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Lincoln Conspiracy Trial--Mysterious Phases

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LINCOLN CONSPIRACY TRIAL—MYSTERIOUS PHASES

Never were there two opinions in the world alike, no more than two haires or two graines. Diversity is the most universal quality. —*Montaigne.*

INTRODUCTION

In discussing a case that involves the relationship between the civil and the military power it is interesting to note the gradual development of the civil power. Great Britain evolved into a state as a result of a merger of small military units. Naturally the military power was recognized at that time and for a considerable period thereafter as the supreme power. The civil power, then in its incipiency, gradually grew until Magna Charta gave it due recognition; and from that time on, as the Petition of Right and the Bill of Rights show, it grew in importance. The transition resulting from the contraction of the military and the expansion of the civil power brought forth a new philosophy of government, the supremacy of the civil power. The American colonists, imbued with this doctrine, predicated the Declaration of Independence upon it. In this great document the people stated as one of their grievances that the King "has affected to render the military independent of, and superior to, the civil power." The Articles of Confederation and the Constitution and Bill of Rights likewise manifest the intention of the founding fathers to rest our government on the principle of civil supremacy. A corollary of this American constitutional theory is that the jurisdiction of the civil courts is supreme. A further corollary is that a civilian has a constitutional right to demand a public and speedy trial by jury in the civil courts. Dr. Edward Jenks, an eminent legalist, states, "Moreover, where there is a conflict of jurisdiction, the civilian jurisdiction prevails." [1]

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[1] JENKS, THE NEW JURISPRUDENCE (1933) 256.

This brief summary of the rise of civil power led to the following discussion between a professor and a student about one of the most famous trials in the United States, the Lincoln Conspiracy Trial.

STUDENT: What was this famous trial?

PROFESSOR: It was the trial of eight conspirators leagued with John Wilkes Booth in the assassination of President Lincoln and the attempted assassination of the Honorable William H. Seward, Secretary of State.[2] Immediately after the death of President Lincoln, Secretary of War Stanton announced in an official bulletin that all persons who had harbored or secreted Booth and his aids or assisted their escape should be subject to trial before a military commission. Booth was captured in Garrett's barn near Port Royal, Virginia, and died on Garrett's porch about four hours later, April 24, 1865. Arrested as his co-conspirators were David E. Herold, George A. Atzerodt, Lewis Payne, Michael O'Laughlin, Edward Spangler, Samuel Arnold, Mrs. Mary E. Surratt, and Dr. Samuel A. Mudd. They were brought to trial on May 10, 1865, before a military commission of nine officers convoked by order of President Andrew Johnson, following an opinion of Attorney-General Speed. This proceeding was based upon the theory that the assassination of Lincoln was a military crime. Instead of a secret military trial, the defendants demanded, as civilians, a public trial by jury in the District of Columbia civil courts, which were then open and functioning. The military commission sustained its own jurisdiction and proceeded with the trial. The trial continued for several weeks, and on July 5, 1865, President Johnson approved the commission's findings ordering four of the defendants to be imprisoned and four to be executed.[3] On July 7, 1865, the date set for the hanging,

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2 PITMAN, ASSASSINATION OF PRESIDENT LINCOLN AND TRIAL OF THE CONSPIRATORS (1865); POORE, THE CONSPIRACY TRIAL (1865); DEWITT, THE ASSASSINATION OF ABRAHAM LINCOLN (1909).

3 PITMAN, *op. cit. supra* note 2, at 249.

Mary E. Surratt applied to Judge Wylie of the Supreme Court of the District of Columbia for a writ of habeas corpus. The writ was issued by Judge Wylie and made returnable before the criminal court of the District of Columbia at ten o'clock that morning.[4] Instead of obeying the writ and producing the person of Mary E. Surratt at ten o'clock, Major-General Hancock, accompanied by Attorney-General Speed, appeared before Judge Wylie at eleven-thirty o'clock that morning without Mary E. Surratt, because President Johnson had suspended the writ. Judge Wylie yielded to the suspension of the writ,[5] and Mary E. Surratt, David E. Herold, George A. Atzerodt, and Lewis Payne were hanged that afternoon. The other four were sent to the federal prison (Dry Tortugas) in Florida. In 1867 O'Laughlin died during an epidemic of yellow fever which swept the prison; and in 1869 Dr. Mudd, Samuel Arnold, and Edward Spangler were pardoned by President Johnson. Incidentally, a story of the Lincoln Conspiracy Trial would be incomplete without a reference to the fact that the small diary removed from Booth's pocket at his capture was not included with the other Booth effects introduced at the trial of the co-conspirators,[6] and without a reference to the controversy between President Johnson and Judge Advocate General Holt over the recommendation to mercy of Mrs. Surratt signed by a majority (five) of the commission which had sentenced her to be executed.[7]

STUDENT: What is the origin of the military commission in the United States?

