UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S SECOND MOTION FOR SUMMARY JUDGMENT

Pursuant to F.R.C.P. 52, Plaintiff respectfully requests that Summary Judgment again be granted in favor of Plaintiff.

SUMMARY OF ARGUMENT

Following this Court's entry of summary judgment for Plaintiff on October 29, 1998, a designee of the Secretary of the Army reviewed this matter for the third time and on March 6, 2000, decided, for the third time, that the determination and recommendation of the Board for Correction of Military Records ("ABCMR" or "Board") of January 22, 1992 should not be followed, and that Dr. Mudd's conviction should be upheld. Assistant Secretary Henry reached this decision without adequately discussing the question that this Court found had not been adequately addressed by Ms. Lister, *i.e.*, whether Dr. Samuel Mudd, a civilian, was a citizen of the

nonsecessionist Union State of Maryland, and whether, as a civilian citizen of the State of Maryland, the military had jurisdiction to try him by military commission.

The reasons set forth in the Army's letter of March 6th as to why the Army Board for Correction of Military Records recommendation should not be followed are not convincing. The Army's decision not to follow the Board's recommendation is based on *Ex Parte Quirin,* 317 U.S. 1 (1942), a case which was fully discussed by the Plaintiff and extensively cited in support of Plaintiff's position in his previous brief . In addition, the Army's decision of March 6, 2000 completely ignores the teaching of the companion cases *to Quirin* of *Cramer v. United States*, 325 U.S. 1 (1945) and *Haupt v. United States*, 330 U.S. 631 (1947), which make even clearer that the American civilian citizens, who cooperated with the *Quirin* defendants after they landed in the United States, were tried for treason in federal court, and were not tried with the *Quirin* defendants by military commission. The Army's March 6, 2000 decision raises no new evidence nor cites new case law; it simply asserts that the Army was right the first time.

In its newest decision, though, the Army makes a new mistake of fact (that Dr. Mudd was an unlawful enemy belligerent), although there is nothing in the record compiled over 135 years to support that finding and then misapplies the law to that fact. Astonishingly, after this court reversed Ms. Lister's prior decision for failure to address the central fact that Dr. Mudd was a civilian citizen of Maryland, Henry concludes that the same fact was not critical to his resolution of the issues.

Plaintiff respectfully submits that the Army's decision of March 6th is arbitrary and capricious, is without a substantial basis in evidence, and is contrary to established law; the recommendation of the ABCMR to set aside Dr. Mudd's conviction is still correct and should be followed.

JURISDICTION

This court has authority to review the lawfulness of the Secretary's decision under the provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*. The issue presented to the court is whether the Secretary was correct in declining, for the third time, to follow the ABCMR's unanimous determination[1]. In its October 29, 1998 decision in this case, this court noted that Ms. Lister had not addressed the issues raised before the Board as to Dr. Mudd's status as a citizen, and that she had not addressed the testimony by Dr. Jan Horbaly on the lawfulness of the government's decision to try Dr. Mudd for violation of the law of war. This Court retained jurisdiction.

ADMINISTRATIVE RECORD

The record in this case has been filed by the Army. However, Mr. Henry may still have not considered the arguments actually presented to the Board, much less to this Court. Plaintiff submitted a 40-page brief to the ABCMR in January of 1992, and referred to the brief in the hearing before the Board (Board Transcript, pp. 16; A.R.

[1]As shown in the affidavit of Chairman Charles Chase, attached to Plaintiff's motion to reopen, this unanimous determination was made by five members carefully selected to serve on the Mudd panel because of their experience and longevity. Between the five, they had more than 60 years' experience as members or chairmen on the Army Board for Correction of Military Records.

13) Mr. Henry states in his letter that he "reviewed the Administrative Record before the Court." The original record, as conveyed to the Court, does not appear to contain a copy of Plaintiff's ABCMR brief, although the brief was part of the record reviewed by the ABCMR and relied upon in reaching its recommendation[2]. Presumably Plaintiff's January 1992 brief has been in the Army's files on this case since its submission. This brief is important because it thoroughly discusses the *Quirin* case, as well the Supreme Court's contemporaneous decisions in *Duncan v. Kahanamoku,* 327 U.S. 304, 66 S. Ct. 606, 90 L. Ed. 688 (1946), *Haupt v. United States,* 330 U.S. 631, 67 S. Ct. 874, 91 L. Ed. 1145 (1947), *Cramer v. United States,* 325 U.S. 1, 65 S. Ct. 918, 89 L. Ed. 1441 (1945), and *Tomoya Kawakita v. United States*, 96 F. Supp. 824 (S.D. Calif. 1950), *aff'd*, 190 F.2d 506 (9th Cir. 1951), *aff'd*, 343 U.S. 717 (1952), *pet. for reh. denied*, 344 U.S. 850 (1952), *motion to modify sentence denied*, 108 F. Supp. 627 (1952).

