THIRD GEORGE S. PRUGH LECTURE IN MILITARY LEGAL HISTORY[1]: ABRAHAM LINCOLN IN LAW AND LORE: THE LINCOLN CONSPIRATORS' TRIAL BY MILITARY COMMISSION

CHIEF JUDGE FRANK J. WILLIAMS[*]

[1] This is an edited transcript of a lecture delivered on 29 April 2009 by Chief Justice (Ret.) Frank J. Williams to the members of the staff and faculty, distinguished guests, and officers attending the 57th Graduate Course at The Judge Advocate General's Legal Center and School, Charlottesville, Va. The chair lecture is named in honor of Major General George S. Prugh (1920–2006).

[*] Chief Judge, U.S. Court of Military Commission Review; Chief Justice, Supreme Court of Rhode Island (2001–2008); Frank Williams was born in Cranston, R.I., where he attended public schools. He received his commission as a Second Lieutenant upon graduation from Boston University, where he was a member of the Army Reserve Officers' Training Corps. Justice Williams served for three years in Germany along the East/West German border with the 1st Reconnaissance Squadron, 2d Armored Cavalry Regiment, as a Tank Platoon Leader, S3 Air, Commanding Officer for C Troop, and Adjutant of the Squadron. Justice Williams was then transferred to Ban Me Thuot, Republic of Vietnam, in December 1965, where he served with Advisory Team 33, Military Assistance Command–Vietnam, and as an advisor to the 23d ARVN Infantry Division for one year. During this time he was promoted to Captain.

Justice Williams's military decorations include, in addition to the Combat Infantryman's Badge, the Bronze Star Medal, three Air Medals, two Vietnam Campaign Medals, the Army Commendation Medal, and the Aircraft Crewman Badge. His foreign awards and decorations include both the Vietnam Gallantry Cross (with Silver Star for Valor) and the Vietnam Staff Service Medal (First Class).

Justice Williams separated from the service in March 1967 and attended Boston University School of Law from which he graduated in 1970. He was in private practice for twenty-five years in Providence, Rhode Island, and was selected as a Superior Court Judge in December 1995. In February 2001, he was nominated by Governor Lincoln Almond to be Rhode Island's 50th Chief Justice and was unanimously confirmed by the General Assembly. Chief Justice Williams has been named one of the top 500 American judges (out of 30,000) by Lawdragon, an organization that rates judges and lawyers throughout the United States.

On 30 December 2003, the President of the United States, through the Secretary of Defense, invited Chief Justice Williams to be a member of the then-Military Commissions Review Panel for tribunals to be held in Guantanamo Bay, Cuba, with the rank of Major General. The Military Commissions Act of 2006 created the Court of Military Commission Review on which Justice Williams serves as a civilian appellate judge.

On 21 November 2007, the Secretary of Defense appointed Chief Justice Williams Chief Judge of the U.S. Court of Military Commission Review.

Chief Justice Williams is also a nationally recognized authority on the life and times of Abraham Lincoln. He is the author and editor of over thirteen books and lectures widely. His *Judging Lincoln* was published by Southern Illinois University Press in 2002. *See* FRANK J. WILLIAMS, JUDGING LINCOLN (2002). In 2006, Louisiana State University Press published *The Emancipation Proclamation: Three Views,* with Harold

Thank you very much, Colonel Borch, ladies and gentlemen, General Chipman. Mrs. Prugh and your family, thank you so much for the opportunity to be the third lecturer in honor of your late husband, a true patriot. When I go around the country speaking to young lawyers and citizens—our fellow citizens—I remind them that they all enhance certain values. There are values and characteristics that many of our fellow citizens think of as old-fashioned. You know them, don't you? Loyalty, friendship, patriotism, family, and nation. It's unfortunate that our fellow countrymen have to be reminded of these values from time to time. This is why I remain so inspired about Abraham Lincoln. Just as Colonel Borch indicated, Lincoln saw the vision of America as enshrined in the Declaration of Independence, and a vision that you fulfill every day.

I hope that all of you who serve in the Judge Advocate General's (JAG) Corps, and who are being taught here, realize how lucky you are to have these opportunities. I wanted to go into JAG from a combat branch. I had always wanted to be a lawyer. When I was thirteen in junior high school, I recognized what a good lawyer Abraham Lincoln was and wanted to be just like him. We didn't have a Reserve Officers' Training Corps then, as you do now. Nor did we have programs that allowed an officer to transfer to another branch like JAG after completing an initial tour of duty. I regret that very much. So, I went to law school and practiced law for twenty-five years. Much like Abraham Lincoln, I engaged in a very general law practice doing litigation. I decided that I was tired of being the 800-pound gorilla. I wanted to become a judge—a trial judge—who could mediate cases. Lincoln, believe it or not, was a great mediator and believed in alternative dispute

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Holzer and Edna Greene Medford. *See* HAROLD HOLZER ET AL., THE EMANCIPATION PROCLAMATION: THREE VIEWS (2006). His latest book, *Lincoln Lessons: Reflections on America's Greatest Leader*, with William D. Pederson, was published by Southern Illinois University Press in 2009. *See* LINCOLN LESSONS: REFLECTIONS ON AMERICA'S GREATEST LEADER (Frank J. Williams & William D. Pederson eds., 2009) [hereinafter LINCOLN LESSONS]; *see also* Frank J. Williams, *The Compleat Lincolnator: Enthusiast, Collector, and Scholar*, *in* LINCOLN LESSONS, *supra*, at 160.

In addition to teaching at the Naval War College, Chief Justice Williams is an Adjunct Professor at Roger Williams University School of Law. Annually, he hosts the international students of the Naval Command College at the Rhode Island Courts.

The author would like to acknowledge Captain Evan R. Seamone for his research assistance and Colonel (Ret.) Fred L. Borch for the invitation to present the 3rd Annual Prugh Lecture.

resolution before that term was ever invented.[2] As a judge I mediated disputes, and we continue to mediate in our courts in Rhode Island. I am proud of each and every one of you for your service to our country. I think about you every day; you and the men and women in arms, across the seas.

I would like to recognize the members of the Afghan delegation and the Afghan National Army. Everyone in this room, and many millions across the United States, wish peace for you and your country. We have found in our own history, before that peace can be obtained, certain things have to be done and they are not pleasant. Abraham Lincoln did not win the Civil War with a powder puff, and unfortunately that's what your beloved country is undergoing right now. I'm glad we are there to help you.

General Malinda E. Dunn and General Clyde "Butch" Tate, thank you for being with us today. You honor me with your presence. Dean, Colonel Robert A. Burrell, it is good to have you with us. My co-author, Bill Bader is here. He and I are working on a book together. It is not on the most distinguished Supreme Court justices—but rather the undistinguished Supreme Court justices. We are having fun doing it, aren't we, Bill?

[To which Mr. Bader responds, "Yes."]

My wife Virginia told me you're a tough group. She suggested, "Don't try to be charming, witty, or intelligent—just be yourself." So, I'm glad to be here to talk about one aspect—really, a subset of—the Lincoln story. It is one for which you may see parallels today. I intend for you to notice these parallels and I hope there will be a heated, or at least a good discussion about them in the Q & A period that will follow. Today, I belong to you. You can ask me anything you want; tomorrow, when you're in my court, you belong to me.

