

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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RICHARD D. MUDD, M.D.,)	
)	
Plaintiff,)	Civil Action No. 97-2946 (PLF)
)	
v.)	
)	
LOUIS CALDERA, SECRETARY)	
OF THE DEPARTMENT OF THE)	
ARMY, <u>et al.</u> ,)	
)	
Defendants)	
)	

DEFENDANTS' OPPOSITION TO PLAINTIFF'S SECOND MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' CROSS MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 12 (b)(1), defendants move to dismiss this case on the ground that the court lacks subject matter jurisdiction pursuant to 5.U.S.C. §701. Defendants further move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the grounds that there is no genuine issue of mater/al fact and defendants are *entitled to* judgment as a matter of law.

Defendants' Memorandum of Points and Authorities and Proposed Order are attached.

Respectfully submitted,

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Assistant United States Attorney

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Of Counsel:

LIEUTENANT COLONEL JILL M. GRANT

MAJOR JAMES R. AGAR II

Office of The Judge Advocate General

Department of the Army

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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 Plaintiffs,)
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 v.) Civil Action No. 97-2946 (PLF)
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 LOUIS CALDEKA, SECRETARY)
 OF THE DEPARTMENT OF THE)
 et al.,)
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 Defendants.)
)

DEFENDANTS' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE

Pursuant to Local Rule 108(h), defendants hereby respectfully submit their statement of material facts as to which there is no genuine dispute:

A The Hunter Commission

1. The Attorney General of the United States determined that persons implicated in the April 14, 1865 assassination of President Abraham Lincoln, the attempted assassination of Secretary of State William H. Seward, and the conspiracy to assassinate Vice President Andrew Johnson and Lieutenant-General Ulysses S. Grant, including aiders and abettors, were subject to the jurisdiction of a Military Commission. AR 22, 24, 408-410.²

2. In May 1865, a trial was held before a nine-member Military Commission (hereinafter "the Hunter Commission") in which Samuel A. Mudd, M.D., along with several

¹ "AR" refers to the Administrative Record filed herewith.

² The Attorney General's opinion was provided (1) in a one-line opinion to the President prior to the commencement of the Hunter Commission proceedings discussed below, see AR 22 (¶ 12), and (2) in a full opinion issued in July 1865. AR 24 (¶ 21) (see opinion at AR 408-410).

others, was accused of complicity in the assassination of President Lincoln. AR 409. Specifically, Dr.

Mudd was charged with the following offenses:

...Samuel A Mudd did ... on or before the 6th day of March, A.D., 1865, and on divers other days and times between that day and the 20th day of April, A.D. 1865, advise, encourage, receive, entertain, harbor, and conceal, aid and assist the said John Wilkes Booth [and others], with knowledge of the murderous and traitorous *conspiracy* ... and with the intent *to* aid, abet, and assist them in *the* execution thereof, and in escaping from justice after the murder of the said Abraham Lincoln, in pursuance of said conspiracy in manner aforesaid.

AR 58, 411-412.

3. During the proceedings, the Hunter Commission considered and rejected Dr.

Mudd's argument that it had no jurisdiction to adjudicate the matters before it. See AR 59-65, 413-14.

4. On June 29, 1865, Dr. Mudd was convicted of "receiving, entertaining, harboring and concealing" John Wilkes Booth and another man "with the intent to aid, abet and assist them in escaping from justice after the assassination" of President Lincoln. See AR 399-400. Dr. Mudd was sentenced to life at hard labor and imprisoned in a military prison outside Key West, Florida. *Id.*, 401.

B. Dr. Mudd's Unsuccessful Federal Court Challenges
To The Hunter Commission's Jurisdiction

5. In 1866 or 1867, Dr. Mudd filed a petition for a writ of habeas corpus with the United States Supreme Court, but Chief Justice Samuel Chase denied the petition on the ground that Dr. Mudd had not exhausted his remedies in the lower courts. AR 394.

6. On September 9, 1868, the United States District Court for the Southern District

of Florida denied Dr. Mudd's petition for a writ of habeas corpus. See Ex parte Mudd, 17 F. Case 954 (WL) (SD. Fla. 1868) (Del Exh. 1 hereto) (copy also attached at AR Tab 21, pp. 395-397). In that case, Dr. Mudd argued, inter alia, that the Hunter Commission had no jurisdiction to try and sentence him on charges of complicity in the Lincoln assassination. In support of his petition, Dr. Mudd cited the case of Ex parte Milligan, 4 Wallace sup. C.R. 1 10 (1866) (copy attached at AR Tab 19, pp. 367-393), in which the Supreme Court held that "military tribunals have no authority to try civil offences in districts where the regularly organized civil courts of the country are in undisturbed possession of all their powers." See id., 396 (Milligan as interpreted by the district court in Mudd).