PROFESSOR: General Winfield Scott in his memoirs states in reference to the Mexican War in 1847 that "Reliable information reached Washington almost daily that the wild volunteers as soon as beyond the Rio Grande committed,

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4 PITMAN, *op. cit. supra* note 2, at 250.
5 PITMAN, *op. cit. supra* note 2, at 250.
6 1 TRIAL OF JOHN H. SURRATT (1867) 27.
7 *Loc. cit. supra* note 6.

with impunity, all sorts of atrocities on the persons and property of Mexicans, and that one of the former, from a concealed position, had even shot a Mexican as he marched out of Monterey, under the capitulation. There was no legal punishment for any of those offenses, for, by the strange omission of Congress, American troops take with them beyond the limits of their own country, no law but the Constitution of the United States, and the rules and articles of war. . . .

"To suppress these disgraceful acts abroad, the autobiographer drew up an elaborate paper, in the form of an order . . . called, his *martial law order* . . . to be issued and enforced in Mexico, until Congress could be stimulated to legislate on the subject. On handing this paper to the Secretary of War for his approval, a startle at the title was the only comment he then or ever made on the subject. It was soon silently returned, as too explosive for handling. A little later the Attorney-General 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. All the authorities were evidently alarmed at the proposition to establish martial law, even in a foreign country, occupied by American troops. Hence they touched the subject as daintily as a 'terrier mumbles a hedgehog.' . . . Under it, all offenders, Americans and Mexicans, were alike punished with death for murder or rape, and for other crimes proportionately. It will be seen that the order did not in the least interfere with the administration of justice between Mexican and Mexican, by the ordinary courts of the country. It only provided a special American tribunal for any case to which an American might be a party." [8]

STUDENT: Why did President Johnson order a military commission to be convoked to try the civilians accused of being leagued with John Wilkes Booth in the assassination of President Lincoln?

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[8] MEMOIRS OF LIEUT.-GENERAL SCOTT (1864) 392-395.

PROFESSOR: Secretary of War Stanton decided that the conspirators should be tried by a military commission and Attorney-General Speed thereupon advised President Johnson that such a tribunal had jurisdiction.[9] In the diary of Gideon Welles is an observation that throws further light on this matter and permits an inference that Secretary of the Navy Welles thought that Speed at first was of the opinion that the conspirators should be tried in the Criminal Court of the District of Columbia. Welles, in his diary, states: "I regret they are not tried by the civil court, and so expressed myself, as did McCullough (McCullough was Secretary of the Treasury); but Stanton, who says the proof is clear and positive, was emphatic, and Speed advised a military commission, though at first, I thought, otherwise inclined." [10] Orville Hickman Browning, in his diary, states: "This commission was without authority, and its proceedings void. . ." [11] It is rather interesting to note Mr. Pierrepont's statement to the jury in the subsequent trial of John Surratt, in 1867, in the District of Columbia Criminal Court: "This, gentlemen [referring to the jury], as I have already said, is a trial of one of those conspirators. It has this marked feature in it: it is the first judicial trial that has ever been instituted to try any of these conspirators. Our freedom-loving race and the sturdy blood from which we spring has always clung with exceeding fondness to liberty . . . to the right of trial by jury in a court of law, and they have always been jealous of military power. When the other conspirators were tried, it was claimed that as the head of the United States had been murdered in his camp, it was eminently fit that the trial of those conspirators should be held by military men. Many said that in the city of Washington there was so much feeling and sympathy for the rebel cause,

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9 PITMAN, *op. cit. supra* note 2, at 403.

10 2 DIARY OF GIDEON WELLES (1911) 303 (May 9, 1865). Mr. Wright Howes of Chicago called this to my attention.