As the twenty-first century lurches forward, it is tempting to wonder, who among the presidents, that have served and that will serve, will ever

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[2] For example, Lincoln recommended, "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time." Notes for a Law Lecture (July 1, 1850), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 81 (Roy P. Basler ed., 1953–55) [hereinafter COLLECTED WORKS].

join Abraham Lincoln in the rarified ranks of Monday holidays. How can a culture that picks apart its president's infirmities—that looks for dye in the hair or clay on the feet and writes books on dysfunctional first families—compete for heroes with one that nourished the image of the rail-splitter? In the avalanche of intense mourning that greeted Lincoln's death 144 years ago this month, Americans pursued a dual, and not entirely compatible, course of revenge and mythification. On the one hand, his admirers elevated Abraham Lincoln to the status of icon, a transfiguration into secular sainthood that was as swift as it was sure.[3] On the other hand, concurrently, Americans thirsted for revenge against the conspirators who had perpetrated the murder of the man they now mourned.[4]

Through the summer of 1865, the public was entirely able to sanctify the memory of Lincoln, the forgiver, the preserver of American democracy, while simultaneously encouraging the trial of his assassins by questionable military means and in conditions that would ordinarily have been repugnant to lovers of liberty.[5] Precisely what did the military trial of the Lincoln assassination conspirators mean in law, culture, and history? Despite the intense and widespread hatred for Lincoln that existed during the War, even in the North, there was an avalanche of intense mourning for him when he was assassinated.[6] No doubt, some Lincoln haters experienced a strong, emotional reaction in his favor,[7] but

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[3] *E.g.*, Don E. Fehrenbacher, *The Anti-Lincoln Tradition*, 4 J. ABRAHAM LINCOLN ASS'N 15, ¶ 18 (1982), *available at* http://www.historycooperative.org/journals/jala/4/fehrenbacher.html ("The apotheosis of Lincoln thus began as soon as he died. Savior of the Union, liberator of a race, struck down on Good Friday . . . he was readily assimilated to the universal myths of the fallen hero and the dying god."). In fact, "The majority of Northern preachers compared Lincoln to Moses . . . [and] . . . the biblical leader who after leading his people to the Promised Land was denied entry himself." EDWARD STEERS JR., BLOOD ON THE MOON: THE ASSASSINATION OF ABRAHAM LINCOLN 14–15 (2001).

[4] *E.g.*, ANTHONY S. PITCH, "THEY HAVE KILLED PAPA DEAD!: THE ROAD TO FORD'S THEATRE, ABRAHAM LINCOLN'S MURDER, AND THE RAGE FOR VENGEANCE 166 (2008) (describing how "[r]age quickly overtook grief" in the public's reaction to Lincoln's assassination).

[5] *E.g.*, JAMES L. SWANSON & DANIEL R. WEINBERG, LINCOLN'S ASSASSINS: THEIR TRIAL AND EXECUTION AN ILLUSTRATED HISTORY 20–23 (2001) (describing serious limitations on the defense's ability to prepare and present its case).

[6] *E.g.*, STEERS, *supra* note 3, at 15 ("The deification of the man who had once been reviled as 'the original gorilla' and 'Abraham Africanus the First' was being proclaimed from church pulpits all across the land.").

[7] *E.g.,* Feherenbacher, *supra* note 3, at 15, ¶ 18 ("Many of his critics at home and abroad hastened to revise their estimates of his worth and scramble, as it were, aboard the funeral train. . . . [T]here was George Bancroft, who had earlier called the President 'ignorant' and 'incompetent,' now delivering the principal funeral oration in New York City.").

others would have found it impossible to forgive him his despotism and championship of a despised race simply because of his death.[8] Like Booth, they would have thought he had it coming to him and that the assassination served a patriotic end.

But who can stand against an avalanche? Most of the individuals who continued to hate Lincoln were smart enough to keep quiet about it; so quiet that it soon came to seem that mourning for him had been universal. In his first and beautifully written chapter in *Lincoln in American Memory*, titled, "Apotheosis," Merrill Peterson, who taught right here at the University of Virginia, gives this precise impression.[9] Another friend, Californian William Hanchett, who taught in San Diego too, made this point. He also stated that some of the ostentatious grief displayed was not sincere, as many pronounced Copperheads in the North, who believed in the justice of the Southern cause and who were virulently anti-Lincoln, sought to appease Republican mourners by overdecorating their houses and businesses with flags and mourning crepe and by solemnly attending memorial services.

Professor David Donald at Harvard wrote, "Within eight hours of his murder, Republican congressmen, in secret caucus agreed that his death was a godsend to their cause because Andrew Johnson, the new President, would punish the errant South in ways that Lincoln was resisting . . . politicians of all parties were apparently startled by the extent of the national grief over Lincoln, and, politician-like, they decided to capitalize upon it."[10] Of course, the mourning was very real, and the long train ride to Springfield moved Americans in a way that is still reflected in the Lincoln myth. But the President who led the North to victory is more admirable than the myth. And, this is the President whose death silenced, but did not convert, all his enemies. The fact that Americans elevated Lincoln to secular sainthood, while, at the same time, sought to discover and punish those responsible for his murder may not be incompatible. In fact, love for Lincoln would strengthen determination that those who took his life not be allowed to get away with it. This is one explanation of the military trial which permitted a wide-ranging investigation of the assassination conspiracy in an attempt

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[8] STEERS, *supra* note 3, at 16. In one noteworthy example, the editor of the *Texas Republican* wrote, "It is certainly a matter of congratulations that Lincoln is dead because the world is rid of a monster that disgraced the form of humanity." *Id.*

[9] MERRILL D. PETERSON, LINCOLN IN AMERICAN MEMORY 3–35 (1994).

[10] David H. Donald, *Getting Right with Lincoln* (1956), *reprinted in* DAVID H. DONALD, LINCOLN RECONSIDERED: ESSAYS ON THE CIVIL WAR ERA 3, 4 (3d rev. ed. 2001).

to implicate the Confederate government, not just the band of John Wilkes Booth, and the use of a military trial as opposed to a civil trial, which would have had to confine itself to the guilt and innocence of the accused.[11]

As it turned out, the U.S. Government could not prove a Confederate conspiracy. It was four o'clock on the morning of April 15th, 1865, when John Wilkes Booth and David E. Herold turned their horses onto the narrow, rutted lane which led to the home of Dr. Samuel A. Mudd, a quarter of a mile off the main road to Bryantown in Southern Maryland's Charles County.[12] After a few minutes, the riders could make out the doctor's plain, two-story, clapboard house silhouetted against the sky at the top of a long rise. They stopped at the edge of the lawn, and Herold, who had ridden ahead of Booth, dismounted and pounded on the door while Booth sat hunched on his horse. Booth was the very image of misery and discomfort. The doctor and his wife were asleep in a back room on the first floor of the house and were startled by the heavy pounding on their door. So, the 31-year-old doctor rose and trudged wearily to the door in his nightshirt. Without opening the door, he asked who was there and was told, he would later insist, that his callers were two strangers on their way to Washington.[13] One of their horses had fallen, the voice said, and the rider believed his leg had been strained or fractured.[14] Dr. Mudd opened the door and helped the dismounted rider bring the injured man into the parlor where they laid him on a sofa. Trouble—big trouble—had descended on the little household of Dr. Samuel A. Mudd.