7. The district court noted that:

There is nothing in the opinion of the Court in [Milligan] nor i[n] the third article of the constitution, nor in the habeas corpus act of 1863 to lead to the conclusion that if an army had been encamped in the State of Indiana (whether in the immediate presence of the enemy or not) any person a resident of Indiana or any other state (enlisted soldier or not) had not from any private animosity but from public reasons made his way into the Army lines and assassinated the Commanding General, such a person could not have been legally tried for his military offense by a Military Tribunal and legally convicted and sentenced. 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 and to the northward as well as the southward of which battles had many times been fought, which was the head-quarters of all the Armies of the United States from which daily and hourly went military orders. 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 names of the Secretary of War or commanding general. It was not Mr. Lincoln who was assassinated but the commander-in-chief of the Army for military reasons. I find no

difficulty therefore in classing the offence 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.

AR 396 (emphasis added).

C. The Presidential Pardon

8. On February 8, 1869, President Andrew Johnson pardoned Dr. Mudd and ordered his release from prison. AR Tab 22, pp. 399-402.

D. Dr. Mudd's Death

9. Dr. Mudd died in 1883. AR 437.

E. Petitioner's Request For Correction of Military Record

10. On October 15, 1990, Richard D. Mudd, M.D., the petitioner in this action and the grandson of Dr. Samuel A. Mudd, filed a request for the correction of military records showing his grandfather's conviction for complicity in the assassination of President Lincoln. AR 46-213.

11. On January 22, 1992, a hearing was held before the Army Board for Correction of Military Records ("Board"). See AR Tab 13 (pp. 214-345) (transcript of Board hearing). At that hearing, petitioner requested, inter alia, that the Board find that the Hunter Commission lacked jurisdiction to try Dr. Mudd. Id., pp. 220, 230.

F. The Board's January 22, 1992 Findings, Conclusions and Recommendation

12. On January 22, 1992, the Board issued a decision consisting of Findings, Conclusions, and a Recommendation. See AR Tab 5, pp. 18-30.

13. In its Findings, the Board discussed the holding and rationale of the Supreme Court's decision in Ex parte Milligan. AR 25-26 (¶¶s 22-25). The Board noted that Dr. Mudd's case was unsuccessfully appealed to the Supreme Court and to a federal district court in Florida,

and that Ex parte Milligan was discussed in the latter case. Id., 26 (¶ 26). However, the Board's Findings contain no discussion of the district court's reasons for rejecting Dr. Mudd's claim or any discussion of the precedential value and legal significance of that decision. See id., 18- 28 (¶¶ 1-30).

14. In its Conclusions, the Board, citing Ex parte Milligan, stated that

Borrowing from the rationale in that case the Board concludes that the evidence submitted by the applicant and the information uncovered during the Board's research clearly show that the civilian courts were fully open and operating in the District of Columbia in the spring of 1865; that at the time President Lincoln was assassinated, Dr. Mudd was a civilian and a citizen of Maryland, a nonsecessionist state; and that he had never served in the military or naval service. Notwithstanding the Attorney General's opinion in 1865, the crimes he is alleged to have committed were not uniquely military in nature, and none of the individuals with whom he was alleged to have conspired were members of, or closely involved with, the military.

Id., 29 (¶ 5).

15. The Board also concluded:

General Robert E. Lee had surrendered at Appomattox on 9 April 1865, a month before the trial began. There is no evidence that the capital was "under siege" or that any Confederate forces had invaded or were likely to invade the District of Columbia in the spring of 1865.

AR 29 (¶ 6).

16. The Board further concluded:

[T]he Military Commission did not have jurisdiction to try [Dr. Mudd], and ... in so doing denied him his due process rights, particular his right to a trial by jury of his peers This denial constituted such a gross infringement of his Constitutionally protected rights, that his conviction should be set aside. To fail to do so would be unjust.

AR 29.

17. The Board's Conclusions contain no discussion of the district court's decision in

Ex parte Mudd. See id., pp. 28-29 (¶¶ 1-7).

18. The Board made one Recommendation:

That the Archivist of the United States, the custodian of the Hunter Commission's report of the conviction of Dr. Samuel A. Mudd for his complicity in the assassination of President Abraham Lincoln, a Department of the Army record, correct the records in his possession by showing that Dr. Mudd's conviction was set aside pursuant to action taken under Title 10, United States Code, section 1552.

