CHAPTER VIII.

WAS IT NOT MURDER?

And now what shall be said as to this taking of human life?

Maintaining the most rigorous allegiance to the simple unadulterated truth, what can be said? Arraigned at the bar of the common law as expounded by the precedents of centuries, and confronted by plain provisions of the Constitution of the United States, which need no exposition and yet have been luminously expounded; but one thing can be said.

Had Mary E. Surratt the right guaranteed by the Constitution to a trial singly and alone, in a regularly constituted civil court, and by a jury of the vicinage, the individuals of which she might select by challenge, both for cause, in all cases, and without cause to a certain number, before she could be legally convicted of any crime whatever, or be lawfully punished by the most trivial loss of property or the minutest injury to limb, to say nothing of the brutal crushing out of her life? That's the unevadable question which the ages put and will continue to put. And upon its precisely truthful answer, depend the character and color of the acts of every person who had lot or part in the execution of this woman.

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On the 21st day of October, 1864--while the war was still raging--Lambdin P. Milligan, a citizen of the United States and a resident of Indiana, was arraigned before a Military Commission convened by the commanding General of that Military District, at Indianapolis, on the following charges preferred against him by Henry L. Burnett, Judge-Advocate of the Department of the West:

1. Conspiracy against the Government of the United States.

2. Affording aid and comfort to the rebels.

3. Inciting insurrection.

4. Disloyal practices.

5. Violation of the laws of war.

There were also specifications, the substance of which was that Milligan had joined and aided a secret society, known as the Order of American Knights or Sons of Liberty, for the purpose of overthrowing the Government and authorities of the United States; had communicated with the enemy; conspired to seize munitions of war in the arsenals, and to liberate prisoners; resisted and encouraged resistance to the draft: at or near Indianapolis, in Indiana, "a State within the military lines of the Army of the United States, and the theatre of military operations, and which had been and was constantly threatened to be invaded by the enemy."

On these charges and specifications, Milligan was subjected to a lengthy trial by this Military Commission which finally found him guilty on all the charges and sentenced him to be hanged. The record was approved by the Commanding General, and then transmitted to President Lincoln, who held it long under advisement, and was so holding it when he was killed. His successor, at about the same time that he summoned the Commission to try Mrs. Surratt, at length approved the findings and ordered the sentence to be executed on Friday, the 19th day of May, 1865.

But this object-lesson to the Commission sitting at that date in the old Penitentiary was intercepted. On the 10th of May, Milligan brought the record before the United States Circuit Court by a petition for his discharge, and, the two judges differing upon the main question of the jurisdiction of the Commission, the cause was certified under the statute to the Supreme Court of the United States; in deference to which action the President suspended the execution. The argument before that high tribunal coming on in the winter of 1865-66, a great array of counsel appeared upon both sides; David D. Field, James A. Garfield and Jeremiah S. Black for the prisoner, and Attorney-General Speed and Benjamin F. Butler for the United States. The counsel for the Government followed the same line as did Judge Bingham in his argument on the "Conspiracy Trial;" the counsel for the prisoner on their side, only enlarging, emphasizing and enforcing the argument of Reverdy Johnson. At the close of the term the Court unanimously decided that the Military Commission had no jurisdiction to try Milligan; that its verdict and sentence were void; and ordered the defendant discharged.

At the next term, the Court handed down two opinions--one the opinion of the Court, read by Judge Davis, in which four of his colleagues concurred, and one by Chief-Justice Chase, in which three of his colleagues concurred. The two opinions agreed that, as matter of law, the President could not of his own motion authorize such a Commission, and that, as matter of fact, the Congress had not authorized such a Commission; and therefore they were at one in their conclusion. But they differed in this; that, whereas the majority of the Court held that not even the Congress could authorize such a Court, the minority, while agreeing that the Congress had not exercised such a power, were of opinion that such a power was lodged in that branch of the Government.

The attempt has often been made to distinguish the case of Mrs. Surratt from that of Milligan by alleging that Washington at the time of the assassination was within the theatre of military operations, and actually under martial law, whereas Indiana at the time of the Commission of Milligan's alleged offenses was not.