With the exception of Mrs. Mary Surratt, a woman tried as a conspirator in the Lincoln assassination and the first woman to be sentenced to death in the federal system,[15] no other person punished for complicity in the Lincoln plot has been so steadfastly and vociferously defended as an innocent victim of the Federal Government's thirst for

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[11] Thomas R. Turner, *What Type of Trial? Civil Versus a Military Trial for the Lincoln Assassination Conspirators*, 4 J. ABRAHAM LINCOLN ASS'N 35, ¶ 20 (1982), *available at* http://www. historycooperative.org/journals/jala/4/ turner.html ("Since a military trial had wider rules of evidence than a civil trial, many looked upon it as almost a Warren Commission that could get to the bottom of the conspiracy.").

[12] *See*, *e.g.*, STEERS, *supra* note 3, at 144–45.

[13] *See, e.g.*, JIM BISHOP, THE DAY LINCOLN WAS SHOT 277 (1955).

[14] *Id*.

[15] *See generally* KATE CLIFFORD LARSON, THE ASSASSIN'S ACCOMPLICE: MARY SURRATT AND THE PLOT TO KILL ABRAHAM LINCOLN 169–95 (2008) (describing aspects of her hearing and the resulting sentence).

vengeance as has Dr. Mudd. Not only has an elementary school in Maryland been named in his honor,[16] in 1936, for example, 20th Century Fox released a film, "The Prisoner of Shark Island," which sympathetically portrayed the doctor's imprisonment.[17] In 1973, the Michigan legislature, at the urging of Dr. Richard Mudd, who spent a lifetime trying to clear his grandfather's name, adopted a resolution stating that Dr. Samuel A. Mudd was innocent of any complicity in the assassination of President Abraham Lincoln.[18] In 1979, President Jimmy Carter declared his personal belief in Dr. Mudd's innocence, as did President Ronald Regan, shortly thereafter, but the federal circuit in Washington dead-ended any further change in the conviction of Samuel Mudd.[19]

Mudd is remembered as a kind and gentle country doctor who was sucked into the whirlwind of violence by his innocent administrations to an injured nighttime visitor who, unbeknownst to him, had shot the President of the United States only a few hours earlier.[20] Dr. Mudd, his supporters maintain, was the American Dreyfus,[21] an innocent man

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[16] *See* About Us, *available at* http://www2.ccboe.com/mudd/aboutus.cfm (last visited Nov. 4, 2009). In part, the school's website explains:

> For over 130 years his descendants have fought to have his name cleared from all charges. This debate continues to this day. Despite both Presidents Carter and Reagan's statements of belief in his innocence, only the Army can overturn his conviction. Currently, there is a lawsuit pending in U.S. Circuit Court fighting for his innocence.

Id. Despite the courts' determinations that the conviction should stand, proclamations like these recognize the continuing current action to prove the Dr. Mudd's innocence in courts of law.

[17] *See generally* THE PRISONER OF SHARK ISLAND (20th Century Fox 1936).

[18] *See* Mich. H. Con. Res. 126, A Concurrent Resolution Expressing the Sentiment of the Michigan Legislature that Dr. Samuel A. Mudd was Innocent of any Complicity in the Assassination of President Abraham Lincoln (July 17, 1973).

[19] *See*, *e.g.*, Robert Aitken & Marilyn Aitken, *The Long, Strange Case of Dr. Samuel Mudd: The Assassination of Abraham Lincoln*, 31 LITIG. 51, 55–56 (2005) (describing presidential sentiments and their inability to overcome jurisdictional hurdles of setting aside the conviction).

[20] STEERS, *supra* note 3, at 145 (describing Mudd's desire to be remembered as "an unsuspecting doctor who innocently provided medical care to an injured stranger in need of help"); *id.* at 239 (explaining the adoption of this view approximately fifty-five years after his conviction when researchers and writers "accepted the sympathetic view put forward by Richard Mudd and other members of the Mudd family").

[21] *See, e.g.*, Rebecca Roiphe, *Lawyering at the Extremes: The Representation of Tom Mooney, 1916–1939*, 77 FORDHAM L. REV. 1731, 1742 (2009) (discussing the wrongful

convicted and sent to prison for a crime he did not commit by an unconstitutional military commission comprised of second rate officers who were on a Government-sanctioned blood quest. Even his place of confinement, Fort Jefferson and the Dry Tortugas, smacks of Devil's Island.[22] But that's one side of the story.

Others, both at the time of the Lincoln assassination and more recently, have investigated and uncovered that Dr. Mudd was a cruel slave owner and a strong Confederate sympathizer who passed mail back and forth between North and South.[23] Being among the largest slave owners in Maryland, Mudd and his relatives increased their existing opposition to Lincoln after the signing of the Emancipation Proclamation.[24] Mudd had prior contacts with Booth, before the assassination, that revealed closer contact than a chance visit on the night of Lincoln's shooting.[25] These were contacts that Mudd obviously wanted to hide. Mudd also apparently aided Booth and Herold in their flight and misled the forces that were conducting the pursuit.[26] Mudd escaped the death penalty by one vote.[27] According to a number of

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conviction of Captain Alfred Dreyfus and noting its "symbolism for French nationalism" and national redemption).

[22] *See, e.g.*, OSBORN H. OLDROYD, THE ASSASSINATION OF ABRAHAM LINCOLN: FLIGHT, PURSUIT, CAPTURE, AND PUNISHMENT OF THE CONSPIRATORS 150 (1901) (describing conditions of confinement so deplorable that someone had written "Leave hope behind who enters here" at the entrance to the facility).

[23] *E.g.*, Aitken & Aitken, *supra* note 19, at 53–54 (describing issues raised by witnesses during the hearing of Dr. Mudd).

[24] *E.g.*, THE LIFE OF DR. SAMUEL A. MUDD 23, 28 (Nettie Mudd ed., 1906) (describing how Mudd's father, Henry Low Mudd, was "a wealthy planter and slave owner" with an estate spanning over a mile and how, following the Emancipation Proclamation, the Mudd family was forced to pay high wages to emancipated slaves "in order to make even a partial crop"); BISHOP, *supra* note 13, at 276 (noting of Mudd, "[u]ntil the Emancipation Proclamation, he owned eleven slaves" and that "[h]e owned a five-hundred-acre farm, and worked it").

[25] *E.g.*, WILLIAM HANCHETT, THE LINCOLN MURDER CONSPIRACIES 47 (1983) (observing that Mudd had Booth as a visitor overnight and even "introduced Booth to John Harrison Surratt, who became Booth's closest associate in the abduction conspiracy"); *see generally* EDWARD J. STEERS, HIS NAME IS STILL MUDD: THE CASE AGAINST DR. SAMUEL ALEXANDER MUDD (1997) (describing various indications of Mudd's involvement in the conspiracy).

[26] *E.g.*, STEERS, *supra* note 3, at 145–46 (describing how Mudd's actions to assist Booth and Herold were, in truth, motivated by his role as a "strong Confederate sympathizer and member of the Confederate underground").