AR30.

G. The July 22, 1992 Decision by Acting Assistant Secretary Clark

19. On July 22, 1992, William D. Clark, then Acting Assistant Secretary of the Army for Manpower and Reserve Affairs, declined to adopt the Board's recommendation. See AR 43-44 (Tab 11). He denied petitioner's application for correction of military records AR 45.

H. The February 2, 1996 Decision by Assistant Secretary Lister

20. On August 14, 1992, petitioner asked Michael Stone, then Secretary of the Army, to "reverse" Acting Secretary Clark's decision. AR Tab 4, pp. 15-17. By letter dated January 14, 1993, Robert S. Silberman, Assistant Secretary of the Army for Manpower and Reserve Affairs,

advised petitioner that the Army would review the matter again. Id____, Tab 3, p. 14.

21. In a memorandum dated March 10, 1993, Brigadier General Harold W. Nelson (USA), Chief of Military History, Department of the Army Center of Military History, reviewed the record and reported that

General Joseph Johnson's army in North Carolina did not surrender until 26 April [1865], the last major Confederate force in the west did not give up until 26 May 1865, and the insurrection [was] not legally declared at an end until April 1866. Nor was the historical background of Maryland as a source of Confederate support discussed. Did adequate justification exist for the U.S. Government to consider itself still in a state of war in Maryland, a border state with questionable internal security when the crime was committed? Was it the murder of a civilian official, or the assassination of a military commander-in-chief in wartime? There is historical evidence to support either side in these and the many other questions in the case, Answers are a matter of opinion, judicial or otherwise, not historical fact.

AR 442. General Nelson further cautioned that the Board "heard testimony that was flawed, or at best partial in its historical accuracy." Id____.

22. On February 2, 1996, Sara E. Lister, then Assistant Secretary of the Army for Manpower and Reserve Affairs, declined petitioner's request that she reconsider and reverse Mr. Clark's July 1992 decision not to adopt the recommendation of the Board. See AR 1-3 (Tab 1). In her decision, the Secretary noted that her review of the record was limited to the question whether the Hunter Commission had jurisdiction to try Dr. Mudd for his role in the assassination of President Lincoln, and that her review did not involve the "substantive aspects of whether Dr. Mudd was actually guilty or innocent." AR 1.

I. Judicial Challenge to The Army's Decisions

23. On December 9, 1997, Plaintiff filed suit in this Court, seeking to overturn the

decision of the Army in regard to the case of Dr. Samuel Mudd.

24. On October 28, 1998, this Court dismissed two of Plaintiff's counts for relief and granted summary judgment in favor of the Plaintiff under one count. This Court vacated the decision of the Army and remanded the case of Dr. Samuel Mudd to the Secretary of the Army. *Mudd v. Caldera*, 26 F. Supp 2d 118 (D.D.C. 1998).

25. On March 6, 2000, Assistant Secretary of the Army for Manpower and Reserve Affairs, Assistant Secretary Patrick Henry, responded to this Court's remand order. Assistant Secretary Henry denied the relief requested by Plaintiff. AR. 513-515.

Respectfully submitted,

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**DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO
PLAINTIFF'S SECOND MOTION FOR SUMMARY JUDGMENT, AND IN SUPPORT OF
DEFENDANTS' CROSS-MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR
SUMMARY JUDGMENT**

Defendants respectfully submit its Memorandum of Points and Authorities in support of its Opposition to Plaintiff's Second Motion for Summary Judgment and its Cross Motion to Dismiss, or in the Alternative for Summary Judgment.¹

SUMMARY OF THE ARGUMENT

The Secretary of the Department of the Army has fully complied with this Court's October 29, 1998 in the March 6, 2000 decision of Assistant Secretary Patrick Henry. Plaintiff has not met his burden in establishing that the Secretary's decision was arbitrary or capricious. Plaintiff continues to assert that the Hunter Commission lacked jurisdiction to try Dr. Samuel Mudd. Defendants submit that such jurisdictional issue is precluded from judicial review by the express language of the Administrative Procedure Act.

¹ Plaintiff has requested summary judgment pursuant to Fed. R. Civ. Pro. 52. However Fed. R. Civ. Pro. 52(a) provides that "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56..."