Now, it must be admitted that at the time of the murder of President Lincoln the war had swept far away from the vicinity of the Capital. There had been no Confederate troops near it since Early's raid in the summer of 1864, and no enemy even in the Shenandoah Valley since October. It must also be admitted, and was, in fact, proved on the trial, that the civil courts were open and in full and unobstructed discharge of their functions. As for the reiterated affirmation of Judge Bingham that the courts were only kept open by the protection of the bayonet; that is

precisely what was affirmed by General Butler, in his argument before the Supreme Court, to have been the fact in Indiana.

None of the counsel in the Milligan case claimed that a Military Commission could possibly have jurisdiction to try a simple citizen in a State where there was no war or rumors of war.

> "We do fully agree, that if at the time of these occurrences there were no military operations in Indiana, if there was no army there, if there was no necessity of armed forces there, * * * then this Commission had no jurisdiction to deal with the relator, and the question proposed may as well at once be answered in the negative."

They contended, as the very basis of their case, that the acts of Milligan "took place in the theatre of military operations, within the lines of the army, in a State which had been, and then was constantly threatened with invasion."

And, in fact, the record in so many words so stated, and the statement was uncontroverted by the relator.

General Butler with great earnestness put the question:

> "If the Court takes judicial notice that the courts are open, must it not also take judicial notice how, and by whose protection, and by whose permission they were so open? that they were open because the strong arm of the military upheld them; because by that power these

Sons of Liberty and Knights of the American Circle, who would have driven them away, were arrested, tried and punished.

"If the soldiery of the United States, by their arms, had not held the State from intestine domestic foes within, and the attacks of traitors without; had not kept the ten thousand rebel prisoners of war confined in the neighborhood from being released by these Knights and men of the Order of the Sons of Liberty; there would have been no courts in Indiana, no place in which the Circuit Judge of the United States could sit in peace to administer the laws."

Moreover, the opinion of the minority Judges bases their contention that Congress had the power, if it had chosen to exercise it, to authorize such a Military Commission, upon this very fact.

"In Indiana, for example, at the time of the arrest of Milligan and his co conspirators, it is established by the papers in the record, that the State was a military district; was the theatre of military operations, had been actually invaded, and was constantly threatened with invasion. It appears, also, that a powerful secret association, composed of citizens and others, existed within the State, under military organization, conspiring against the draft, and plotting insurrection, the liberation of the prisoners of war at various depots, the seizure of the State and national arsenals, armed co-operation with the enemy, and war against the national government."

Not one of which circumstances (except that it was a military district)

can be truthfully predicated of the District of Columbia at the time of the assassination.

As for actual martial law, there was no declaration of martial law claimed for the City of Washington, other than the proclamation of the President which applied as well to Indiana, and, indeed, to the whole North.

We are justified, therefore, in saying, that the Supreme Court of the United States, in this case of Milligan, pronounced the final condemnation of the whole proceedings of the Military Commission which tried and condemned Mary E. Surratt; declaring, with all the solemn force of a determination of the highest judicial tribunal known to this nation, that every one of its acts, from its creation by the President to its transmission of its record of doom to the President, was in direct contravention of the Constitution of the United States and absolutely null and void.

That illustrious Court, speaking by Judge David Davis, thus enunciates the law:

> "The Constitution of the United States is a law for rulers 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. Such a doctrine leads directly to anarchy or despotism."

"From what source did the Military Commission * * derive their authority?"

"It is not pretended that the commission was a court ordained or established by Congress."

"They cannot justify on the mandate of the President; because he is controlled by law and has his appropriate sphere of duty, which is to execute not to make the law; and there is no unwritten criminal code to which resort may be had as a source of jurisdiction."

"The laws and usages of war can never be applied to citizens in states which have upheld the authority of the government and where the courts are open and their processes unobstructed. And no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power; and to the honor of our national legislature be it said it has never been provoked by the state of the country even to attempt its exercise."

"All other persons," (i. e., all other than those in the military and naval service) "citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity."

"It is claimed that martial law covers with its broad mantle the proceedings of this Military Commission."

"Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration."

"Martial law can never exist where the courts are open, and in the proper and unmolested exercise of their jurisdiction. It is also confined to the locality of actual war."

