The Surratt Courier

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The Surratt House Museum, a historic property of the Maryland-National Capital Park and Planning Commission. The Surratt House Museum's phone number is (301) 868-1121 and email is surratthouse@pgparks.com .

EDITOR'S MESSAGE

The question of Mary Surratt's guilt or innocence has been debated for over 160 years. This issue explores Mrs. Surratt's sentencing as reported in *The Evening Star* (Washington, D.C.), the plea for clemency that was seen by President Johnson or was it, and Mrs. Surratt's lawyers' last-ditch effort to save her life.

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Reprinted from

THE EVENING STAR
(Washington, D.C.)
July 6, 1865

EXTRA

The Conspiracy.

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The Findings of the Court.

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The Sentences Approved by the President.

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Mrs. Surratt, Payne, Herold, and Atzerodt to be Hung!!

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The Sentence to be Executed Tomorrow!!

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Mudd, Arnold, and O'Laughlin to be Imprisoned for Life!

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Spangler to be Imprisoned for Six Years!

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The following are the official orders approving the finding and sentence in the cases of the prisoners tried before the court of which Major General Hunter was the president:

War Department, Adjutant General's Office,
Washington, July 5, 1865

To Major General W.S. Hancock, U.S. Volunteers,
Commanding Middle Military Division, Washington, D.C.

Whereas, by the Military Commission appointed in paragraph 4, No. 211, dated War Department, Adjutant General's Office, Washington, May 6, 1865, and of which Major General David Hunter, U.S. Volunteers, is President, the following named persons were tried, and after mature consideration of the evidence adduced in their cases, were found and sentenced as hereinafter stated, as follows:

[*Surratt Courier* Editor's Note: Only the section on Mrs. Surratt is reprinted, as the findings and sentences were the similar for all the conspirators.]

1st. –David E. Herold
2nd. –George A. Atzerodt
3d. –Lewis Payne
4th. –Mary E. Surratt

Finding: --Of the specification Guilty, except as to receiving, entertaining, harboring, and concealing Samuel Arnold and Michael O'Laughlin, and except as to combining, confederating, and conspiring with Edward Spangler; of this Not Guilty.

Of the charge Guilty, except as to combining, confederating, and conspiring with Edward Spangler; of this Not Guilty.

Sentence: --And the Commission does therefore sentence her, the said Mary E. Surratt, to be hung by the neck until she be dead, at such time and place as the President of the United States shall direct, two-thirds of the members of the Commission concurring therein.

And whereas, the President of the United States has approved the foregoing sentences in the following order, to wit:

EXECUTIVE MANSION, July 5th, 1865.

The foregoing sentences in the cases of David E. Herold, G. A. Atzerodt, Lewis Payne, Mary E. Surratt are hereby approved, and it is ordered that the sentences in the cases of David E. Herold, G. A. Atzerodt, Lewis Payne, and Mary E. Surratt be carried into execution by the proper military authority, under the direction of the Secretary of War, on the 7th day of July, 1865, between the hours of ten o'clock a.m. and two o'clock p.m. of that day.

Andrew Johnson, President.

Therefore, you are hereby commanded to cause the foregoing sentences in the cases of David E. Herold, G. A. Atzerodt, Lewis Payne and Mary E. Surratt to be duly executed in accordance with the President's order.

By command of the President of the United States.

E. D. Townsend,
Assistant Adjutant General.

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THE EVENING STAR
July 6, 1865

SECOND EDITION
5 o'clock p.m.
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The Great Conspiracy.

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THE CRIMINALS.

--*--

THEIR DEATH WARRANT READ TO THEM.

--*--

WHERE THEY ARE TO BE HUNG.

--*--

THE PREPARATIONS FOR THEIR EXECUTION.

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This morning General Hancock, commanding Middle Military Division, proceeded to the Arsenal and handed the death warrant of Payne, Herold, Mrs. Surratt, and Atzerodt, to Major General Hartranft, in charge of the prisoners, and they at once proceeded to the prison, when they informed the prisoners of their sentence. General Hartranft reading the warrants in each case.