ARGUMENT

This Court's order, and *Frizelle v. Slater,* 111 F.3d 172 (D.C. Cir. 1997), require the Army to "consider" the points legitimately raised by Plaintiff before the ABCMR, including those presented in the 1992 brief. Surely that requires more than the simple statement by the Army that it considered the issues raised by Plaintiff. In short, the Army's decision not to follow the finding of the Board for Correction of Military Records must be based on substantial evidence and not be contrary to law.

[2]*See* Chase affidavit attached to Plaintiff's Supplemental Complaint. The Brief submitted to the Board was filed with this Court attached to the Supplemental Complaint attached to Plaintiff's Motion to Reopen.

Because the Army has not complied with the Court's "*Frizelle*" direction, it is Plaintiff's position that the court may, and must, tell the Army the correct law and order it to adopt the Board's recommendation.[3]

Henry decision letter

In its latest decision, Mr. Henry notes that the Army considered the testimony of Dr. Horbaly and did "not agree with his opinion and interpretation of *Ex Parte Quirin* . . ." Dr. Horbaly correctly testified about the holding in the Quirin case:

> One of the parties in the eight saboteurs was Haupt, and as you remember, he was an American citizen, and there was some question, and it caused Chief Justice Stone some problem in the *Quirin* case, as to whether he should be tried as an unlawful belligerent as part of the enemy alien group under the laws of war.
>
> The Chief Justice determined in his opinion that [Haupt], because he had left the country at a young age, . . . because he was – spent time in Germany, because he came back here in a German uniform, because he become part of – as part of the submarine group and landed, that he was an unlawful belligerent and, in a sense, gave up his citizenship to take on the role of a foreign spy, and he [properly] was tried by military commission for a violation of the laws of war.

Mr. Henry first contends that *Quirin* makes clear that "citizenship and the fact that the civilian courts are open <u>are not relevant factors</u> in determining which tribunal has jurisdiction to try civilian belligerents for law of war and military violations." *Quirin* and its companion cases do not say this, and as Dr. Horbaly

[3]At the very least, the decision of Mr. Henry should be remanded with direction that the Army consider the whole record and specifically address the arguments made in Plaintiff's 1992 brief and raised by Dr. Horbaly in his testimony before the Board regarding the Supreme Court's decisions in *Haupt, Cramer, Tomoya Kawakita* and *Duncan*. In light of Dr. Richard Mudd's age (99), and the length of time it took Mr. Henry to issue the current three-page letter (16 months), it is requested that if the Court direct the Army to reconsider the record, it also directs that the Army file its response with the court within two weeks of the issuance of the Court's order.

testified, in fact stand for the opposite. The Supreme Court in *Quirin* specifically does not set aside the holding in *Milligan* that inquiry into whether a defendant is a citizen of the United States and whether the civil courts are open are essential elements of an evaluation of whether a military commission has jurisdiction to try a United States citizen. Since Mr. Henry stated that these factors were not relevant and since they were principal facts relied upon by the ABCMR[4] in reaching its conclusions, his decision is arbitrary and capricious.

Next, Mr. Henry disagrees with Dr. Horbaly's testimony by supporting the opinions expressed by Attorney General Speed and District Court Judge Boynton regarding the assassination of a Commander in Chief as a "military crime" subject to trial by military commission. Dr. Horbaly correctly testified that Speed and Boynton were wrong in their assertions, and correctly cited *Milligan* and *Quirin* and *Duncan* in support of this position.[5]

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[4]In its finding 29, the ABCMR summarized the testimony of Dr. Horbaly upon which the Board relied:

> One witness, a recognized expert on the constitutional aspects of civilian versus military law, concentrated on the jurisdiction of the commission to try Dr. Mudd for the alleged offenses, noting that the civilian courts were open in the District of Columbia and that no state of war existed in the area. He further noted that Dr. Mudd was a citizen of Maryland, a Northern state which did not secede from the Union. He stated that the principles cited by the Court in the *Milligan* case also applied in Dr. Mudd's case. He then went on to compare the criteria for martial law and trial by military commissions. He observed that in several more recent decisions by the Supreme Court and by lower Federal courts during Wold War II, it was ruled that United States citizens are entitled to trial by civilian courts, even if the offenses were military in nature and had occurred in a military theater of operation. In conclusion, he stated that in his expert opinion, Dr. Mudd had been denied his right to due process under the constitution.