11 22 DIARY OF ORVILLE HICKMAN BROWNING (Illinois Historical Collection) 37.

there were so many enemies of our country here, that the chances were that a jury would not be found among whose number there would not be some one or two in sympathy with the traitor and the assassin, who would prevent a verdict. That argument was used in favor of the military tribunal, instead of a trial in the courts of law. I am one of those who at all times, and upon all occasions, have insisted that the civil courts, with a jury of twelve men, were competent to the trial of these crimes." [12] Mr. Pierrepont was Associate Counsel for the United States in the prosecution against John Surratt.

STUDENT: If the Military Commission had no jurisdiction of the defendants as they claimed, why didn't they apply for a writ of habeas corpus?

PROFESSOR: Mary E. Surratt, one of the defendants, applied for a writ of habeas corpus on the day set for her execution and Judge Wylie of the Supreme Court of the District of Columbia ordered a writ to issue as prayed and made it returnable before the Criminal Court of the District of Columbia at 10 A. M., July 7th, 1865. At 11:30 the same morning, Major General Hancock, accompanied by Attorney-General Speed, appeared before Judge Wylie in obedience to the writ, but refused to produce the body of Mary E. Surratt as President Johnson, that morning, suspended the writ in this case and Judge Wylie ruled that the court yielded to the suspension of the writ of habeas corpus by the President of the United States.[13]

STUDENT: Should Judge Wylie have yielded to the military jurisdiction in this case?

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12 2 TRIAL OF JOHN H. SURRATT, 1258.

13 PITMAN, *op. cit. supra* note 2, at 250. Hugh McCulloch, Secretary of the Treasury in Administrations of Lincoln, Johnson, and Arthur, in a volume entitled "Men and Measures of Half a Century" (New York, 1888, Charles Scribner & Sons) referring, on page 226, to President Johnson, said: "And that he especially regretted that he ordered the writ of habeas corpus, issued by Judge Wylie, on the morning of her execution, to be disregarded."

PROFESSOR: Judge Wylie should not have yielded in this case according to my interpretation of the law, but should have ordered General Hancock to obey the order and ignore the suspension of the writ and have acted just as Lord Kilwarden, a great constitutional judge, did in *Wolfe Tone's* case. Wolfe Tone had been sentenced to death by an order of a military court and, on the morning set for his execution, his counsel applied for a writ of habeas corpus, stating: "I do not pretend that Mr. Tone is not guilty of the charge of which he is accused. I presume the officers were honorable men. But it is stated in this affidavit as a solemn fact that Mr. Tone had no commission under His Majesty, and, therefore, no court-martial could have cognizance of any crime imputed to him while the Court of King's Bench sat in the capacity of the great Criminal Court of the land. In times when war was raging, when man was opposed to man in the field, courts-martial might be endured; but every law authority is with me, while I stand upon the sacred and immutable principle of the Constitution, that martial law and civil law are incompatible, and that the former must cease with the existence of the latter. This is not, however, the time for arguing this momentous question. My client must appear in this court. He is cast for death this very day. He may be ordered for execution while I address you. I call on the court to support the law, and move for a writ of habeas corpus, to be directed to the provost marshal of the barracks and Major Sandys, to bring up the body of Tone." The Chief Justice thereupon said: "Have a writ instantly prepared and Mr. Sheriff proceed to the barracks and acquaint the provost marshal that a writ is preparing to suspend Mr. Tone's execution, and see that he be not executed." The military officers refused to obey the writ and the Chief Justice said: "Mr. Sheriff, take the body of Tone into custody. Take the provost marshal and Major Sandys into custody, and show the order of the court to General

Craig." [14] In the United States the noted decision of Chief Justice Taney in the *Merryman* case in 1863 and the landmark *Milligan* decision in 1866 and the early opinion in 1807 in the *Bollman and Swartwout* proceedings by Chief Justice Marshall point to the fact that Judge Wylie did not have to yield. The problem is extremely important because in final analysis it involves the proper functions of the judicial department as well as the line of demarcation between the three departments of our government. The supremacy of the judiciary should be, as a matter of principle, upheld at all times.

STUDENT: In the cases in which civilians are tried by a military court, it is always contended that a civil court has jurisdiction and it would seem as though the civilian ought to have that question decided by a judicial tribunal.