Had the swift process by which this unfortunate woman was hurried to the scaffold been interrupted by a stay to allow a review by the same high tribunal which rescued Milligan from the jaws of death, it cannot be doubted that in her case, as in his, the same conclusions would have been reached, viz.:

1st. "One of the plainest constitutional provisions was, therefore, infringed when" (Mary E. Surratt) "was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior."

2nd. "Another guarantee of freedom was broken when" (Mary E. Surratt) "was denied a trial by jury;"

that, in her case, as in his, the Court would have set the prisoner free;

there would have been no hanging, no felon's grave, and not even an ulterior attempt at a constitutional trial.

For it is remarkable that although the Military tribunal which tried Milligan pronounced him guilty of crimes deserving a traitor's death; the seeming strength of the evidence must have melted away, strangely enough, when subjected to the prospective investigation of constitutional courts, as there was not even a subsequent effort on the part of the Government to call him to account.

Let us add, as a final corollary to this exposition of the Constitution by the Supreme Court, the following remark: that the ground and argument employed by Attorney General Speed in his opinion upon the right of the President to order the trial of the alleged assassins by Military Commission, and by Judge-Advocate Bingham in his address to that Commission, involve a reductio ad absurdum, or, rather, a reductio ad monstrosum, that is, a Reductio ad absurdum quia monstrosum.

For, that ground and that argument, invoked to uphold and sanction the trial of civilians by military commissions, necessarily and inevitably go farther, and proclaim the right of President Johnson, alone, of his own motion and without the interposition of a formal court, whether military commission or drum-head court-martial, to have commanded the immediate execution of every person whom he might believe to be guilty of participation in the assassination of his predecessor or in the presumed attempt upon himself.

The conclusion forced upon us, therefore,--the one only thing to be said--is, that the hanging of Mary E. Surratt was nothing less than the crime of murder.

Murder, not only in the case of the private soldiers who dragged her to the scaffold and put the rope about her neck; they, at least can plead the almost irresistible force of military discipline.

But murder, also, in the case of the Major-General whose sword gave the signal for the drop to fall. General and soldiers are in the precise position, before the law, of a mob of Lynchers carrying out the judgment of a Lynch court.

Murder, not only in the case of the one military officer who superintended the details of the execution. He, too, though with much less force, can plead that he was the mere bailiff of what he believed to be a competent Court.

But murder, also, on the part of the nine military officers and the three advocates who tried and sentenced this woman to death. These men, in the forum of the law, stand in the precise position of any nine policemen steered by any three police attorneys in the city of New York, who should dare to try, convict and sentence to death a citizen of that city.

Murder, not only on the part of the Commission and its lawyers; they too might, possibly, plead--though with still diminishing force--that, although they were warned and took the awful responsibility, still they

believed in their competency.

But murder, also, in the President of the United States, who appointed the court, approved its findings, and commanded the execution of its sentence. He stands before the law in the same position as though, sweeping aside all empty forms, he had seized a sword and with his own hand cut off the head of the woman, without the mockery of a trial. In our frame of government, there is surely no room for such a twi-formed barbarian-despot, as a President having the power to pick out from the army, of which he is the commander-in-chief, the members of a court to try and punish with death, at his option, any one of the citizens, for an abortive attempt on his own life.

And it was murder, not only in the case of the President; he, too, but with scarcely audible voice, might plead the coercion of his situation--sitting as he did in the seat of the murdered Lincoln.

But it was murder, also, in the Secretary of War, who initiated the iniquitous process, pushed on the relentless prosecution, shut his own ears and the ears of the President to all pleas for mercy, presided like a Moloch over the scaffold, and kept the key of the charnel-house, where, beside the unpitied carcasses of the reputed ruffians forced upon her in her ordeal of torture and in the hour of death, the slaughtered lady lay mouldering in her shroud. Here, at least, the plea of mitigation exhales in a cry like that of Payne, "I was mad!"

Weigh the extenuating circumstances in whatever scale you may; extend as

much mercy as possible to those who showed no mercy in their day of power--still, the offense of every one and all, who had hand, part or lot in this work of death, contains every element which, under the most rigorous definition of the law, makes up the Crime of Murder. The killing was there. The unlawful killing was there. The premeditated design to effect death was there. The belief of the perpetrators, that they had a right to kill, or that they were commanded to kill by an overruling power, before a court of law avails not a whit. Ignorance of the constitution as well as the law excuses no man, be he civilian or soldier, President or assassin, War-Minister or Payne.