None of the cases cited by Plaintiff preclude the exercise of military *commission* jurisdiction over United States civilians for crimes against the laws of war. Indeed, the Secretary's reliance on *Ex Parte Quirin v. Cox*, 317 U.S. 1 (1942) reinforces the principle that citizens of the United States can be brought before a military commission for crimes against the law of war, even if the civilian courts are open. Accordingly, the Secretary's decision finding that the Hunter Commission had jurisdiction was not contrary to law. For these reasons, and those set forth below, this case should be dismissed or judgment entered for defendants in this case.

JURISDICTION

This court has no jurisdiction or authority to review the March 6, 2000 decision under the Administrative Procedure Act (APA), 5 U.S.C. §701.² Congress has expressly excluded from the definition of "agency" all "courts-martial and military commissions." *See* 5 U.S.C. §701 (b)(1)(f). This definition, embodied in the APA itself, is a clear indication that Congress intended for military commissions, such as the Hunter Commission, to be free from judicial review under the

² This Court's October 29, 1998 decision addressed *two procedural* issues in the Secretary's decision-making process, failure to address Mudd's citizenship in Maryland and use of material outside the administrative record. Plaintiff's current summary judgment motion, however, does not address any procedural aspects of the Secretary's decision-making process. Rather, Plaintiff has made a direct legal challenge to the jurisdiction of the Hunter Commission itself. Plaintiff argues that "the military commission which tried Dr. Mudd did not have jurisdiction to do so and that His [Secretary Henry's] legal conclusion is incorrect and cannot be upheld under the Administrative Procedure Act (APA)". Plaintiff further states that, "this court must conclude that the underlying law and facts are such that the Army has *no discretion* to act in any other matter." (Plaintiff's 2d Motion for Summary Judgment, pp. 34)(emphasis added). To the contrary, such review of any military commission is not permissible under the APA. As this court has stated, "the relief requested by Plaintiff...would require the Court to independently evaluate whether the Hunter Commission in fact had *jurisdiction over* Dr. Mudd. That determination is entrusted to the Secretary of the Army and is therefore not justiciable." *Mudd v. Caldera*, 26F. Supp 2d 113, 118 (D.D.C. 1998).

APA. Because of the explicit language of the APA, there is "persuasive reason to believe," that Congress intended to preclude judicial review of military commissions when it passed the APA (5

U.S.C. §701(a)(1) and (2)). *See Banzhaf v. Smith* 737 U.S. 1167, 1168-69 (D.C. Cir. 1984)

"Congress has conferred no power on the courts to review their [military commissions'] *determinations* save only as it has granted judicial *power* to "grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty." *In Re Yamashita*, 327 U.S. 1, 8 (1946). Dr. Samuel Mudd pursued his habeas appeal over 131 years ago and failed. Dr. Mudd's habeas appeal cannot now be resurrected in the guise of an APA review to be again be litigated in the federal courts.

THE ADMINISTRATIVE RECORD

The second administrative record in this case is now before the Court. This second administrative record contains a brief submitted by Plaintiff to the Army Board for Correction of Military Records in January 1992. This brief is on file with the Army. Such brief is and has always been a part of the administrative proceedings in this case. Counsel for the government, however, did not receive a copy of the brief initially when the district court case was filed. Thus, this brief was not filed with the original administrative record submitted to the Court. Neither counsel for plaintiff, the government, or the Court detected this omission until after Assistant Secretary Patrick Henry rendered the March 6, 2000 decision. That omission has now been corrected.

ARGUMENT

On October 29, 1998, this Court vacated the decision of the Secretary of the Army to deny Dr. Mudd his request for relief from the Army Board for the Correction of Military Records. This Court also remanded the case for a reconsideration of plaintiff's petition "for proceedings not inconsistent with this Opinion and Order." *Muddv. Caldera*, 26 F. Supp. 2d 113, 123-124 (D.D.C. 1998). In its decision, this Court stated that the Army had failed to consider Dr. Mudd's citizenship in a non-secessionist state and that the Army had based its decision on information which was not contained in the administrative record. *Id* 120 - 123.

In response to this Court's remand order, Assistant Secretary Patrick Henry reconsidered plaintiff's petition. Assistant Secretary Henry examined the very legal issues identified by this Court in its remand order and issued his decision on March 6, 2000. The issue now before this Court is whether Assistant Secretary Henry's March 6, 2000 decision complied with this Court's remand order.

I. The March 6, 2000 Decision by Assistant Secretary Patrick Henry Was Not Arbitrary or Capricious, or Contrary to Law, and Is Based on Substantial Evidence in the Record.