PROFESSOR: Today a recent statute known as the Federal Declaratory Judgments Act (Signed June 14, 1934) provides a remedy for a civilian who denies the jurisdiction of the military authorities over him, as it permits a person to obtain a declaration of his rights and "In cases of actual controversy the courts of the United States shall have power, upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such." [15] In an English case, which shows the possibilities of the declaratory judgment in this field, a party asked for a declaration that he was not obliged to comply with a military notice and that it was illegal as to him.[16]

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14 27 HOWELL'S STATE TRIALS (1820) 614.

15 BORCHARD'S DECLARATORY JUDGMENTS (1934) 634.

16 BORCHARD'S DECLARATORY JUDGMENTS, 615; Flint v. Attorney General [1918] 2 Ch. 50.

General T. M. Harris, one of the members of the military commission that tried the conspirators, published a volume on the trial in 1892. At page 110 it is

STUDENT: Jefferson Davis was captured on May 11, 1865, and imprisoned in Fort Monroe and indicted for treason. Why was he not tried?

PROFESSOR: That question has never been satisfactorily answered but an interpretation of DeWitt, in his Impeachment and Trial of President Andrew Johnson states: "As to the indictment, the real causes of delay were the refusal of the Chief Justice to hold court in Virginia while the military held even partial control of the state, mistrust of a Virginia jury, and the desire to avoid the opening of embarrassing constitutional questions which the defendant's counsel were sure to raise on the trial. The President was in no way responsible for the tardiness of the prosecution; on the contrary, he, probably, was the only member of the administration having no misgivings as to its success. As to the charge of complicity, the real cause of delay in pressing it was that the testimony on which it was based—taken in secret before the military commission—in its subject matter was of the most flimsy and inconclusive character, was incompetent under the most elementary rules of evidence and came from the mouths of professional witnesses testifying under pay." [17]

STUDENT: What did the people of the United States think about the situation?

PROFESSOR: There were two schools of thought extant. On June 11, 1866, one month after the capture of Jefferson Davis, the following resolution was offered in the House of Representatives by Mr. Boutwell of Massachusetts, which was agreed to—yeas 105, nays 19—to this effect: "Whereas it is notorious that Jefferson Davis was the leader of the late rebellion, and is guilty of treason under the laws of the United States; and whereas by the proclamation of the

stated: "To the executive department of the government alone belonged the decision of the question as to the kind of trial that the accused should have. . . ." Is that an executive question under the Constitution? See General O'Duffy's Case [1934] Irish Rep. 550

17 DEWITT'S IMPEACHMENT AND TRIAL OF PRESIDENT ANDREW JOHNSON (1903) 137.

President of May, 1865, the said Davis was charged with complicity in the assassination of President Lincoln, and said proclamation has not been revoked or annulled: Therefore, Be it resolved, As the opinion of the House of Representatives, that said Davis should be held in custody as a prisoner, and subjected to a trial according to the laws of the land.[18]

STUDENT: Didn't the decision of the Supreme Court of the United States in the *Milligan* case make it clear that military commissions had no jurisdiction over civilians where the courts were open and functioning?

PROFESSOR: All are not agreed on the meaning of the *Milligan* case,[19] but it seems as though the prevailing opinion is that the majority of the court were correct. Some claim the case to be limited by the fact that the majority of the court claimed to have "judicial knowledge that in Indiana, in time of war, the Federal authority was always unopposed, and its courts always open to hear criminal accusations, and redress grievances." [20] It is contended that the fact assumed by the majority of the court was really a political question and if the executive department had declared that the State of Indiana and the Federal courts were subject to military jurisdiction on account of war, the courts would have been bound to recognize the military order. In a recent interpretation by John M. Zane, in Lincoln The Constitutional Lawyer, it is stated: "It was plain under the law that Milligan was entitled to be discharged under the Act of Congress then in force, and that he had not, therefore, been lawfully tried by the military commission." (Page 87.) In discussing the opinion of the majority in that case though, Justice Davis, according to the author, went too far, as he

18 MCPHERSON'S HAND-BOOK OF POLITICS FOR 1868, 113. A nolle prosequi was entered on the treason indictment, December, 1868 (U. S. Cir. Ct. at Richmond.).

19 4 Wall. 2 (1866).

20 WHITING'S WAR POWERS UNDER THE CONSTITUTION (43rd ed. 1871) 460, contains an extensive critique of the Milligan case.

states: "The rule laid down by Justice Davis cannot be considered sound." (Page 88.)

STUDENT: Is my understanding correct as to the fact that a majority of the military commission signed a recommendation of mercy in behalf of Mary E. Surratt, one of the four conspirators they had found guilty and sentenced to be executed?