Murder it essentially was, and as such it should be denounced to the present and future generations.

Garrett Davis told no more than the exact truth when he declared in his place in the Senate of the United States:

> "There is no power in the United States, in time of war or peace, that can legitimately and constitutionally try a civilian who is not in the naval or military service of the United States, or in the militia of a State in the actual service of the United States, by a court-martial or by a military commission. It is a usurpation, and a flagitious usurpation of power for any military court to try a civilian, and if any military court tries a civilian and sentences him to death and he is executed under the sentence, the whole court are nothing but murderers, and they may be indicted in the State courts where such military murders are perpetrated; and if the laws were enforced firmly

and impartially every member of such a court would be convicted, sentenced and punished as a murderer."

Although the actual guilt of any of the victims constitutes no legal defense to this fearful charge, yet as the unquestioning obedience which the soldier yields, as a matter of course, to the commands of his superior officer must alleviate, if it do not wipe away, the guilt of the members of the Commission, in the forum of morals; so the ascertainment that the sufferers on the scaffold and in prison, in fact, deserved their doom, cannot but blunt the edge of our condemnation of the iniquity of the trial, as well as weaken our pity for the condemned and our sense of shame over the tyrannous acts of the government.

A word or two, therefore, will be appropriate in respect to the sufficiency of the testimony to establish the guilt of the accused.

I. As to Arnold and O'Laughlin, it may be said in one emphatic word, that there was no evidence at all against them of complicity in the plot to kill. The letter of Arnold to Booth shows, when fairly construed, that, if the writer had conspired with the actor, he conspired to abduct; and, also, for the time being, even that conspiracy he had abandoned. He was at Fort Monroe for the two weeks prior to the assassination. His confession, used on the trial against himself not only but also against O'Laughlin because he was mentioned in it as present at a meeting of the conspirators, was a confession only of a conspiracy to abduct which had been given up. The condemnation of these two men was brought about by the conduct of Judge Bingham, to which we have drawn attention, in

systematically shutting his eyes to the existence of any conspiracy to capture, and employing the letter and confession as proof that both these men were guilty of conspiracy to murder.

II. As to Dr. Mudd, the evidence leaves it doubtful whether or not he recognized Booth under his disguise on the night he set his broken leg, and therefore whether he may have been an accessory after the fact or not; but the testimony of the informer Weichman, by which chiefly if not solely the prosecution sought to implicate the doctor in the conspiracy to murder, was greatly damaged, if not completely broken down, by the proof on the part of the defense that Dr. Mudd had not been in Washington from November or December, 1864, until after the assassination.

III. As to Payne, his guilt of the assault on Seward in complicity with Booth was clear, and confessed by himself. He was but twenty years of age, of weak mind, entirely dominated by the superior intellect and will of Booth. He claimed he acted under the command of his captain. He was so stolidly indifferent during the trial as to raise suspicion of his sanity, and he repeatedly expressed his wish for the termination of the trial so that he might cease to live.

IV. As to the boy Herold, it was manifest that, as the mere tool and puppet of Booth, he was acquainted beforehand with the design of his master to kill the President, but there is no evidence that he aided or abetted Booth in the actual assassination in any way except to participate in his flight after he had got out of Washington.

V. As to Atzerodt, for whom there appears to have been no pity or sign of relenting, it is nevertheless a fact, that the testimony to his lying in wait for Andrew Johnson is so feeble as to be almost farcical. The poor German was a coward and never went near Johnson. There is no circumstance in the evidence inconsistent with his own confession, that he was in the plot to capture, knew nothing of the design to murder until 8 o'clock on the evening of the 14th, and then refused to enact the part assigned him by Booth.

Indeed, it would appear as if the Commission, by a sort of proleptic vision of the future course of the President in his desperate struggle with the Congress, in grim irony actually hung Atzerodt because he did not kill Andrew Johnson.

