

## REVERDY JOHNSON'S POSITION AGAINST THE LEGALITY OF THE MILITARY COURT IN 1865

Reverdy Johnson's argument is a brilliant statement on personal liberties and limitations on the power of the president:

1. The Constitution specifically confers war powers on Congress, the Legislative Branch, and that includes making the rules for the army and navy. The Executive Branch, including the President, "possesses no power over the soldier except as Congress may – by legislation – confer upon him." Congress did not authorize this 1865 Commission. The creation of such a court is a legislative function, not an executive one. Therefore, this should have left both Stanton and Andrew Johnson out of the decision process.
2. A public trial was essential to the protection of the innocent, and it was no answer to say that this particular trial had been in secret only in part.
3. The crimes alleged were the conspiracy and execution of "traitorous" acts, and so the crime is treason – a civilian crime, not a military crime. The Constitution requires (Article III, Section 3) that no one be convicted of treason except by the testimony of two witnesses. Its trial by a military court is clearly illegal. (Even in dealing with the treason of Aaron Burr, Jefferson never proposed a military court, and Burr was tried by a competent civilian court.)
4. While there was a statute dealing with military tribunals, "persons not belonging to the army cannot be subjected to its jurisdiction." The military court had rules of evidence that have "latitude that no civil court would allow." The "Constitution provides courts consisting of judges selected by legal knowledge, and made independent of executive power. Military judges are not so selected, and so far from being independent are absolutely dependent on such power."
5. Note that Jefferson Davis was indicted by a civilian grand jury and was awaiting a decision about a civilian court (no court was ever convened, and Davis went free) while mere instruments of the Confederacy were tried by the military.
6. The members of the commission faced personal liability if their actions were held to be void for lack of jurisdiction.
7. **As citizens, the defendants had a constitutional right to be indicted by a grand jury, a right to due process of law [Fifth Amendment] and a right to a public trial by an impartial jury [Sixth Amendment].**

**Laurie's Note: With the exception of Lewis Thornton Powell, all of the conspirators were civilian citizens of either D.C. or the State of Maryland, which did not leave the Union. Therefore, they were protected (or should have been) under the Constitution.**

Now, for the opinion of Attorney General James Speed, whose opinion on the legality of the military tribunal appeared AFTER the trial in July:

Speed argued that the laws of war are part of the law of nations, which is part of the law of the United States, and that under this law an army has the right to protect itself, not only from open belligerents, but also from secret "irregulars." The laws of war authorize commanders to create tribunals for the trial of offenders, whether open or secret participants. Noting the constitutional protections for those charged with crimes, Speed argued that they were not relevant for "offenses" – not crimes – under the laws of war: "Some of the offenses against the laws of war are crimes, and some are not." The fact that

the civil courts are open does not affect the right of a military tribunal to try a prisoner. Speed's conclusion:

*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 against the laws of war, it would be as palpably wrong of the military to hand them over to civilian 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.*

Basically, Speed was saying that "the war" justified everything and a conspiracy to attack the commander-in-chief was a military crime properly punished by a military court. The fact that the defendants were civilians was, in his eyes, irrelevant. Stretching it to the "nth" degree: The Commander-in-Chief of the U.S. was killed in a city that had been defended throughout the war and had come under enemy attack with Jubal Early's raid. Lincoln was an active commander-in-chief who stayed in constant contact with his military leaders. The civilian conspirators were deemed to be enemy belligerents.

Many are making comparisons with the 9/11 combatants at Guantanamo, but that is different because they are not citizens of the U.S. However, it should draw attention to the fact that the issue of civilians being tried in military court has not gone away in 146 years and maybe should be addressed once and for all???