[5]Another contemporaneously determined that the military commission did not have jurisdiction to try the conspirators: Col. Cyrus B. Comstock, briefly of the Hunter Commission, wrote the following contemporaneously in his diary :

> **April 18 [,1865]** Mr. Lincoln & Seward have been assassinated. It is horrible -- death is too good for the murderers. Just as he can see the ___ of the murderer, he is Killed. It seems to[o] hard. Everybody is moribund -- It will cost the South very dear. Vicksburg is all in mourning.

Dr. Horbaly's testimony regarding jurisdictional facts was the only testimony presented to the Board on this issue. Mr. Henry states that the facts are "not dispositive" on the jurisdictional issue, but he never states what is dispositive in this case. He concludes that the crimes were military crimes. Dr. Horbaly concluded as an expert (and testified) that they were not.

Dr. Horbaly was not alone in holding this view. The government's prosecutor before the Commission stated during the trial:

> I think the testimony in this case has proved, what I believe history sufficiently attests, how kindred to each other are the crimes of treason against a nation and the assassination of its chief magistrate. [As] I think of those

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* * *

May 6 [,1865] Have been these past few days in the office doing not a great deal & not yet feeling as if the war were over.

May 8 [,1865] On Military Commission for trial of conspirators. Hunter president. Wish I could get off. They ought to be tried by Military [that's crossed out] Civil courts -- this commission is what is yet worse a secret one I believe. Met at penitentiary but did nothing as two members were absent.

May 9 [,1865] Met at ten, prisoners 8-10 were brought before court with black linen masks covering all their faces except tip of nose & mouth, heavily chained and each led staggering & clanking in, by his keeper. It was a horrid sight. Nothing remarkable about their faces. I questioned the president as to jurisdiction. Gen. Holt replied that the Atty Gen. had decided we had jurisdiction. Gen Holt proposed limiting counsel to "arguments " and to have closed doors, as the evidence if public would prevent the arrest of others implicated & as some of the witnesses dared not give their evidence in public. I doubted the jurisdiction, opposed this idea, & closed doors. Prisoners made their applications for counsel.

May 10 [,1865] [Horace] Porter & I went down to court & found an order relieving us from the Court. We are both very much delighted. During the day Mr. Stanton sent us word through Gen. Grant that it was no reflection on us, but that we were members of Gen. G's staff. He was one of the objects of assassination.

May 11 [,1865] . . .

12 PM went with General to see President & got him to open Commission room.

[Col. Comstock was thereafter posted to Louisville].

Col. Cyrus B. Comstock diary, Library of Congress Manuscript Division, Cyrus B. Comstock Collection, Reel 1 (emphasis added).

Edward Bates, Lincoln's Attorney General from 1861 - 1864, also criticized the decision to try the alleged assassins by a military commission. See footnote 19, *infra*.

> crimes the one seems to be, if not the necessary consequence, certainly a logical sequence from the other. The murder of the President of the United States, as alleged and shown, was pre-eminently a political assassination.

Brigadier General Joseph Holt, Judge Advocate General, U.S. Army, in the course of the Hunter Commission trial, Poore, Vol. II, p. 140.

Mr. Henry also contends at page 2 of his letter that "**unlawful** belligerents may be tried by a military commission for law of war violations committed during a time of war," quoting as support the *Quirin* Supreme Court: "[c]itizenship in the United States of an **enemy** belligerent does not relieve him of the consequences of a belligerency which is unlawful because of a violation of the law of war." (Emphasis supplied) As can be seen from a comparison of those two phrases, Mr. Henry makes a significant error: he transforms the Court's statement about **enemy** belligerents into support for his theory that **unlawful** belligerents may be tried by a military commission, as will be further elaborated below, the terms "enemy" and "unlawful" are not interchangeable.