The announcement did not take Payne by surprise, as he expected no other sentence, and he showed little emotion. Atzerodt tried hard to assume an indifferent air, but vainly, as shown by the tell-tale tremor of his extremities and the ashy pallor upon his face. The sentence was a thunderbolt to Herold, who had expected nothing more serious than a short imprisonment in the penitentiary. The frivolous simper deserted his face, and for once he seemed wholly unmanned.

Mrs. Surratt was completely unstrung.

The execution is to take place in the prison yard at the Arsenal, which is not large enough, to accommodate many spectators, and therefore, while the execution will be in effect a public one, it will require a pass for admission signed by Major General Hancock, who is charged with the execution of this order, and these will be given sparingly—no more being admitted than can find convenient standing room.

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The Mercy Recommendation for Mrs. Surratt

The Holt-Johnson Controversy

By James O. Hall
Reprinted from *The Surratt Courier*, August 1990

On June 30, 1865, five members of the Military Commission signed a recommendation to President Andrew Johnson that he exercise executive clemency for Mrs. Mary Surratt by reducing her sentence of death to life imprisonment. On the 5th of July, Judge Advocate General Joseph Holt took papers relating to the trial to the White House for review and action by the President. The two met alone. What was said and done there is disputed. Judge Holt maintained for the rest of his long life that he showed Mr. Johnson the mercy recommendation. Johnson adamantly denied this, saying that Holt did not show him this recommendation and did not tell him about it. The controversy has historians at odds—some agree with Holt, some with Johnson.

Over the years, I have gathered a large file on this subject. Perhaps one small part of this file will be of interest to your readers.

The trial of John H. Surratt began in Washington on June 10, 1867. He was charged as the party to the assassination of President Lincoln. The government brought in a special prosecutor, Edward Pierrepont, an able lawyer. Before the jury was sworn, Pierrepont stated in open court that there had been questions about whether President Johnson had seen the mercy recommendation for Mrs. Surratt. This document, he said, would be put in evidence.

During closing arguments, one of Surratt's lawyers, R.T. Merrick, twitted Pierrepont about not keeping this promise. In the afternoon session of court on August 1st, Merrick asked Pierrepont why the mercy recommendation had not been produced. Note this date, August 1st. Pierrepont requested Judge Advocate General Holt to bring him the record of the 1865 conspiracy trial. Pierrepont allowed the defense to see this recommendation. Then Holt withdrew everything. Indeed, at that point, new evidence could not be introduced. All that remained was to finish the closing arguments in the case. So, the mercy recommendation for Mrs. Surratt did not get into the record.

Now look at the date, August 1st. It was on that date that Merrick prodded Pierrepont about not bringing in the mercy recommendation for Mrs. Surratt. At the White House on that same day, President Johnson called his private secretary, Colonel W.G. Moore, and had him prepare a terse note to Secretary of War Edwin M. Stanton. This was as follows.

August 1, 1867

Sir:
Public considerations of a high character constrain me to say that your resignation as Secretary of War will be accepted.

Very respectfully yours,
(s) Andrew Johnson

To the Honorable Edwin M. Stanton

For some reason, Johnson did not send this note to Stanton. But the pressure was building. On August 5th, Johnson ordered Stanton to send over to him all the papers relating to the mercy

recommendation—that is, the documents Holt claimed to have shown the President on July 5th, 1865. These were secured from the Bureau of Military Justice and delivered to the White House. The mercy recommendation was with these papers. That same day, August 5th, Johnson had Colonel Moore re-date the resignation note to Stanton. It now carried a new date: August 5, 1867. Colonel Moore delivered this to Stanton and the battle was on.