Assistant Secretary Henry's decision can only be vacated by this court if it is "arbitrary, capricious,...or otherwise not in accordance with law." 5 U.S.C §706(2)(a). "Plaintiff has the burden of satisfying this standard by providing "cogent and clearly convincing evidence" and must "overcome the presumption that military administrators discharge their duties correctly, lawfully, and in good faith." *Smith v. Dalton*, 927 F. Supp. 1, 4 (DD.C. 1996). "Under this standard, Plaintiff has the burden of showing by cogent and clearly convincing evidence that the military decision was the product of a material legal error or injustice." *McDougall v. Widnall*, 20 F.

Supp. 2d 78, 82 (D.D.C. 1998) "The ultimate inquiry is a narrow one. The court is not empowered to substitute its judgment for that of the agency. The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." Bubala v. Luian, No. 91-5099, slip opinion, *per curium*, 961 F. 2d 963 (D.C. Cir. 1992).

"The standard does not require a reweighing of the evidence, but a determination *whether the conclusion being reviewed* is supported by substantial evidence." Heisig v. United States, 719 F. 2d 1153, 1157 (Fed. Cir. 1983) (emphasis added). All that is required is that the Secretary's decision "minimally contain" a rational connection between the facts found and the choice made." Frizelle v. Slater, 111 F. 3d 172, 176 (D.C. Cir. 1997). "Adjudication of these claims requires a court to determine whether the Secretary's decision making process was deficient, rather than whether his decision was *correct*." Charette v. Walker, 996 F. Supp 43, 50 (D.D.C. 1998).

"However, should a court find the Secretary's decision making process was deficient, appropriate relief consists only of remand to the Secretary with instructions to follow the appropriate legal standards and to explain his reasoning more fully. *Id.* "We require only that the agency exercise its discretion in a reasoned manner, but we defer to the agency's ultimate decision." Kreis v. Sec'y of the Air Force, 866 F. 2d 1508, 1512 (D.C. Cir. 1989). "Since the statute [10 U.S.C. § 1552] authorizing the Secretary to correct military records gives the Secretary a great deal of discretion, the arbitrary and capricious standard is even more difficult to meet than in other agency review cases." Muddy. Caldera, 26 F. Supp. 2d 113, 120 (D.D.C.).

Plaintiff contends that Assistant Secretary Henry did not "adequately" address the issue of Dr. Samuel Mudd's citizenship in a non-secessionist state with regard to the jurisdiction of the

Hunter Commission. Indeed, Assistant Secretary Henry did address Dr. Mudd's citizenship in Maryland. However he found that, pursuant to the court's decision in Ex parte Quirin v. Cox, 317 U.S. 1 (1942), Dr. Mudd's citizenship was "not critical to the resolution of whether the Hunter Commission had proper jurisdiction in this case." (A.R. 513). Most important, Assistant Secretary Henry found that both Dr. Horbaly's testimony and the recommendation of the Army Board for the Correction of Military Records were based upon Ex Parte Milligan, 71 U.S. 2 (1866), which the Assistant Secretary correctly found was a case involving martial law jurisdiction (A.R. 513). This Court has already found that martial law is not the jurisdictional basis for the Hunter Commission. *Mudd* at 121.

Assistant Secretary Henry's March 6, 2000 decision acknowledged "law of war" as the jurisdictional basis for the Hunter Commission. A.R. 513 - 15. Thus, Milligan is inapplicable to the facts of this case.

A Ex Parte Quirin Supports The Secretary's Position that The Hunter Commission Could Exercise Jurisdiction Over Dr. Samuel Mudd.

In Ex Parte Quirm, eight Nazi saboteurs came ashore at Florida and New York in 1942. Their aim was to destroy American war industries and war facilities in the United States. The saboteurs entered the United States via German submarines and quickly buried their uniforms after landing on the U.S. coastline. *Id.* at 21-22. Seven of the saboteurs were German citizens, but the eighth was an American citizen named Herbert Haupt. *Id.* At 20

Haupt argued that his United States citizenship precluded the application of the law of war to him under the Court's previous decision of Ex Parte Milligan. Quirin at 45. The Supreme Court rejected this argument, stating "[w]e do not find it necessary to resolve these

contentions". The Supreme Court further held that "citizenship in the United States of an enemy belligerent does not relieve him of the consequences of a belligerency which is unlawful because in violation of the law of war," and that "unlawful belligerency is the gravamen of the offense of which he [Haupt] is accused." *Id.* 37-38. The Supreme Court concluded that Haupt's acts constituted a violation of the law of war, triable by a military commission. *Quirin* at 46.