The contention that Dr. Samuel Mudd was an unlawful enemy belligerent is "contrary to substantial evidence" submitted by Plaintiff to the Board which establishes that Dr. Samuel Mudd was not a combatant or an enemy belligerent[6] but was a civilian citizen of the nonsecessionist State of Maryland and that he was not affiliated with the military, Confederate or Union. Not only is Mr. Henry's contention

[6]Neither lawful nor unlawful.

contrary to evidence presented to the Board, but also it fails to set forth what evidence in the record it relies upon to establish that Dr. Mudd was: (1) an enemy belligerent, (2) who committed law of war violations, (3) during a time of war. In addition, Mr. Henry fails to cite evidence in the record to support his contention that Dr. Mudd was an enemy combatant who could be tried by a military commission for violations of the law of war .

The holding in *Quirin*

In *Quirin*, eight German saboteurs landed on the shores of the United States in the summer of 1942 "wearing German uniforms and provided with civilian clothes, ample funds in United States currency, and a variety of explosive materials. They donned civilian garb, buried their uniforms and explosives, went about within the country, and [later] were taken into custody."[7] The saboteurs were charged with violating the laws of war and provisions of the Articles of War. They were convicted and six were sentenced to death, one to life imprisonment, and one to 30 years.

All of the saboteurs filed applications for writs of habeas corpus in the Supreme Court of the United States attacking their conviction by a military commission. The Supreme Court held that the military commission had jurisdiction to try these saboteurs for violating the laws of war, concluding that they were enemy belligerents and as such, were subject to trial for law of war violations.[8] The fact stressed most by

[7] THE LAW OF MARTIAL RULE at 174.

[8] "Quirin and the others came as enemy combatants. But by putting off their German uniforms they ceased to be lawful combatants. Had they remained a hostile detachment, in uniform, conducting themselves openly as troops, they would be

the Supreme Court in *Quirin* was that the Plaintiffs admitted their status as agents of an enemy belligerent state, who admittedly crossed military lines by stealth, with sabotage as their objective.

Quirin teaches that to qualify as an unlawful enemy belligerent, one must

1. Be affiliated with the enemy military (all of the Quirin defendants, including Herbert Haupt, were citizens of the enemy, Germany, and affiliated with its military for purposes of training and mission);
2. Be acting under the instruction of the enemy military;
3. Be in the pay of the enemy military;
4. Be in violation of the law of war by, for example, disguising that belligerent relationship by ruse, such as burying the enemy uniform.
5. While crossing into the territory controlled by the United States.

In sum, to become an unlawful enemy belligerent, one must be an enemy (citizen of an enemy sovereignty); affiliated by instruction and pay with that enemy's military (belligerent/combatant) and acting unlawfully under the laws of war (e.g., failing to wear enemy uniform). Under *Ex Parte Quirin*, such an individual can be tried by a military commission.

In the present case, Dr. Mudd steadfastly denied any belligerent status, secret invasion, or any intent to commit any offense against the laws of war. Indeed, **none** of the elements listed in *Quirin* to identify an unlawful enemy belligerent apply to Dr. Mudd. In addition, the Army cites no evidence in the record before the Board to support is allegation that Dr. Mudd was an unlawful enemy belligerent.

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captured and held as prisoners of war, and as prisoners would not have been subject to trial for their acts of war. But as it was they had placed themselves squarely within paragraph 351 of our Rules of Land Warfare, and were treated exactly as is there provided." *Quirin*, *id*. at 185-86.

Was Dr. Mudd an enemy belligerent?

An enemy belligerent is defined in the law of war and by the laws of the United States. Essential to the definition is the element of combatancy. In *Quirin*, the Supreme Court distinguishes between lawful and unlawful belligerency:

> Our Government, by thus defining lawful belligerents entitled to be treated as prisoners of war, has recognized that there is a class of unlawful belligerents not entitled to that privilege, including those who **though combatants** do not wear 'fixed and distinctive emblems'. And by Article 15 of the Articles of War Congress has made provision for their trial and punishment by military commission, according to 'the law of war'.

Id. at 34 (emphasis added). What is significant is that only unlawful enemy belligerents can be tried by military commission.

In addition, the Supreme Court in *Quirin* emphasized that it was not overruling *Ex parte Milligan:*

> Elsewhere in its opinion [in *Ex parte Milligan*], at pp. 118, 121-122 and 131, the Court was at pains to point out that **Milligan, a citizen twenty years resident in Indiana, who had never been a resident of any of the states in rebellion, was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents**.