[27] *E.g.*, James H. Johnston, *Swift and Terrible: A Military Tribunal Rushed to Convict After Lincoln's Murder*, WASH. POST, Dec. 9, 2001, at F01 ("Mudd was saved from the death sentence because a vote by two-thirds of nine was required for death. Only five of the required six thought Mudd should die.").

historians, the four years that he served in prison at Fort Jefferson was just about the right number of years of incarceration for the crime he committed.[28]

Dr. Mudd's conviction, along with seven others obtained by military tribunal instead of a trial before a civil court, has been one of the most persistent complaints of his supporters.[29] Because a civil jury failed to convict John H. Surratt, Jr., using the same evidence in 1867, two years later, this view has strongly reinforced supporters in their belief that the military commission was a hanging court.[30] F. Lee Bailey, remember him, co-counsel for Dr. Samuel Mudd in a replication of the trial and in an appeal at the University of Richmond Law School, predicted that the conspirators would not have been convicted by a civil jury.[31] But, given the inflamed conditions of 1865, it appears that a civil trial would also have found the conspirators guilty.[32]

By 1867, the interest of the public had moved on from the Lincoln murder to reconstruction policy, the power struggle in President Johnson's cabinet, and the possible impeachment of the President.[33] The Government's list of defendants, some of whom were held here at the Old Capitol Prison, and ultimately brought to trial at what is now Fort Lesley J. McNair, for the murder of Abraham Lincoln, was a curious one. It was curious not so much because U.S. citizens were dragged before this military body, as it was for the fact that so many individuals who might recently—or reasonably—have been indicted were not. The

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[28] *E.g.*, ELIZABETH LEONARD, LINCOLN'S AVENGERS: JUSTICE, REVENGE, AND REUNION AFTER THE CIVIL WAR 289 (2004).

[29] STEERS, *supra* note 3, at 239 (describing the favorable results of the Mudd family's "crusade" to clear Dr. Mudd's name).

[30] Turner, *supra* note 11, at 44, ¶ 37 ("When his trial before a civil court ended in a hung jury, the simple conclusion seemed to be that since the jury had heard basically the same case as was presented in 1865, that the 1865 trial was a miscarriage of justice.").

[31] Commenting that "the jurisdiction issue was the key," Mr. Bailey convinced a panel of distinguished judges that "Mudd's prosecution was one sledgehammer after another upon the constitution." Editorial, *Doctor Who Aided Lincoln's Killer Is "Cleared,"* N.Y. TIMES (Sun. Ed.), Feb. 14, 1993, at 40.

[32] The public widely criticized the decision to try the Lincoln conspirators with a military commission because they believed that an incensed civil jury would be more harsh and quicker to convict. *E.g.*, PITCH, *supra* note 4, at 312 (describing strong opposition to Stanton's decision).

[33] *See* MICHAEL LES BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON (1973) (providing a detailed account of the developments leading to President Johnson's impeachment).

Government decided not to prosecute Samuel Cox,[34] Thomas Jones,[35] and William Rollins,[36] all known to have aided Booth's escape or to have obstructed justice. There were also others who almost certainly knew about the conspiracy, but against whom no hard evidence had been garnered. Booth's brother, Junius Brutus, Jr., was the author of and recipient of some suspicious correspondence with John Wilkes Booth.[37] Other evidence suggested that Anna Surratt, the daughter of Mrs. Mary Surratt and sister of John Surratt, Jr., cannot have been unaware of the plotting going on around her at her mother's boarding house.[38] Furthermore, eighteen-year-old Private William ("Willie Jett") Starke was a commissary agent for the Confederate Army who dropped Booth off at Garrett Farm on his escape route.[39] Despite these questionable circumstances surrounding the assassination, not a single one of these individuals was indicted. Ultimately, the Government settled on nine conspirators: David E. Herold, Lewis Payne, George Atzerodt, Mary E. Surratt, Edman Spangler, Samuel B. Arnold, Michael O'Laughlen, and Dr. Samuel A. Mudd, all of whom were in custody. John H. Surratt, Jr., who had fled to Canada, would later go to Britain, Italy, and Egypt, until he was extradited back.[40]

However, a major question loomed: Before what tribunal should the conspirators be tried? For this answer, President Andrew Johnson turned to Attorney General James Speed, an Abraham Lincoln appointee, who wrote an opinion justifying trial by commission.[41] On 28 April 1865, Edwin Stanton, the Secretary of War, convinced the President that trial before a military commission, rather than before a civil court, was

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[34] MICHAEL W. KAUFFMAN, AMERICAN BRUTUS: JOHN WILKES BOOTH AND THE LINCOLN CONSPIRACIES 332 (2004) (describing how witness testimony could have supported the prosecution of Cox).

[35] *Id.* (describing how witness testimony could have supported the prosecution of Jones).

[36] *Id.* at 307 (describing how Rollins offered Booth and Herold assistance in crossing a river).

[37] *Id.* at 327–28.

[38] *See*, *e.g.*, VAUGHAN SHELTON, MASK FOR TREASON: THE LINCOLN MURDER TRIAL 82–83 (1965) (reprinting trail transcripts of the examination of Anna Surratt on her knowledge of visitors to the household).

[39] *See id.* at 294–95, 311–19 (providing further accounts of Willie Jett's involvement).

[40] *See*, *e.g.*, STEERS, *supra* note 3, at 232 (describing how Surratt was captured in Alexandria, Egypt, in February of 1867 and returned to the United States).

[41] Opinion on the Constitutional Power of the Military to Try and Execute the Assassins of the President, Op. Att'y Gen. 14 (July 1865), *available at* http://www.surratt.org/documents/Bplact16.pdf [hereinafter Opinion].

not only proper but necessary.[42] This was not a universally accepted opinion. Gideon Welles, Secretary of the Navy, was of the opinion that the Secretary of War, Stanton, had pressured Speed into this opinion. Welles wrote in his diary on 9 May, "The rash, impulsive, and arbitrary measures of Stanton are exceedingly repugnant to my notions, and I am pained to witness the acquiescence they receive."[43] Former Attorney General Bates, also appointed by President Lincoln, shared the view that Stanton was behind Speed's opinion. He wrote in his diary on 25 May 1865, "I am pained to be led to believe that my successor, Attorney General Speed, has been wheedled out of an opinion to the effect that such a trial is lawful. If the offenders are done to death by that tribunal, however truly guilty, they will pass for martyrs with half the world."[44] Bates exhibited an incredible sense of clairvoyance. Although Dr. Samuel A. Mudd was spared execution, his martyrdom began with the question of the jurisdiction of the military commission.

Questions arise from the fact that no real precedent existed for what the Government faced: the trial of civilian U.S. citizens engaged in paramilitary actions at the close of a civil war.[45] Military commissions were created during the Mexican War by General Winfield Scott to try civilians for crimes committed during a period of martial law and for violations of the laws of war.[46] Little restraint was imposed on the officials in charge of the conspirators.[47] Consequently, the tribunal commissioners' conduct illustrates the dangers inherent in the use of courts organized to convict. Even today, it calls for a more detailed examination of the military commission convened to try these particular eight civilians for the assassination of Abraham Lincoln.

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[42] *E.g.*, William C. Edwards & Edward Steers Jr., *Introduction* to THE LINCOLN ASSASSINATION: THE EVIDENCE, at xx–xxi (William C. Edwards & Edward Steers Jr. eds., 2009) ("The contention that Stanton was the force behind a military trial is supported by the fact that the original draft of Johnson's executive order, including the editorial changes, was in Stanton's handwriting on War Department stationary.").

[43] 2 DIARY OF GIDEON WELLES, SECRETARY OF THE NAVY UNDER LINCOLN AND JOHNSON 303–04 (Howard K. Beale ed., 1960).

[44] THE DIARY OF EDWARD BATES 1859–1866, at 483 (Howard K. Beale ed., 1933).

[45] *E.g.*, Edwards & Steers, *supra* note 42, at xxi ("While Congress had passed legislation on several occasions between 1862 and 1864 that recognized the use of military tribunals, the laws referred only to military personnel who were subject to the Articles of War.").

[46] *E.g.*, Elbridge Colby, *Courts-Martial and the Laws of War*, 17 AM. J. INT'L L. 109, 111 (1923) (discussing General Scott's motivations in issuing General Order 20, which was amplified by General Order 267).