Plaintiff also contends that *Quirin* creates a five-part test to determine who is an enemy belligerent⁴. However, the *Quirin* decision expressly used the term "belligerent," not "soldier" or "combatant" to describe those subject to the law of war. While the decision includes "those acting under the direction of enemy armed forces," it does not exclude those who may act independently of any armed force. *Quirin* at 37.⁵ Nowhere in the decision does the matter of whether unlawful belligerents were paid by an enemy military enter into the Court's reasoning or holding. Entering or "remaining upon" United States territory is enough to complete the offense. *Quirin* at 38. The Court formally rejected Plaintiff's argument that an enemy belligerent must be a citizen of an enemy nation when it stated: "citizenship in the United States does not relieve him

³ Plaintiff claims that an enemy belligerent is: (1) affiliated with the enemy military, (2) acting under the instructions of the military, (3) in the pay of the military, (4) in violation of the law of war, (5) while crossing into the territory of the United States. (Plaintiff's second motion for summary judgment, pp. 10). Using this logic, no military commission could ever try a civilian, even for espionage.

⁴ Plaintiff's contention that Assistant Secretary Henry juxtaposes the term "unlawful belligerents" with the term "enemy belligerents" is a distinction without a difference. Both the Supreme Court's decision in *Ex Parte Quirin* and the testimony of Plaintiff's own expert, Dr. Jan Horbaly, use the terms interchangeably. AR. 249, 250, 251.

The *Quirin* decision uses the terms "unlawful belligerency," "enemy belligerent," and other terms throughout the decision to describe the status of Quirin and his co-conspirators.

of the consequences of a belligerency which is unlawful because of a violation of the law of war." Quirin at 37.

Plaintiff also contends that Dr. Mudd could not be stripped of his citizenship because of his acts. Plaintiff's own expert disagrees with this proposition (AR. 248). Yet, it is clear from the Court's decision in Quirin that the citizenship issue is irrelevant in cases involving "law of war" jurisdiction for a military commission. Citizenship is relevant only for "martial/aw" jurisdiction of a military commission under the Supreme Court's holding in Milligan. *Id.* at 45. It is the nature of the offense, not the status of the offender, that gives rise to law of war jurisdiction by a military commission. Thus, Quirin provides no support for Plaintiff's *position* here.

B. There is Substantial Evidence in the Record That Dr. Samuel Mudd Acted As An Unlawful Enemy Belligerent and Was Charged With A Violation of the Law of War.

Plaintiff further argues that an American citizen who commits offenses against the law of war must be charged and tried exclusively in the civilian courts with analogous civilian laws. The Secretary contends that the military commission and the civilian courts have concurrent jurisdiction over such offenses. However, it is within the discretion of the President and Commander-in-Chief to determine the appropriate forum for law of war violations. (A.R. 514515). None of the cases cited by Plaintiff requires that civilians be tried exclusively in the civilian courts for law of war violations.

Plaintiff cites Haupt v. United States, 330 U.S. 631 (1947) and Kramer v. United States, 325 U.S. 1 (1945) as further support for its position. Yet those cases do not address any facet of jurisdiction with regard to military commissions. They only test the constitutional sufficiency of the evidence pertaining to the allegations of treason. These cases therefore do not have any

precedential authority. Similarly, Duncan v. Kanamoku, 327 U.S. 304 (1946) and Kawakita v. United States, 343 U.S. 717 (1952), provide no support for plaintiff's jurisdictional argument. In Duncan v. Kanamoku, 327 U.S. 304 (1946), a civilian stockbroker was convicted by military commission of embezzling money from other civilians in Hawaii. Another petitioner had engaged in a fistfight with sentries at the Naval Yard in Honolulu. These acts occurred when Hawaii was under martial law, but the civilian courts remained in operation. Like Milligan, the Duncan military commission found its jurisdictional genesis in martial law, not as a law of war violation. The Supreme Court ruled that Congress did not intend the Organic Act to usurp the power of the civilian courts when it created martial law. That law is inapplicable to Dr. Samuel Mudd.

In Kawakita v. United States, 343 U.S. 717 (1952), petitioner claimed that he was no longer a U.S. citizen and therefore should have been acquitted of treason. Kawakita was found to have committed numerous acts of cruelty and torture on American POWs attached to the civilian corporation where he worked as a civilian employee during early-mid 1945 on the Japanese island of Honshu. Kawakita's acts constituted clear violations of the law of war under both the Geneva and Hague Conventions and could have been brought before a military commission.