Colonel Moore kept a careful record of all this. It was published in the *American Historical Review* for October 1913. Here is an excerpt from that article:

The President, having heard that there was a recommendation in favor of Mrs. Surratt, sent today for papers upon which was endorsed his approval of the finding and sentence of the Military Commission for the trial of the assassination conspirators. Forwarded with the papers was a recommendation of the Court for a commutation of the sentence in the case of Mrs. Surratt from hanging to imprisonment for life. The President very emphatically declared that he had never before seen the recommendation. He was positive that it had never before been brought to his knowledge or notice and explained to me the circumstances attending the signing of the order to carry into effect the sentence of the Commission. He distinctly remembered the great reluctance with which he approved the death warrant of a woman of Mrs. Surratt's age, and that he asked Judge Advocate General Holt, who originally brought to him the papers, many questions, but that nothing whatever was said to him respecting the recommendation of the Commission for clemency in her case. He had been sick, but when he signed the papers, his mind was as clear as it had ever been. Besides, the recommendation did not appear in the published proceedings of the trial, by Ben Pittman, prepared and issued by authority of the Secretary of War, and he felt satisfied that it had been designedly withdrawn from his (the President's) knowledge.

So, the question just hangs there. I can ask it without having an answer. Did Holt show Johnson the mercy recommendation on July 5, 1865? Holt says yes, Johnson said no. But look at the dates. On August 1, 1867, Merrick prodded Pierrepont about the mercy recommendation. On that same day the President instructed Colonel Moore to prepare a note asking Stanton to resign. On August 5, 1867, Johnson asked to see the papers relating to the mercy recommendation. On that same day, he had Colonel Moore redate the resignation request to Stanton and it was delivered to him.

President Johnson believed that Holt was Stanton's man. Thus, whatever Holt did had Stanton's fingerprints all over it. Still the President had been on a collision course with Stanton for some time. So, we shall never really know whether the dates pointed out here merely coincided with the decisions made by Johnson for other reasons.

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Could the Estate of Mary Surratt Have Sued for Malpractice?

By James E.T. Lange and Katherine DeWitt, Jr.
Reprinted from *The Surratt Courier*, July 1990

In the early morning of July 7, 1865, the day scheduled for her hanging, Mrs. Surratt's lawyers sued out a writ of *habeas corpus*. This was an act of desperation and, as many desperate acts, was done hastily and carelessly. They made one gigantic mistake.

Habeas corpus is the ancient writ ordering anyone holding a person in confinement to bring that person before the court so that court may inquire if the confinement is lawful. The court has the power to order the release of the prisoner, if the evidence shows the confinement to be illegal. The lawyers, Frederick A. Aiken and John W. Clampitt, had taken the opinion of Senator Reverdy Johnson of Maryland (Mrs. Surratt's original defense lawyer), who advised them to try for the writ. He apparently based his advice on the working of the Constitution and a law passed by Congress early in the war.

Article 1, Section 9, Paragraph 2, of the Constitution states that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." There was a rebellion. Congress had passed a law[1] and the President had issued a decree[2] partially suspending such writs.

Parts of the law stated that while *habeas corpus* could be suspended, it could be for a limited time only. Military authorities could arrest and hold civilians under certain conditions. If the Federal District or Circuit Court were notified that the individual were in custody, he could be held to the end of the term of the next Grand Jury to allow that Grand Jury to indict him if it wished. If the Grand Jury failed to indict him, he must be released. If the Federal District or Circuit Court had not been informed that he was in custody, then he must be released within 20 days.

Long after the execution, in December 1866, a case called *ex parte Milligan*[3] was decided by the Supreme Court. It is often cited as the reason Mary Surratt's trial and execution was illegal. Lambdin P. Milligan had been arrested by military authorities in Indiana on October 5, 1865, accused of aiding an armed Copperhead uprising, tried by a Military Commission on October 21, 1864, and was sentenced to hang. His lawyer sued for a writ of *habeas corpus* through the United States Circuit Court. They were divided on the issue, which gave an automatic appeal to the Supreme Court. That Court concluded that if the civil courts in a jurisdiction were open, every citizen not attached to the Army, Navy, or militia in actual service had the right to a speedy and public trial by a civil court and an impartial jury. They were holding the military authorities to the letter of the law.