[47] SHELTON, *supra* note 38, at 7 ("It isn't denied that the prosecutors violated every rule and tradition of impartial justice to obtain convictions and that the judges collaborated.").

The President was shot on the evening of 14 April 1865, and died the following morning at the Petersen House, where everyone who was anyone claimed to be present.[48] The small room in the Peterson House in which Lincoln was attended is only 9½-by-17.[49] Some of you have visited this building, which stands just feet across from Ford's Theatre. A co-author and I call this "the rubber room" because it has expanded exponentially with how the painters portrayed those who visited the dying President during the night.[50]

Five days later, the War Department had handbills distributed throughout the country offering fifty thousand dollars for J. Wilkes Booth and twenty-five thousand each for John H. Surratt and David E. Herold.[51] Persons harboring or assisting these fugitives would be treated as accomplices and subject to trial before a military commission and the punishment of death.[52] Both the type of trial and punishment were laid out in this poster.[53] Although the handbill was dated 20 April 1865, it was not until eight days later that the Attorney General of the United States submitted that brief note to President Andrew Johnson, stating the opinion, with no other rationale, that persons charged with the murder of the president can be rightfully tried by a military court.[54]

Secretary of War Stanton and Major General Joseph Holt, The Judge Advocate General, selected the officers who would sit on the commission named to try the accused.[55] At the first meeting of the commission on 8 May 1866, Commissioner, Major General C.B.

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[48] *See generally* BISHOP, *supra* note 13 (providing a detailed description of the events occurring at the Peterson house and the close attention paid to them).

[49] HARLOD HOLZER & FRANK S. WILLIAMS, LINCOLN'S DEATHBED IN ART AND MEMORY: THE "RUBBER ROOM" PHENOMENON 11 (1998)

[50] *See generally id.* (evaluating subtle and apparent differences in verbal and visual accountings of the evening's events).

[51] *See* Handbill, War Department, Washington (Apr. 20, 1865), *reprinted in* SWANSON & WEINBERG, *supra* note 5, at 50.

[52] *Id.* ("All persons harboring or secreting the said persons, or either of them, or aiding or assisting their concealment or escape, will be treated as accomplices in the murder of the President and the attempted assassination of the Secretary of State, and shall be subject to trial before a Military Commission and the punishment of DEATH.").

[53] *Id*.

[54] For further discussion of the context surrounding this communication, see THOMAS REED TURNER, BEWARE THE PEOPLE WEEPING: PUBLIC OPINION AND THE ASSASSINATION OF ABRAHAM LINCOLN 138 (1982).

[55] *See* PITCH, *supra* note 4, at 313–14 (suggesting that Speed's opinion provided a "shield" for the appointment of the commission and discussing President Johnson's delegation of selection to the Adjutant General).

Comstock, who was convinced that the Lincoln conspirators should be tried in a civilian court, aired these concerns.[56] Holt, who was advising the commission, and would sit with them, even in deliberations, responded that the Attorney General had decided they had jurisdiction.[57] On the next morning when Comstock appeared at the court, he as well as another officer, unhappy with the prospect of a military trial of civilians, received an order relieving both from this assignment.[58] Later that day, Stanton sent word through General Ulysses S. Grant—these were Grant's own staff members—that the action represented no reflection on the officers. Rather, removal was justified by the possibility of a conflict, as both men were members of his staff and the general had been an object of the assassination.[59]

The secret sessions ended abruptly when, responding to pressure in the press, President Johnson, on the recommendation of General Grant, ordered the trial open to the public.[60] The trial itself displayed little evidence of a presumption of innocence of the accused and strict impartiality on the part of the judges.[61] Critics explain that the members of the military commission prejudged the accused, most having rather undistinguished careers prior to their selection.[62] As Major General Comstock described the defendants' first appearance in court, they were brought before court, heavily chained and staggering, with black linen

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[56] *Id.* at 315 ("Unable to hold his tongue, Comstock questioned the Chief Military Prosecutor, Judge Advocate General Joseph Holt, about the legitimacy of the court's jurisdiction"); *id.* (describing how Comstock and Holt "clashed" over various issues).
[57] *Id*.
[58] *Id*.
[59] *Id.* In his diary, Comstock noted, "We were both very much delighted," at the prospect of being removed from the commission. *Id.* (citing diary).
[60] *E.g*., Johnston, *supra* note 27, at F01:

> It was Grant who caused the commission to abandon secrecy. He had been called as a witness on May 12 to establish the fact that the District of Columbia was under martial law. Reporters corralled him outside the courtroom to complain about their exclusion. Grant led them to the White House to talk with the president. The proceedings were opened the next day.

[61] *E.g.*, Turner, *supra* note 11, at 37, ¶ 25-6 (observing, "The military commission which was finally convened has been stereotyped by historians as a vindictive group of military officers who were given a license to legally execute, and seized it willingly.").
[62] *E.g*., SHELTON, *supra* note 38, at 60–61 ("All appeared to be qualified largely by their prejudices, total ignorance of the law, and subservience to the will of the prosecutors.").

masks covering their faces, except tips of their noses and mouths.[63] It was a horrible sight.[64]

The military officers comprising the court displayed their prejudice on several occasions. When General Edward Johnson, Confederate States of America, was called to testify, one officer on the commission moved that Johnson be ejected from the court as an incompetent witness on account of his notorious infamy.[65] Because Johnson had been educated at West Point and then had resigned from the Army and bore arms against the United States, he appeared before the court with red hands covered with the blood of his loyal countrymen.[66] The motion to oust him was seconded.[67] However, before Johnson could be removed, Judge Advocate General Holt, who also served as the chief prosecutor for the commission,[68] intervened, advising the commission that the rule of law did not authorize the court to declare the ex-Confederate an incompetent witness, however unworthy of credit he may be.[69]

Holt was also obliged to intervene when a member of the court challenged the right of Senator Reverdy Johnson, one of the great lawyers of that period,[70] to appear as counsel for one of the defendants.[71] After some debate, the commission allowed a stunned Johnson to represent his client.[72] Holt, nevertheless, presented testimony that had nothing to do with the charges against the defendants but would serve to influence adversely the judges and the public at large against the Confederacy as well as the defendants. Holt introduced evidence that concerned plots by the Confederate Secret Service to stage raids from

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[63] PITCH, *supra* note 4, at 314.

[64] Brevet Major General August Kautz, one of the judges, compared the sight of the hooded accused to his worst imagination of the improprieties of the Inquisition. *Id.* at 314–15.

[65] THE TRIAL OF ASSASSINS AND CONSPIRATORS AT WASHINGTON CITY, D.C., MAY AND JUNE 1865 FOR THE MURDER OF PRESIDENT ABRAHAM LINCOLN 113 (1865), *available at* http://www.archive.org/details/trialofallegedas00unit [hereinafter VERBATIM ACCOUNT] (detailing General Howe's motion to eject General Johnson as an incompetent witness was).

[66] *Id*.

[67] *Id.* (providing General Ekin's additional justifications).

[68] KAUFFMAN, *supra* note 34, at 340 (observing that General Holt served as both the commission's prosecutor and its legal advisor).

[69] VERBATIM ACCOUNT, *supra* note 65, at 113.

[70] PITCH, *supra* note 4, at 320 ("Johnson . . . was a distinguished member of the US Senate from Maryland and a former attorney general of the United States.").

[71] VERBATIM ACCOUNT, *supra* note 65, at 21.