PROFESSOR: Yes, it is true that five members of the nine that constituted the commission signed such a recommendation [21] and no incident connected with the conspiracy trial created more general interest than the controversy between President Johnson and Judge Advocate General Holt about it. President Johnson would not admit that he saw the commission's recommendation when he approved the findings of the commission and ordered the execution to be carried out. Judge Advocate General Holt was positive that the record of the conspiracy trial presented to President Johnson by him for approval had attached to it the recommendation of mercy. To this day two schools of thought exist in reference to this matter.

STUDENT: Why was it that the diary of Booth was not mentioned in the conspiracy trial of 1865 but was brought forward in the trial of John Surratt in 1867?

PROFESSOR: A veil of mystery surrounds the story of Booth's diary. In 1865 the fact that a diary was taken from Booth at the time of his capture was not made public and only a limited few knew about it; but in 1867 the public was made conscious of the diary due to the fact that La Fayette C. Baker, Chief of the United States Secret Service, in his testimony before the Judicial Committee of the Impeachment Investigation of President Johnson, mentioned Booth's diary. Baker likewise published a History of the United States Secret Service in 1867 in which he said that he took Booth's effects, including his diary, to Secretary of War

21 1 TRIAL OF JOHN H. SURRATT, 27.

Stanton on Wednesday, April 26, 1865.[22] Another incident that occurred in March, 1867, pyramided the status of the diary episode. The Congressional Globe details how General Butler from Massachusetts and Mr. John A. Bingham of Ohio differed on the policy of reconstruction relief and General Butler practically said, among other caustic remarks, that Mr. Bingham was opposing the policy of the President. Mr. Bingham, who had been very active as Special Judge Advocate in the conspiracy trial of 1865, resented the remarks of General Butler and caused the members present to break into laughter by reflecting on the military ability of General Butler by referring to him as either the hero of Fort Fisher not taken or Fort Fisher taken.[23] This statement roiled General Butler and five days later he replied to Mr. Bingham and referred to the conspiracy trial and the fact that the diary was not brought forward and said: "That diary as now produced, has eighteen pages cut out . . ." [24] General Butler inferred that Mr. Bingham, as Special Judge Advocate in the conspiracy trial, had not fully performed his duty but excepted from this accusation the nine members of the Military Commission by the following remark that is significant in showing the secrecy that surrounded Booth's diary: "They did not see the diary. They did not know of the diary." [25] Four months later the trial of John Surratt for the murder of President Lincoln started in June and according to the record of that trial on June 11, 1867, Mr. Pierrepont, Special Assistant Prosecutor, stated that the news-

[22] See, also: 2 TRIAL OF JOHN H. SURRATT. 1321, 1368; GENERAL HARRIS' TRIAL OF THE CONSPIRATORS (1892) 114; PERSONAL RECOLLECTIONS OF THE WAR OF THE REBELLION, published by the Commandery of the Loyal Legion of the United States (1891) 211; BURNETT, THE CONTROVERSY BETWEEN PRESIDENT JOHNSON AND JUDGE HOLT; BAKER'S HISTORY OF THE UNITED STATES SECRET SERVICE, 540. *Cf.* 1 TRIAL OF JOHN H. SURRATT, 311 (Testimony of Everton J. Conger: "Q. To whom did you give that diary with the other articles?" "A. To the Secretary of War, Mr. Stanton."). Also, see, 2 TRIAL OF JOHN H. SURRATT, 1206, 1229, 1236.

[23] 38 CONGRESSIONAL GLOBE (1867) 262, 263.

[24] 38 CONGRESSIONAL GLOBE, 363.

[25] 38 CONGRESSIONAL GLOBE, 364.

papers stories circulated the last few days as to the reason the diary was not brought forward in the conspiracy trial of 1865 would now be proved false.[26] On June 25, 1867, Everton J. Conger took the stand as a witness and said that he thought he took the diary from Booth.[27] Conger further stated he read the diary carefully before giving it to Secretary of War Stanton and that it was for the year 1864 and that although some leaves were cut out it nevertheless contained some writing.[28] In reply to a question about whether the diary was shown to him when he was a witness in the conspiracy trial two years previously, Conger said: "I have no recollection of seeing it, or of having anything said to me about it." [29] The diary was then introduced and the entries read as follows: "Te amo.