Quirin at 45 (emphasis added). The Supreme Court went on to state in *Quirin* that it construed the *Milligan* "Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them, the Court concluded that Milligan, not being a part of or associated with the armed forces

of the enemy, was a nonbelligerent, not subject to the law of war save as -- in circumstances found not there to be present, and not involved here -- martial law might be constitutionally established." *Id*.

Dr. Mudd was like Milligan. Unlike the saboteurs in *Quirin*. he was not an enemy agent, combatant or belligerent in the service of a foreign military who entered the United States in a uniform buried to disguise his allegiance.

In *Quirin* the Supreme Court stated that:

> Citizens [of the United States] who associate themselves with the military arm of the enemy government, **and, with its aid, guidance and direction, enter this country bent on hostile acts,** are enemy belligerents within the meaning of the Hague Convention and the law of war. *Cf. Gates v. Goodloe,* 101 U.S. 612, 615, 617-18. **It is as an enemy belligerent that Petitioner Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused.** [emphasis supplied][9]
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> * * *
>
> [E]ach petitioner, in circumstances which gave him the status of an enemy belligerent, passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose. The offense was complete when, with that purpose, they entered -- or, having so entered, they remained upon -- our territory in time of war without uniform or other appropriate means of identification.

Quirin at 38.

Quirin does not support the recent decision by the Army regarding Dr. Mudd. Indeed Mr. Henry concedes that Mudd was not "formally" associated with the

[9] Mr. Henry quoted *Quirin* in his letter by only citing the sentence preceding this quote: "Citizenship in the United States of an enemy belligerent does not relieve him of the consequences of a belligerency which is unlawful because of a violation of the law of war." *Quirin* at 58.

military. No evidence before the Hunter Commission, or at the ABCMR hearing, suggests Dr. Samuel Mudd was even informally affiliated with the military of either the Union or the Confederacy. To the contrary, all of the evidence indicates that Dr. Mudd was simply a country doctor.

In deciding *Quirin,* Chief Justice Stone pondered whether Haupt, one of the saboteurs (colorably an American citizen), could be tried by a military commission for a violation of the law of war:

> Stone soon satisfied himself that the alleged citizen among the saboteurs need not be given special consideration, because he had associated himself with German armed forces, thus becoming an enemy belligerent liable to be tried as such under the law of war. One point troubled him, however. 'If Haupt is a citizen,' he asked [his law clerk, Bennett] Boskey, 'does that not make out a charge of treason as to him which the Constitution requires be tried by civil court?' Further reflection led him to conclude that Haupt's real offense was entering the country as an alien unlawful belligerent for a hostile purpose.[10]

Chief Justice Stone concluded that Haupt had become an unlawful enemy belligerent significantly connected with the enemy military, correctly observing that except for this, Haupt, an alleged citizen of the United States, should have been charged with treason "which the Constitution requires be tried by civil court," *Id.* He noted that Haupt was a citizen of the United States only by virtue of his parents' naturalization during his minority, who elected to maintain German allegiance and citizenship when reaching his majority. *Id* at 20. In short, he concluded that Haupt voluntarily waived his American citizenship by entering the country as an enemy belligerent. This act,

[10] Letter from Chief Justice Stone to Bennett Boskey quoted in Mason, Inter Arma Silent Legis: Chief Justice Stone's Views, 69 HARV. L. REV. 806, 821 (1956).

in addition to other facts, made him subject to trial by military commission. As the Court stated, *id* at 46,

> We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered or after entry remained in our territory without uniform-an offense against the law of war. We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.

Mr. Henry does not follow *Quirin*. Instead he relies on in his March 6th decision on the argument made by the government in *Milligan,* an argument rejected by the Court. Milligan was a citizen of Indiana, never in the naval or military service of the United States, nor was he, since the commencement of the Rebellion, a resident of a rebel state. The government nevertheless argued that Milligan's crime " was essentially a military offense that could properly be tried by a military commission." Milligan's counsel argued that "[it has been, and still is, wholly out of [Milligan's] power to have acquired belligerent rights, and to have placed himself in such a relation to the government as to enable him to violate the laws of war." Argument of Counsel, 71 U.S. Supreme Court Reports 284.

In fact, under *Quirin*, neither Milligan, nor John Wilkes Booth, would have been unlawful enemy belligerents. In *Quirin,* the defendants admitted that they were

enemy belligerents; neither Mudd nor Milligan admitted to being enemy belligerents, and the government never proved that they were.