[72] *Id.* at 22–23.

Canada on U.S. cities, the attempt to burn New York City, the effort to spread disease throughout the Union Army by use of contaminated clothing, and, perhaps most unfair of all, witness testimony recounting the starvation of federal Army prisoners at Libby, Belle Isle, and Andersonville prisons.[73] The chained and hooded prisoners accused of complicity in the murder of President Lincoln were somehow connected with these atrocities, if one could believe Judge Advocate General Holt.

In the closing statements of the attorneys, Reverdy Johnson challenged the right of the military to sit in judgment of the eight defendants.[74] The Constitution allowed the *writ of habeas corpus* to be suspended, but, in no way, permitted the suspension of other rights secured to the accused. The Constitution and the laws determine in which court civilians would be tried, but the defendants in the Lincoln conspiracy trial were doomed. As a Holt biographer concluded, the judge advocates exercised an undue influence upon the decision of the untrained military officers.[75] An example of the advantage enjoyed by the judge advocate is particularly telling. Using the printed transcript of the fifty-three-day trial, a friend of mine, Professor Joseph George, Jr., found the special judge advocate John A. Bingham had raised objections to evidence introduced by the defense on thirty-four occasions.[76] In all instances, the objections were sustained.[77] Comparatively, defense attorneys raised objections fifteen times, which were overruled on thirteen occasions.[78] When the military officers, along with Holt and Bingham, deliberated the fate of the defendants behind closed doors at the end of the trial, the judge advocates were evidently under the influence of the Secretary and wanted all eight defendants hanged. The commission voted, however, to condemn only four to the gallows and the remaining four to prison terms. The judge advocates were also very much put out when five of the officers sitting on the commission signed a paper recommending clemency for Mary Surratt, one of the defendants sentenced to be hanged.[79]

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[73] BENN PITMAN, THE ASSASSINATION OF PRESIDENT LINCOLN AND THE TRIAL OF THE CONSPIRATORS 46–62 (1954).
[74] VERBATIM ACCOUNT, *supra* note 65, at 158.
[75] *See*, *e.g.*, LEONARD, *supra* note 28, at 79.
[76] PITTMAN, *supra* note 73, at 42–62.
[77] *Id.*
[78] *Id.*
[79] Some suggest that the act of recommending clemency for Mrs. Surratt "indicates that [the commission's] portrayal as being cruel and insensitive is not accurate." Turner, *supra* note 11, at 29, ¶ 4.

After the sentencing recommendations were completed, the next step was for The Judge Advocate General to take the commission's findings either to the Secretary of War or, as in this instance, to the President himself as capital offenses were involved. In this case, Holt made a slight but significant change in his procedure. Holt's note to President Johnson, dealing with the conviction of the Lincoln conspirators, urged the President to approve the findings of the court but said nothing of the recommendation for clemency on behalf of Mrs. Surratt.[80] Holt later insisted that he had included the petition with the record of the trial when he delivered the documents to the President.[81] Johnson claims that he never saw that petition.[82] But, whether or not Holt included the request for clemency, he should have informed the President of that fact in his covering statement, as he had done on previous occasions.

Attorney General James Speed, who was requested by the President to review the legality of the commission's proceedings, had previously given the opinion that trials of civilians by military commissions were legal in time of war.[83] However, it was not until July 1865, after the trial was completed, that Speed issued his detailed opinion justifying the legality of the military commission. In Speed's analysis, Booth and his associates were secret, active, public enemies, and when Booth said, while mortally wounded, "Say to my mother that I died for my country," after citing the Virginia motto, "*Sic Semper Tyrannis*,"[84] Booth demonstrated that he was not an assassin from private malice but that he acted as a public foe.[85] As such, Speed said:

> If the persons who are charged with the assassination of the President committed the deed as public enemies, as I believe they did—and whether they did or did not is a question to be decided by the tribunal before which they are tried—they not only can, but ought to be tried before a military tribunal. If the persons charged have offended

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[80] ELIZABETH STEGER TRINDAL, MARY SURRATT: AN AMERICAN TRAGEDY 203 (1996) ("It would seem that on Mary Surratt's sentencing pages there would have been a note stating that a plea for clemency was attached! However, no such notification existed!").
[81] STEERS, *supra* note 3, at 227 ("Holt was . . . emphatic, claiming that he had shown the petition to Johnson who ignored it.").
[82] *Id.* ("When word eventually leaked out that a clemency plea was rejected by Johnson, he emphatically denied ever seeing a copy of it and claimed that he was not made aware of it until some time after the hanging.").
[83] Opinion, *supra* note 41.
[84] Military Commissions, 11 OP. ATT'Y GEN. 297–317 (1865) (Opinion on the Constitutional Power of the Military to Try and Execute the Assassins of the President).
[85] *Id.*

> against the laws of war, it would be as palpably wrong for the military to hand them over to the civil courts, as it would be wrong in a civil court to convict a man of murder who had, in time of war, killed another in battle.[86]

This opinion was written after the four defendants had been executed.[87]

One desperate attempt was made on the morning of the execution to save Mrs. Surratt.[88] Her attorneys went before Judge Andrew Wylie of the District of Columbia Trial Court requesting him to issue a *writ of habeas corpus* and demanding that the U.S. Army surrender Mrs. Surratt to the court.[89] General W.S. Hancock, accompanied by Attorney General Speed, returned the writ and refused to surrender Mrs. Surratt following instructions of the President.[90] When Hancock refused to give up his prisoner, Wylie was powerless to take any further action. Thereafter, Mrs. Surratt was doomed.

Hindsight is always twenty-twenty, as we know. We now know that with Lee's surrender of the Army of Northern Virginia at Appomattox on April 9th, the soldiers of the Confederacy marched off the battlefield into the peaceful glory of the legend of the lost cause.[91] But, in late April and early May of 1865, the direction of the Rebel soldiers' march was not nearly so certain. Had Lee or some other charismatic Southern leader issued the call to guerilla warfare, other still-armed and still-angry Southern soldiers may well have taken up the call on the very outskirts of the nation's capital.[92] Civil wars historically end in this fashion far more commonly than did the American Civil War.[93]

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[86] *Id.*
[87] James Speed, *Legality of the Conspiracy Trial: Opinion of Attorney-General Speed*, N.Y. TIMES, Aug. 13, 1865, at 3.
[88] *See*, *e.g.*, DAVID MILLER DEWITT, THE ASSASSINATION OF ABRAHAM LINCOLN AND ITS EXPIATION 138–41 (1909) (describing efforts to halt the execution).
[89] *Id*. at 138.
[90] *Id.* at 139.
[91] *E.g.*, STEERS, *supra* note 3, at 108 ("After Lee's surrender and with the government on the run, the remaining Confederate forces still at large were helpless to offer any serious continued resistance . . . . rational people knew that the end had come.").
[92] *Id.* (observing that "there were still nearly 175,000 Confederate Soldiers scattered throughout the South who had not yet surrendered").
[93] For example, consider the long-running conflict between Ireland and Great Britain.