The problem with applying *Milligan* to the assassination tribunal is that it was, as most Supreme Court decisions are, perspective and not retrospective. It changed what would happen in the future, not what happened in the past. At the time of the actual tribunal, the operative decisions for *ex parte Merriman*[4] and *ex parte Villandingham*.[5]

Merriman was decided in 1861. The facts of the case are that John Merriman was yanked out of bed on the 26th of May 1861. He was hauled by the military authorities to Fort McHenry and thrown into the dungeon without benefit of warrant or any charges being brought. Chief Justice Roger B. Tawny, sitting as the Circuit Judge in Baltimore, Maryland, issued a writ of *habeas corpus*. When the writ was defied by the military commander of the area, the Chief Justice admitted his powerlessness to enforce it further and ordered that a copy of his opinion, which was that only the Congress and not the President, could suspend *habeas corpus*, be sent on to the

President of the United States. History does not record whether President Lincoln reacted on it or not. The Congress went on to suspend the right of *habeus corpus* and *Merriman* never went further than the Circuit Court in Baltimore. Since there was no appeal, the decision and opinion had no controlling value outside that circuit.

In 1863, a former United States Senator named Clement L. Villandingham speechified against the Union and conspired with the Confederate forces to invade Ohio. He was charged with something close to treason—the indictment goes on and on in the old style. He was arrested by order of General Burnside and tried before a Military Commission. They found him guilty and he was sentenced to be imprisoned in a fortress for the duration of the war. In *Villandingham*, a Supreme Court case decided in 1863, the Court ruled in a unanimous opinion that it lacked jurisdiction to review the case of a Military Commission, which had tried a civilian and sentenced him to imprisonment.

These were the controlling cases on May 17, 1865, when the Military Commission opened to try Mrs. Surratt.

Of all those convicted by the Military Commission, only Mrs. Surratt attempted to sue out a writ of *habeas corpus*. Mrs. Surratt's lawyers, Frederick A. Aiken and John W. Clampitt, sued out of a writ in the Supreme Court of the District of Columbia. This would be insufficient, however, even under *Milligan*, where the Supreme Court held that the Federal District or Circuit Court, not the local court, was the proper place to apply for a writ of *habeas corpus*, when one was being held by the Federal military or civilian authority. That procedure had been codified in the Congressional statute suspending the writ. In other words, Mrs. Surratt's lawyers, in the early morning of July 7, 1865, sued in the wrong court. They did not have the benefit of *Milligan*, which hadn't been decided yet, but they did have the Congressional statute to guide them.

Justice Andrew Wylie of the District of Columbia Court signed the writ. It was served on General Whitfield Scott Hancock, Commander of the Middle Military Division, which included Washington, by 8:30 a.m. The authorities were ordered to produce Mrs. Surratt in Wylie's court at 10 a.m. General Hancock and U.S. Attorney General James Speed arrived at Judge Wylie's court at 11:30 a.m. They repeated the formula that the President had suspended the writ in this case and presented President Johnson's signed order to that effect.[6] Judge Wylie, just as Chief Justice Taney before him, had no recourse. Whatever he said, he didn't have the force of arms to back him up.

Mrs. Surratt was hanged at 1:26 p.m. and pronounced dead at 1:44 p.m.

That brings us to the issue of malpractice. In legal or medical malpractice, not only must an error be made, but that error must be one that the average competent practitioner would not make. We cannot now call testimony to establish the standard for lawyers in 1865, so we cannot show malpractice. We have shown that Mrs. Surratt's lawyers tried to save her in the wrong court.

Footnotes:

[1] 12 Stat. At Large, 755 (1863)

[2] 13 Stat. At Large, 734 (1863)

[3] 4 Wallace 2 (1866)

[4] 17 Federal Cases 144 #9487 (1861)

[5] 1 Wallace 243 (1863)

[6] Pitmann, Ben, *The Assassination of President Lincoln and the Trial of the Conspirators*, Moore Wilstach and Baldwin, New York, 1865, p. 250.