"April 13, 14, Friday, The Ides.

"Until to-day nothing was ever thought of sacrificing to our country's wrongs. For six months we had worked to capture. But our cause being almost lost, something decisive and great must be done. . ." [30] In the trial of John Surratt the defendant contended that the statement in the diary above quoted showed the time when the conspiracy was formed and that the plans were changed without his knowledge by Booth. Following its use in the 1867 trial the diary was returned to the government archives without the mystery of the eighteen missing pages being solved.

STUDENT: What was the case of *Shuey v. United States?*

PROFESSOR: On the 20th of April, 1865, the Secretary of War offered for the apprehension of John H. Surratt, one of Booth's accomplices, $25,000 reward, and also that "a liberal reward" would be paid for any information conducive

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26 1 TRIAL OF JOHN H. SURRATT, 27.

27 38 CONGRESSIONAL GLOBE, 312.

28 38 CONGRESSIONAL GLOBE, 308. Conger was asked: "Q. State whether the diary is in the same condition now as when you first saw it? A. Yes sir." *Cf.* Note 22, *supra.*

29 38 CONGRESSIONAL GLOBE, 314.

30 38 CONGRESSIONAL GLOBE, 310.

to the arrest of Surratt. On November 24th, 1865, the President caused to be published an order revoking the reward offered for the arrest of John H. Surratt. Henry B. Ste. Marie, in April, 1866, recognized Surratt and gave information to Mr. King, the American minister at Rome, that Zouave Watson was in fact John H. Surratt. Although Surratt then escaped to Egypt, it was recognized that the disclosures made by Ste. Marie brought about his arrest. Ste. Marie was paid $10,000 by the United States and then sued for $15,000 in the Court of Claims on the ground that balance was due him of the reward of $25,000 offered by the Secretary of War. The claim for $15,000 was not allowed, because the reward offered had been revoked five months before Ste. Marie had given the information.[31]

STUDENT: Were there any other legal trials that arose as an aftermath of the Lincoln Conspiracy Trial?

PROFESSOR: In 1866 the *Milligan* case led the conspirators who had been sentenced to the Federal prison in Florida to believe that their incarceration in 1865 was illegal and that they could obtain their freedom by a writ of habeas corpus. In 1868 following the Amnesty Proclamation more hope arose in the breasts of the conspirators and Doctor Mudd sought his release but District Judge Boynton in Florida refused to recognize his request on the ground that he had committed a military crime and further that the Amnesty Proclamation of 1868 did not extend to his case.[32]

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31 Shuey v. United States, 92 U. S. 73 (1875). The Supreme Court said: "We agree with the Court of Claims, that the service rendered by the plaintiff's testator was, not the apprehension of John H. Surratt, for which the War Department had offered a reward of $25,000, but giving information that conduced to the arrest. These are quite distinct things, though one may have been a consequence of the other. The proclamation of the Secretary of War treated them as different; and, while a reward of $25,000 was offered for the apprehension, the offer for the information was only a 'liberal reward.'"

Professor Sherman Steele called my attention to this case.

32 Ex parte Mudd, 17 Fed. Cas. 954 (1868). (Case No. 9,899.) In 1934 a bill was introduced in Congress to give Dr. Mudd's daughter, now living in Denver, $100,000.

STUDENT: Why was the trial of the conspirators in 1865 and the trial of John H. Surratt in 1867?

PROFESSOR: At the time the military commission was convoked in May, 1865, John H. Surratt, the friend and associate of Booth, had fled from Washington and no trace of him was dicovered until 1866. When he was captured finally in Egypt and brought back to the United States, it was 1867 and in June of that year he was tried alone in the District of Columbia Criminal Court by a jury and not by a military commission. No doubt you will recall that the jury disagreed and some months later he was set free.

STUDENT: If John H. Surratt was so closely associated with the archconspirator, Booth, I cannot understand why he was set free, although his mother, Mary E. Surratt, was hanged?

PROFESSOR: The jury did not find John H. Surratt guilty, but the military commission found sufficient evidence to convict Mary E. Surratt.

STUDENT: In conflicts between the civil and military jurisdiction, does the civil, as a matter of law, always prevail?

