

Touched With Fire: Five Presidents and the Civil War Battles That Made Them

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Recommended Citation

Hardy, James D. (2004) "Touched With Fire: Five Presidents and the Civil War Battles That Made Them," *Civil War Book Review*: Vol. 6 : Iss. 2 .

DOI: 10.31390/cwbr.6.2.25

Available at: <https://repository.lsu.edu/cwbr/vol6/iss2/25>

Review

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Spring 2004

Steers, Jr. Edward, Editor *The Trial: The Assassination of President Lincoln and the Trial of the Conspirators*. University Press of Kentucky, \$55.00 ISBN 813122775

Lincoln's avengers:

Justice in time of war and end of the Conspiracy

Edward Steers Jr., who has published extensively on the assassination of Abraham Lincoln, has here edited Benn Pitman's publication of the trial record from the military court that judged the conspirators. A military court, rather than a regular civil tribunal, reflected the vision of Secretary of War Edwin Stanton, who argued that the government should control the proceedings, rather than leave them to an independent judiciary.

Consequently, on May 1, 1865, President Andrew Johnson appointed eight officers, six of them generals, to the ad hoc military tribunal. All had seen combat service; none were lawyers. Joseph Holt, the judge advocate general, became the prosecutor, assisted by two special judge advocates, Henry L. Burnett and Ohio Congressman John Bingham, who examined the witnesses and gave the government's final summation. The defendants had excellent representation, including United States Senator Reverdy Johnson (D. Maryland), future judges Frederick Stone and Waller Cox, and by Major General Thomas Ewing, Jr. The military court moved with a dispatch commendable then and unimaginable now. The first formal session met in the morning of May 10, 1865, and the court began hearing testimony two days later.

Steers's introduction begins by considering three issues raised by the existence and functioning of the military tribunal. Two of these, the potential for secret proceedings and the possibility that the assassination of Lincoln was part of a general Confederate conspiracy, were settled at the time. The third, the constitutionality of the military court, widely discussed at the time, has remained

an issue.

The military court did not meet secretly, as many at the time had hoped or feared. While spectators were limited, newspapers were generously accommodated. The table for reporters was as large as that for the military commission, itself, and the trial proceeded in full view of daily newspaper reportage and opinion. Beyond the daily journalistic efforts of fact and speculation lay court requirement in its rules of procedure (May 10, 1865) that the testimony shall be taken in shorthand by reporters to record the evidence faithfully and truly. This requirement was fulfilled by a group of reporter/stenographers working for Benn Pitman, who had developed a shorthand system that had been tested in the courtroom. Pitman published his transcripts daily in the *National Intelligencer*, a Washington paper. This newspaper coverage quickly found its way into book form. Using material from the *Philadelphia Daily Inquirer*, T.B. Peterson and Brothers published a volume in July, 1865, while the transcripts from the *National Intelligencer*, enabled Boston journalist Ben Perley Poore to edit three columns in 1865 and 1866. Pitman himself was the last to produce a book. He condensed the daily reports into a single volume, *The Assassination of President Lincoln and the Trial of the Conspirators*, published in New York in November, 1865. Pitman carefully edited the four thousand nine hundred or so pages of hand-transcribed testimony, included the closing arguments by both sides, and indexed the testimony by name and date, giving a summary of the testimony in the index. Steers has reprinted Pitman's volume, as it is clearly the most useful and accessible of the trial records.

Continuing daily publicity quickly routed the fear of secrecy, and the unfolding testimony gradually did the same for notions of a general Confederate conspiracy emanating from the office of Jefferson Davis. Many, including the prosecutor Judge Advocate General Joseph Holt, initially suspected that high Confederate officials were behind the conspiracy. The trial itself, however, exposed some government witnesses of the grand conspiracy as unreliable and the conspirators themselves as a motley gang with no convincing links to the Confederate president. Although John Wilkes Booth had been in Canada and in touch with Confederate agents, this proved to be too thin a link to sustain a grand Confederate conspiracy. Those in the dock were another matter. Plenty of evidence piled up against them, and they were convicted on a sound judicial basis.

One other issue troubled contemporaries and has continued to be contentious. As Steers notes, the initial argument in the court involved the constitutionality of trial by a special military tribunal. The defense claimed that the defendants were civilians, not subject to military jurisdiction, and civil courts were regularly in session. The case should be held in a civil court. Senator Reverdy Johnson stated that a tribunal like this has no jurisdiction over other than military offenses. The government's rebuttal came from John Bingham, a Special Judge Advocate for the hearing. Bingham argued that the crime consisted of killing the Commander-in-Chief of the Union forces within the intended lines of the military department of Washington during time of war and martial law. This position, sustained by the tribunal at the time, was subsequently reinforced (in July 1865) by a strong opinion from Attorney General James Speed. Although the civil courts were open, all major aspects of public policy were under military control, with Washington being regarded as a war zone. The military tribunal was appropriate.

There was current litigation on this point concerning military trials while civil courts functioned. The case of *Ex parte Milligan*, 71 U.S. (1866), had originated in Indiana in October, 1864, when Lambdin P. Milligan, a vocal Democrat, had been arrested for treason, tried by a military court, and sentenced to death. He appealed and the case went to the Supreme Court. Milligan argued that he was a civilian, Indiana was not a war zone, the civil courts were functioning normally, and he should have been tried there.

Milligan won his appeal. On April 3, 1866, a unanimous Supreme Court agreed with Milligan's position. If issues of jurisdiction in Milligan's case and that of the conspirators were similar, much else was not. Criticizing a self-important and over-sensitive military governor hardly compared to murdering a president. Indiana had been safe enough, but Washington remained, to some reasonable extent, a war zone. Finally, the timing of *Ex parte Milligan* did not assist the defendant's position. The decision in Milligan came in 1866 when the emergency had ended. Justice Davis recognized this fact. He wrote Then, considerations of safety were mingled with the exercise of power. Now, that public safety is assured, this question can be discussed and decided without passion. But when Booth shot Lincoln, the war still continued.

In the introduction, Edward Steers examines the issues raised by *Ex parte Milligan* and their relationship to the military trial of the conspirators. He stands on solid ground when he distinguishes factual differences between the two cases,

and there can be no dispute when he says that in the military tribunal, the procedure closely followed civil law. Precedents cited throughout the trial were taken from civil cases and applicable civil law. The conspirators received a fair and open trial in a disturbed and difficult time, and the military tribunal appears to have contributed to that outcome. It is hard to expect more than that.

Edward Steers Jr. has edited an important book in Pitman's trial documents, making it generally available to modern readers. In the introduction, essays on the defendants make up the bulk of the material. They are fascinating and important, giving glimpses into hitherto obscure lives being lived out in paths ordinary for this time. Beyond this, however, one wishes for a longer introduction on the political context of the conspiracy trial. An important edition deserves a full introduction.

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