At the time of Attorney General Speed's opinion, the trial before a military commission was proper[94] and President Johnson's order establishing the military commission—the idea that a state of war existed in Washington, D.C.—was not a mere fanciful notion. One of the myths that surrounds the assassination of President Lincoln is that his death was uniformly mourned throughout the South where it was seen as a catastrophe, at least by all but the most ardent firebrands.[95] In truth, Southerners reacted to Lincoln's death much the same as Americans reacted to the news of the deaths of Hitler, Mussolini, and Stalin, seeing the assassination as the fitting end for a tyrant.[96]

Washington, D.C., remained a fortified city and headquarters for directing military operations against the Rebels during the trial, with Union sentries controlling the flow of people into and out of the nation's capital.[97] The war was still in effect, and President Andrew Johnson did not declare martial law over and peace within the United States until August 20, 1866, over a year after the trial.[98] Whether it was politically astute to try the conspirators before a military commission, or whether the conspirators received fair trials before the commission—which we now know they had not—are not the issues here. The question initially is whether the United States had the legal right to try the conspirators before a military commission in the first place. The attention to due process, protocol, and other processes would come next.

After the 1866 *Milligan* decision,[99] in which the U.S. Supreme Court disavowed military tribunals in favor of trials in civil courts where they were in operation,[100] Samuel Mudd sought a writ of habeas corpus from

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[94] *See* Opinion, *supra* note 41 (describing the basis for military jurisdiction to try the conspirators).

[95] *See* discussion accompanying notes 5–10.

[96] STEERS, *supra* note 3, at 16 ("To many in the South, Lincoln's death was nothing more than tyrannicide.").

[97] *E.g.*, DEWITT, *supra* note 88, at 102–03 (describing the activation of "a brigade of volunteers and a detachment of the veteran reserve corps," as well as the involvement of other armed soldiers as the commission proceeded).

[98] E.B. LONG & BARBARA LONG, CIVIL WAR DAY BY DAY 696 (De Capo Paperback 1983) (reprinting 1971 Doubleday) (reprinting President Johnson's order, "I do further proclaim that said insurrection is at an end and that peace, order, and tranquility, and civil authority now exist in and throughout the whole of the United States of America.").

[99] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866) (mem.).

[100] *Id.* at 118–19, 126 ("[I]t is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could well be said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so.").

Chief Justice Salmon P. Chase, who turned him down.[101] Dr. Mudd petitioned the Florida courts, arguing that the military court lacked jurisdiction and that he and the other prisoners held at Fort Jefferson should go free. In denying the appeal, Judge Thomas J. Boynton upheld the military trial.[102] The heart of his opinion is that the President was assassinated not from private animosity nor any reason other than a desire to impair the effectiveness of military operations and enable the rebellion to establish itself into a government.[103] The act was committed in a fortified city, which had been invaded during the war and to the northward as well as the southward of which battles had many times been fought.[104] This same city was also the headquarters of all the armies of the United States from which daily and hourly went military orders.[105] The President is the Commander-in-Chief of the Army and the President who was killed had many times made distinct military orders under his own hand without the formality of employing the name of the Secretary of War or commanding general.[106] Ultimately, then, it was not Mr. Lincoln who was assassinated, but the Commander-in-Chief.

For military reasons, I find no difficulty, therefore, in classing the offense as a military one and with this opinion arrive at the necessary conclusion that the proper tribunal for the trial of those engaged in it was a military one. In retrospect, Boynton's arguments, like some of Speed's, have validity. The longtime reaction against the military commission comes from a failure to prove a Confederate conspiracy

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[101] It is thought that Justice Chase's reason for denying the appeal was the existence of the President's 1869 pardon, which rendered the decision moot. Susan Low Bloch & Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia*, 90 GEO. L.J. 549, 559 n.43 (2002).

[102] *See Ex parte* Mudd, 17 F. Cas. 954 (S.D. Fla. 1868) (No. 9899).

[103] Although the case materials have been lost, part of the Judge's opinion was reproduced, in which he refused to provide any relief on the following grounds:

> The President was assassinated not from private animosity, nor any other reason than a desire to impair the effectiveness of military operations, and enable the rebellion to establish itself into a Government; the act was committed in a fortified city, which had been invaded during the war . . . . [This] offense [was] a military one . . . [and] the proper tribunal . . . was a military one.

Bloch & Ginsburg, *supra* note 101, at 558 n.42 (citing a newspaper clipping retained by the Surratt Society in which portions of the opinion were reproduced).

[104] *Ex parte* Mudd, 17 F. Cas. 954.

[105] *Id*.

[106] *Id*.

beyond Booth and his friends. Some, like assassination scholar Edward Steers, Jr., believe that such a conspiracy did, in fact, exist, and that within a few years we may look differently upon the military trial of the Lincoln conspirators and upon military tribunals generally.[107]

Today, the nation finds itself questioning the Government's policies regarding military tribunals. And, despite the passage of time, the questions themselves are the same: is it appropriate to try enemy combatants, removed from the field of battle, in military, as opposed to civilian, courts? And, if so, what would constitute constitutional due process? How can we ensure that such trials protect the civil liberties of the accused, while protecting our national security?[108]

Despite the fact that the threat to national security today is at least as great as Lincoln encountered during the Civil War, and President Johnson encountered just after Lincoln's assassination, the administration of President George W. Bush had come nowhere as close to Lincoln in affecting civil liberties afforded by the Constitution to persons tried by military commissions. During the Civil War, under the aegis of the Lincoln Administration, 75,961 Union Army trials took place.[109] Of these, 5460 were trials before military commissions and all were trials of civilian United States citizens.[110] In stark comparison, the Bush administration used commissions to prosecute only three foreign detainees charged with committing terrorist acts.[111] Only thirteen of the remaining 225 detainees at the Guantanamo Bay detention facility have even been assigned to prosecution by military commission.[112]

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[107] *See generally* STEERS, *supra* note 3; *see also* Turner, *supra* note 11, at 33, ¶ 16 (describing various views that "the assassination was a wider plot against the government and one in which the South was involved").

[108] For cases discussing such considerations, see, for example, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), and *Rasul v. Bush*, 542 U.S. 466 (2004); *see also* Frank J. Williams et al., *Still a Frightening Unknown: Achieving a Constitutional Balance Between Civil Liberties and National Security During the War on Terror*, 12 ROGER WILLIAMS U. L. REV. 675 (2007) (addressing various related concerns).

[109] E-mail from Thomas P. Lowry, historian, to author (8 Dec. 2005, 17:33 EST) (on file with author) (reporting his research in National Archives Record Group 153).

[110] *Id.*

[111] *See* United States v. David M. Hicks (Commission); United States v. Salim Hamdan (Commission); United States v. Ali Hamza Ahmad Suliman al Bahlul (Commission).

[112] Randy James, *A Brief History of Military Commissions*, TIME, May 18, 2009, *available at* http://www.time.com/time/nation/article/0,8599,1899131,00.htm.