However, Kawakita's crimes were not discovered until October 7, 1946. This discovery was just months after Kawakita's return to the United States. Such discovery was a year after the formal surrender with Japan was signed on September 2, 1945. Kawakita was not indicted until June, 1947, and conviction was handed down almost three years after the formal surrender of Japan. Had Kawakita's crime been brought to the attention of American authorities when he was

still in Japan, a military commission could have tried him.⁶ A military commission could also have tried him in the United States. The fact that the Executive Branch chose to bring Kawakita to justice in a civilian court in the United States does not suggest a trial by military commission would have been unlawful. As with the other cases cited by Plaintiff, Kawakita is silent on the issue of law of war jurisdiction for military commissions and the record contains no evidence that a military commission was considered for Kawakita. Thus, Kawakita provides no support for plaintiff's position that the Hunter Commission lacked jurisdiction to try Dr. Mudd.

Plaintiff also challenges the manner in which Dr. Samuel Mudd was charged by the Hunter Commission. Plaintiff asserts that Dr. Mudd was not charged as an "unlawful enemy belligerent." In addition, the words "in violation of the law of war" do not appear in this charge. Because of that, plaintiff argues that Dr. Mudd was not charged with a war crime (Plaintiff's brief pp. 16) and was instead charged and tried for treason (Plaintiff's brief pp. 17).

However, nothing in the charge against Dr. Mudd mentions treason. (A.R. 399-402). In fact, the word "treason" is never used in connection with any of his crimes. Assistant Secretary Henry simply used contemporary language to explain his decision-making process on this matter of antiquity. The fact that Dr. Mudd was not charged as an "unlawful enemy belligerent" is of no consequence. "Obviously charges of violations of the law of war triable by a military tribunal

⁶The government is unaware of any military commission being convened in the United States during or after the time of Kawakita's trial. However the United States convened military commissions for war crimes and other crimes in occupied Japan and Germany during this time. These commissions tried civilian and military personnel alike, including American citizens. See Madsen v. Kinsella, 343 U.S. 341 (1952). Japan consented to the existence of these tribunals when it surrendered and accepted the terms of the Declaration of Potsdam of July 26, 1945 which declared "...stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners." In Re Yamashita, 327 U.S. 1, 11 (1946).

need not be stated with the precision of a common law indictment." *In Re Yamas'hita*, 327 U.S. 1, 17 (1946).

Plaintiff further argues that *Haupt, Kramer*, and *Kawakita* stand for the proposition that a United States citizen who commits acts of treason must be tried in civilian courts. First, as we argue above, Dr. Mudd was never charged with treason. Second, none of the cases cited by Plaintiff give any support to Plaintiff's position that the civilian courts have exclusive jurisdiction over law of war violations merely because the *acts* were committed by civilian *belligerents*, as opposed to military belligerents. Dr. Mudd's crimes could have been tried in either venue, depending on what laws Dr. Mudd violated. (A.R. 515)

Plaintiff also ignores the sole case to which addresses the issue of whether the Hunter Commission had jurisdiction over Dr. Samuel Mudd. On September 9, 1868, the United States District Court for the Southern District of Florida issued a decision on the matter of the Hunter Commission's jurisdiction over Dr. Mudd (A.R. 150-152). Then, as now, Dr. Mudd argued that the case of *In Re Milligan* prevented his trial before the military commission. However, Judge Boynton determined that Mudd's crimes were a "military offense" (AR. 151) and "that the military commission not only had jurisdiction, but was the proper tribunal for the purpose" of trying the war crimes of Mudd (AR. 152). Thus, Assistant Secretary Henry's March 6, 2000 decision is clearly supported by the District Court's ruling in *In Re Milligan*.

Indeed, in responding to this Court's remand, the Secretary took notice of both Judge Boynton's decision from 1868 and this Court's opinion from 1998 (AR. 513). The Assistant Secretary's March 6, 2000 decision with regard to the Mudd jurisdiction issue comports with the holdings in both cases. In addition, the Secretary, based on the Supreme Court's holding in

Quirin, looked at the misconduct committed by Mudd and determined that the law of war violation was itself sufficient to permit the Hunter Commission's jurisdiction. This was the same determination made by Attorney General Speed (AR. 360-366) and President Andrew Johnson (A.R. 408). Dr. Mudd's citizenship would only be relevant if the Hunter Commission was exercising "martial law" jurisdiction. Indeed, this Court has previously determined that martial law was not the jurisdiction basis for the Hunter Commission. Mudd at 121. Accordingly, under "law of war" jurisdiction, Dr. Mudd's acts, not his status, governed the jurisdiction of the Hunter Commission.

Plaintiff also argues that the Hunter Commission lacked jurisdiction under Quirin because of the time when Dr. Mudd's trial occurred. Dr. Mudd's trial began on May 10, 1865.