VI. And as to Mrs. Surratt, the only witnesses of importance against her are Weichman and Lloyd. Without their testimony the case for the prosecution could not stand for a moment. Weichman, a boarder and intimate in her house, the college chum of her son, and, equally with him, the associate of Payne, Atzerodt, Herold and Booth, who, frightened almost to death at the outlook, was swearing, under a desperate strain, to clear his own skirts from the conspiracy and thus save his threatened neck:--Weichman's testimony before the Commission, even at such a pass, is for some reason quite vague and indefinite, and only becomes deadly when supplemented by Lloyd's. This man Lloyd it was who, in fact, furnished the only bit of evidence directly connecting Mrs. Surratt with the crime. He testifies to two conversations he had with her--one on the 11th and the other on the 14th of April--when she alluded to the weapons left weeks

before at the hotel at Surrattsville owned by her and kept by Lloyd--on the 11th, that the "shooting-irons" would be wanted soon; on the 14th, that they would be called for that night. Lloyd, himself, however, admits, and it is otherwise clearly shown, that on the 14th he was so drunk as hardly to be able to stand up. Lloyd, also, was deeply implicated in the conspiracy to capture if not to assassinate. He had aided the fugitive assassins to escape, had kept their weapons hidden in his house, and he had, for two days after his arrest, denied all knowledge of Booth and Herold's stopping at his hotel at midnight after the murder. He had been placed in solitary confinement and threatened with death. His nervous system, undermined by debauchery, gave way; his terrors were startling to witness and drove him well-nigh mad, and, at last, in a moment of distraction, he turned against Mrs. Surratt and her son. Like Weichman's, his, also, was the frenzied effort of a terror-stricken wretch to avoid impending death by pushing someone forward to take his place. Reverdy Johnson, at the close of his plea to the jurisdiction of the court, let fall the following words, no less weighty for their truth than their force:

> "This conclusion in regard to these witnesses must be, in the minds of the Court, and is certainly strongly impressed upon my own, that, if the facts which they themselves state as to their connection and intimacy with Booth and Payne are true, their knowledge of the purpose to commit the crimes and their participation in them, is much more satisfactorily established than the alleged knowledge and participation of Mrs. Surratt."

Moreover, the testimony of both these witnesses, suborned as they were alike by their terrors and their hopes, is perfectly reconcilable with the alternative hypothesis, either that the woman in what she did was an innocent dupe of the fascinating actor, or that she was unaware of the sudden transformation of the long-pending plot to capture, of which she might have been a tacit well-wisher, into an extemporaneous plot to kill.

Much stress was laid by Mr. Bingham on her solemn denial of any prior acquaintance with Payne when confronted with him on the night of her arrest. But it is more than probable that the non-recognition was unsimulated, because of the disguise and pitiable plight of the desperado, who had been hidden in the mud of the suburbs three days and three nights, and, also, because the non-recognition was shared with her by the other ladies of the house. Besides, that a woman, caught in the toils in which Booth and her own son had unwittingly involved her, under the terror of recent arrest and imminent imprisonment, should have shrunk from any acknowledgment of this midnight intruder, even to the extent of falsehood, certainly is in no wise incompatible with innocence.

These are the only circumstances by which Mrs. Surratt is brought nearer than conjectural connection with the assassination, and the force of these is greatly weakened by the testimony in her defense.

It is neither necessary, nor relevant to this exposition, to enter into a lengthy discussion upon the pros and cons of her case. Her innocence has been demonstrated in a more decisive manner by subsequent events, and stands tacitly admitted by the acts of the officers of the government. Few

impartial hearers would have said then, and no impartial readers will say now, that the testimony against her is so strong as to render her innocence a mere fanciful or even an improbable hypothesis. No one can say that a jury, to a trial by which she was entitled under the Constitution, would have pronounced her guilty, and every one will admit that had her sentence been commuted to imprisonment for life, as five of her judges recommended, she would have been pardoned with Arnold, Spangler and Mudd, and might have been living with her daughter to-day. The circumstances of the whole tragedy warrant the assertion that, had John H. Surratt been caught as were the other prisoners, he, and not she, would have been put upon trial; he, and not she, would have been condemned to death; he, and not she, would have died by the rope. If he was innocent, then much more was she. Mary E. Surratt, I repeat, suffered the death of shame, not for any guilt of her own, but as a vicarious sacrifice for the presumed guilt of her fugitive son.