On 20 January 2009, Barack Obama took the oath of office as the forty-fourth President of the United States, setting the stage for a new approach to balancing civil liberties and national security. President Obama often invokes the words and images of Lincoln.[113] Indeed, President Obama can claim many similarities to Lincoln: both were lawyers who came from humble beginnings; both are veterans of the Illinois Legislature; both are accomplished orators and masters of the English language; and both were, at least at first, seemingly unlikely candidates for president.[114]

During his presidential campaign, Obama routinely challenged the military commissions system. As he stated in August 2008, rather than rely on military commissions, "It's time to better protect the American people and our values by bringing swift and sure justice to terrorists through our courts and our Uniform Code of Military Justice."[115] President Obama's plan was based, at least in part, on the ideal that such a shift from the Bush Administration would "create a global wave of diplomatic and popular goodwill that could accelerate the transfer of some detainees to other countries."[116]

True to his campaign promises, shortly after taking office in January 2009, the new President signed several executive orders aimed at closing the detention facility at Guantánamo Bay within one year;[117] ending the Central Intelligence Agency's worldwide network of secret rooms to imprison terror suspects; as well as imposing the requirement that all U.S. personnel conduct interrogations that "follow the noncoercive methods of the Army Field Manual."[118] In addition, the President ordered a 120-day suspension of the military commissions.[119] President

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[113] *See*, *e.g.*, Susan Schulten, *Barack Obama, Abraham Lincoln, and John Dewey*, 86 DENV. U. L. REV. 807 (2009) (comparing imagery as well as historical facts).
[114] *Id.*
[115] Peter Finn, *Guantánamo Closure Called Obama Priority*, WASH. POST, Nov. 12, 2008, at A1.
[116] *Id.*
[117] Exec. Order No. 13,492, § 3, 74 Fed. Reg. 4897 (Jan. 22, 2009).
[118] Scott Shane et al., *Obama Reverses Key Bush Policy, but Questions on Detainees* Remain, N.Y. TIMES, Jan, 23, 2009, at A16; *see also* Exec. Order No. 13,491, § 3(b), §74 Fed. Reg. 4893 (Jan. 27, 2009) (prohibiting "any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3"); U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS (6 Sept. 2006).
[119] Peter Finn, *Obama Set to Revive Military Commissions: Changes Would Boost Detainee Rights*, WASH. POST, May 9, 2009, at A1.

Obama declared that such executive orders would send to the world the message that the "United States intends to prosecute the ongoing struggle against violence and terrorism . . . vigilantly . . . in a manner that is consistent with our values and ideals."[120]

The President also directed that each detainee's case be reviewed to determine who could be repatriated to third-party nations or referred to an American civilian court.[121] President Obama personally reviewed the case of Ali al-Marri, detained without charge in a military jail in South Carolina.[122] The presidential check on the commission system was as prominent in the Lincoln Administration. President Lincoln, too, personally reviewed certain cases before the military commissions of the Civil War.[123] After the Sioux uprising in Minnesota that killed hundreds of white settlers in 1862, the military court had sentenced 303 Sioux to death.[124] These cases came before Lincoln to review as final judge.[125] Yet, despite great pressure to approve these verdicts, Lincoln ordered that the complete records of the trials be sent to him.[126] Working deliberately, Lincoln reviewed each case, one-by-one.[127] Even though he was embroiled in the task of administering the government during the Civil War, Lincoln carefully worked through the transcripts for a month to sort out those who were guilty of serious crimes.[128] Ultimately, Lincoln commuted the sentences of 265 defendants, and only thirty-nine of the original 303 were executed.[129] Although Lincoln was criticized for this act of clemency, he responded, "I could not afford to hang men for votes."[130]

Despite President Obama's criticism of the military commissions system, and his suspension of its use, the commissions did remain, as his

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[120] Bobby Ghosh, *Obama Orders Gitmo Closed: Now the Hard Part*, TIME, Jan. 22, 2009, *available at* http://www.time.com/time/nation/article/0,8599,18 72158,00.html.
[121] Jess Bravin & Siobhan Gorman, *Obama Closes Detention Network*, WALL ST. J., Jan. 23, 2009, at A3.
[122] Shane et al., *supra* note 118, at A16.
[123] DAVID HERBERT DONALD, LINCOLN 394 (1996).
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id*.
[130] *Id.* at 394–95.

Secretary of Defense stated, "very much on the table."[131] Then, only a few months after he suspended such tribunals, President Obama brought them back—but not without changes. The new rules and procedures of the commissions were intended to "offer terrorism suspects greater legal protections."[132] Such protections would "block the use of evidence obtained from coercive interrogations, tighten the admissibility of hearsay testimony and allow detainees greater freedom to choose their attorneys."[133] Most detainees would be transferred from Guantánamo to some domestic United States prison where they would remain until they receive a *habeas corpus* hearing (although those who pose the highest security risk would remain at Guantánamo to be tried by a military tribunal).[134] The President declared that these changes were "the best way to protect our country, while upholding our deeply held values."[135]

President Obama stated that he would also consider following Lincoln's example of employing preventive detention measures to hold members of foreign terrorist organizations before they are able to carry out attacks. During the Civil War, the Lincoln administration detained some 13,000 citizens in northern states—not even foreign detainees—preemptively, under the fear that they either would engage in or encourage acts of rebellion against the Union. He defended the detentions with his ever-keen understanding of military necessity:

> Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wiley [sic] agitator who introduces him to desert? This is none the less injurious when effected by getting a father, or brother, or friend, into a public meeting, and there working upon his feeling, till he is persuaded to write the soldier boy, that he is fighting in a bad cause, for a wicked administration of contemptible government, too weak to arrest and punish him if he shall desert. I think that in such a case, to silence the agitator, and save the boy is not only constitutional, but, withal, a great mercy.[136]

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[131] William Glaberson, *U.S. May Revive Guantánamo Military Courts*, N.Y. TIMES, May 2, 2009, at A12.
[132] Finn, *supra* note 119.
[133] *Id.*
[134] James, *supra* note 112.
[135] *Id.*
[136] Letter from President Abraham Lincoln to Hon. Erastus Corning and Others (June 12, 1863), *reprinted in* 6 COLLECTED WORKS, *supra* note 2, at 266–67.

Undoubtedly, President Obama learned the impracticalities of trying certain terrorist suspects in civilian courts. But he seems to have realized that certain rights enjoyed in a civilian tribunal are impossible to maintain in the face of the current national security threat. In sensitive cases involving evidence secretly compiled by an intelligence agency, for example, it is imprudent to have such information aired in an open, civilian court. Justice can still be served under a different framework that protects national security interests but ensures a fair and impartial hearing. Abraham Lincoln knew of this necessity during the Civil War, as did Franklin Roosevelt during the Second World War.[137] It appears President Obama has, himself, embraced this necessity today.

Reversing his original determination to end the military commissions was an act of political courage for President Obama. Surely, the president, feeling the loneliness of command, knew the ire such a decision would draw—especially from his most ardent campaign supporters. One human rights advocate declared that by "resurrecting this failed Bush administration idea, President Obama is backtracking dangerously on his reform agenda."[138] Yet, as Justice Oliver Wendell Holmes wisely noted, "[w]ar opens dangers that do not exist at other times. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that no court could regard them as protected by any constitutional right."[139]

Such was true during Lincoln's presidency, and such was true in the atmosphere surrounding the trial of the assassination conspirators. The lessons of yesterday serve as a useful guide to the very similar questions of today. We must take care that the mistakes of the past, brought about by passion and outrage, are not repeated, but that our very security is not sacrificed in the process.

On 12 February 1866, both houses of Congress convened to commemorate the emancipator's birth and here the historian, George Bancroft, praised him as a leader who was molded by events rather than one who made the times take shape in accordance with his will.[140] And

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[137] *See Ex Parte* Quirin, 317 U.S. 1 (1942) (addressing the trial of German saboteurs captured on U.S. soil with explosives).
[138] Editorial, *Anger at Obama Ruling*, BBC NEWS, *available at:* http://news.bbc.co.uk/2/hi/8052999.stm.
[139] Schenck v. United States, 249 U.S. 47, 52 (1919).
[140] *See generally* GEORGE BANCROFT, MEMORIAL ADDRESS ON THE LIFE AND CHARACTER OF ABRAHAM LINCOLN (Feb. 12, 1866).

today, and this year, we celebrate the 200th birthday of Abraham Lincoln and recognize his great leadership and skill in leading our country.

Thank you very much.