebellion, or gave aid and comfort to rebels. If this course of reasoning do not develop the object of that strange testimony, I know not how to read it. Indeed, a position taken by the learned Assistant Judge Advocate, in discussion my objection to the part of that evidence which relates to my clients, goes to this—and even beyond it—namely, that participation in the rebellion was participation in the assassination, and that the rebellion itself formed part of the conspiracy for which these men are on trial here.