PROFESSOR: The military jurisdiction is supreme in its own sphere and the case of *United States v. McDonald* [83] is enlightening on that point where a court martial was properly held to have jurisdiction to try a spy arrested in New York City. It seems no matter how clear the point of jurisdiction may be, the matter is invariably sought to be brought into a civil court. In the first mutiny in the United States Navy, for example, there was no doubt about the jurisdiction of the court-martial held at the navy yard in Brooklyn, but the following detail shows that the civil jurisdiction was sought: "In the case of Mackenzie, Commander of the

[83] 265 Fed. 754 (D. C. E. D. N. Y. 1920), *appeal dismissed*, 41 S. Ct. 535, 256 U. S. 705, 65 L. ed. 1180.

United States Brig Somers, who, in December, 1842, had caused an officer and two men to be executed for mutiny, and who was tried by a court-martial on the charge of murder, and acquitted, the question arose, whether the case was exclusively within the jurisdiction of a court-martial. Application was twice made to the Circuit Court, while the court-martial was in session, to take jurisdiction of the case; but, after full argument, the application was denied. And the reasoning of the Court went the length of sustaining the principle, that courts-martial in the army and navy have exclusive jurisdiction of the offenses committed in violation of their respective codes." [34]

STUDENT: The Lincoln Conspiracy Trial and its various phases now appears in a different light since you have used it to illustrate the difficulty that arises where a constitutional problem remains unsettled, but before you conclude I would like to ask you one or two questions.

PROFESSOR: Let us save a little of the night share for the morning, as Professor Meehan would say.

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[34] WALKER'S AMERICAN LAW (6th ed. 1874) 167. In a pamphlet published in New York in 1843, entitled "Case of the Somers' Mutiny," the defense of Alexander Mackenzie, Commander of the U. S. Brig Somers, before the court-martial held at the Navy Yards, Brooklyn, stated: "In judging of the necessity of the execution, it is of vital importance to ascertain preliminary, whether a mutinous conspiracy in fact existed on board the Somers, and whether the persons executed were parties to that conspiracy. That such conspiracy existed; that it had for its object the conversion of the Brig into a piratical cruiser; that such object was to be effected by the murder of the officers and faithful of the crew; and that Mr. Spencer and Small were not only parties but ring leaders, in the conspiracy—appears from their own repeated and solemn declaration, and from unequivocal documentary evidence." (Page 3.) The execution of three of the prime conspirators at sea was justified because "The Commander of a ship at sea cannot, like a commander on shore, invoke the aid of some neighboring troops, or appeal to the patriotism of the sturdy militia . . . a mutiny on land does not always vitally endanger the interests or the fame of the country." (Page 10.) "Under these circumstances what was the Commander of the Somers to do? He was alone on the ocean. He could not invoke a regular court-martial." (Page 20.).

Conclusion

The Lincoln Conspiracy Trial in 1865 and the controversies that have arisen as a result of it cannot be attributed to the fact that the people believed that the co-conspirators of Booth should not be punished. Rather, they have arisen because the trial was by a military commission instead of by a common law jury in a criminal court and because the trial was secret, rather than public, as the founding fathers intended when the Bill of Rights was added to the Constitution. In other words the trial proceeded on the theory that in conflicts between the military and civil powers, the military was supreme, which in the United States is an anachronism as the *Milligan* case, decided by the Supreme Court of the United States in 1866, evidences. "The Constitution of the United States is a law for rules and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." [35] Mr. Justice Stephen J. Field some years later, in referring to the *Milligan* case, said: "The decision of the Court was in favor of the liberty of the citizen. Its opinion was announced by Mr. Justice Davis, and it will stand as perpetual monument to his honor. It laid down in clear and unmistakable terms the doctrine that military commission organized during the war, in a state not invaded nor engaged in rebellion, in which the federal courts were open and in the undisturbed exercise of their judicial functions, had no jurisdiction to try a citizen who was not a

35 Ex parte Milligan, 4 Wall. 2, 18 L. ed. 281 (1866).

resident of a state in rebellion, nor a prisoner of war, nor a person in the military or naval service; and that Congress could not invest them with any such power; and that in states where the courts were thus open and undisturbed the guaranty of trial by jury contained in the Constitution was intended for a state of war as well as state of peace, and is equally binding upon rulers and people at all times and under all circumstances." [86] All things considered, it seems difficult to reconcile the Lincoln Conspiracy Trial with the fundamental guaranties of the Constitution unless one refers to that old adage, "hard cases make bad law."

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[86] FIELD, PERSONAL REMINISCENCES (1893) 160.