According to Plaintiff, President Johnson had declared that hostilities were over. Yet it is the time the political branch of the government declares peace that is relevant, rather than whether hostilities have ceased.

We cannot say there is no authority to convene a commission after hostilities have ended to try violations of the law of war committed before their cessation, at least not until peace has been officially recognized by treaty or proclamation by the political branch of the government. In fact, in most instances the practical administration of the system of military justice under the law of war would fail if such authority were thought to end with the cessation of hostilities. For only after their cessation could the greatest number of offenders and the principal one be apprehended and subjected to trial.

No writer on international law appears to have regarded the power of military tribunals, otherwise competent to try violations of the law of war, as terminating before the formal state of war has ended. In our own military history there have been numerous instances in which offenders were tried by military commissions after the cessation of hostilities and before the proclamation of peace, for offenses against the law of war committed before the cessation of hostilities.

The extent to which the power to prosecute violations of the law of war shall be exercised before peace is declared rests, not with the courts, but with the political

branch of the government. *In Re Yamashita*, 327 U.S. 1, 12-13 (1946).⁷

While a cessation of hostilities may have been in effect at the time of Dr. Mudd's trial, Congress and President Johnson did not declare the insurrection over earlier than April 2, 1866,⁸ almost a year after the cessation of hostilities and well after Dr. Mudd's trial was completed. Indeed, the immediate need to create a military commission was recognized by the U.S. Supreme Court in the time between the cessation of hostilities and the time of formal peace being declared. "The war power, from which the commission derived its existence, is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict." *In Re Yamashita* at 12. The peril of re-igniting the Civil War remained very real after President Abraham Lincoln was assassinated. Thus, there is no support for plaintiff's position that the Hunter Commission lacked *jurisdiction* because hostilities had ceased.

CONCLUSION

The Secretary followed the guidance of this Court in its remand order dated October 29, 1998. His decision-making process in this case demonstrates a careful, meticulous consideration of the remand of this Court, the administrative record, and the law. Dr. Mudd's citizenship in

⁷ *Yamashita* involved the war crime trial of the commander of all Japanese forces in the Philippine Islands. He was convicted of failing to supervise the troops under his command so as to prevent them from committing atrocities against civilians and prisoners of war in the Philippines. Despite the Japanese surrender and "cessation of hostilities" on August 14, 1945, Yamashita and his troops continued to fight on in the Philippines for weeks. He was later captured in September, 1945. The military tribunal for Yamashita "The Tiger of Malaya" began on September 24, 1945. *Yamashita* at 10-11.

⁸ The Proclamation ending the insurrection can be found at United States Statutes at Large, 14 Stat. 811; 14 Stat. 812; 14 Stat. 813; 14 Stat. 814; 39th Congress, 1866.

Maryland was fully considered by the Secretary. No matters outside the record were utilized in reaching his conclusions. The decision of the U.S. Supreme Court in *Quirin* and the district court in *In Re Mudd* fully support Assistant Secretary Henry's March 6, 2000 conclusion that the Hunter Commission had jurisdiction over Dr. Samuel Mudd. Plaintiff has not met his burden to prove the Secretary's decision was arbitrary or capricious. The decision is supported by substantial evidence in the record and, as demonstrated, above is neither arbitrary or capricious. The Secretary has fulfilled its mandate issued by this court. Accordingly, Plaintiff's second motion for summary judgement should be denied and the government's cross-motion to dismiss or in the alternative for summary judgment should be granted.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been mailed postage prepaid to:

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on this .-J~ ~) day of August, 2000.

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

RICHARD D. MUDD, M.D.,)	
)	
Plaintiff,)	Civil Action No. 97-2946 (PLF)
)	
v.)	
)	
LOUIS CALDERA, SECRETARY)	
OF THE DEPARTMENT OF THE)	
ARMY, <u>et al.</u> ,)	
)	
Defendants.)	
)	

ORDER

Upon consideration of Defendants' Opposition to PlaintiWs Second Motion for Summary Judgment and Defendants' Cross Motion' to Dismiss, or in the Alternative, for Summary Judgment, the opposition thereto, and the record in this case, it is hereby;

ORDERED that Defendants' Cross-Motion to Dismiss, or in the Alternative, for Summary Judgment is GRANTED.

It is further ORDERED that judgment in this action is ENTERED in favor of Defendants, and this case is DISMISSED WITH PREJUDICE from the docket of the Court.

UNITED STATES DISTRICT JUDGE

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