The Supreme Court, per Justice Davis, stated in *Milligan*:

> "[t]he controlling question in the case is this: upon the facts stated in Milligan's petition, and the exhibits filed, had the Military Commission mentioned in it jurisdiction legally to try and sentence him? Milligan, not a resident of one of the rebellious states, or a prisoner of war, but a citizen of Indiana for twenty years past and never in the military or naval service, is, while at his home, arrested by the military power of the United States, imprisoned, and, on certain criminal charges preferred against him, tried, convicted and sentenced to be hanged by a military commission, organized under the direction of the military commander of the military district of Indiana. Had this tribunal the legal power and authority to try and punish this man?"

Ex parte Milligan, 4 Wall 107, 118; 71 U.S. 281, 295 (1867).

In a later case, the Supreme Court made it clear that citizenship and its benefits are not easily forfeited, and cannot, consistent with the Constitution, be stripped by the Government or lost by implication. The case was *Afroyim v. Rusk*, 387 U.S. 253 (1967), declaring an immigration statute unconstitutional where it provided that voting in foreign elections was an implicit renunciation. The Consitution, it was held, conferred no such power on the Government. The Court quoted with approval the words of Rep. Van Trump of Ohio, in 1868:

> To enforce expatriation or exile against a citizen without his consent is not a power anywhere belonging to this Government... the lawless precedents created in the delerium of war... of sending men into exile, as a punishment for political opinion, were violations of this great law [of the Constitution].

Dr. Mudd never renounced his citizenship and never performed any act which had the clear and unequivocal effect of declaring such a renunciation. He is therefore not an enemy belligerent.

Was Dr. Mudd charged with, or did he commit, a law of war violation?

Mr. Henry argues at page 2 of his letter "that Dr. Mudd's citizenship in the State of Maryland is not dispositive of the issue of whether the military tribunal had jurisdiction because Dr. Mudd was charged with acting as an enemy belligerent by aiding and abetting those who had violated the laws and customs of war." This statement is also in error because Dr. Mudd was **not** charged with acting as an enemy belligerent or with violation of the laws of war. Even had he been so charged, no evidence was presented that aiding and abetting was, in 1865, a crime against the law of war (conspiracy was not a crime under the customary law of nations at the time) and not a common law crime.

Count I in *Quirin* charged the saboteurs with an offense against the law of war. The specification states that Quirin and others secretly penetrated military and naval lines in order to commit acts of sabotage, which the defendants admitted and which the evidence amply supported. In *Quirin* the court makes clear that the type of conduct engaged in by the saboteurs and alleged in count I -- that is, espion-age by an enemy belligerent in time of war — is an offense against the law of war.

In contrast to the saboteurs in *Quirin*, who were charged with the law of war crime of committing espionage as enemy belligerents during time of war, Dr. Mudd was an American citizen and civilian who was charged with the common law crimes of treason and aiding and abetting in a conspiracy to commit treason. In short, Dr. Mudd was charged with common law crimes triable in federal court, and not law of war crimes triable by military commission.

The charges against Dr. Mudd began with the words, "*For maliciously, unlawfully, and traitorously, and in aid of the existing armed rebellion"* and used the word "traitorously" throughout.[11]. Clearly, Dr. Mudd was charged and tried by military commission for committing the common law offense of treason.

Only one crime is defined in the Constitution of the United States and that is treason. Plaintiff's Memorandum in Opposition to Summary Judgment, previously filed with respect to the previous Army decision, sets out the importance of only trying treason cases in civilian courts and the law in that area.

The Hunter Commission never charged Mudd with an offense against the law of war. The specific charge against Dr. Mudd is:

> And in further prosecution of said conspiracy, the said Samuel A. Mudd did, at Washington City, and within the military department and military lines aforesaid, on or before the 6th day of March, A.D. 1865, and on diverse 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, David E. Herold, Lewis Payne, John H. Surratt, Michael O'Laughlin, George Atzerodt,

[11]Pitman at page 18.

> Mary E. Surratt, and Samuel Arnold, and their confederates, with knowledge of the murderous and traitorous conspiracy aforesaid 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 the conspiracy in manner aforesaid.

The sole contact with forces in rebellion of those named in the Charge and Specification was that of "combining, confederating, and conspiring together with one … Jefferson Davis[12], George N. Sanders[13], Beverly Tucker[14], Jacob Thompson[15], William C. Cleary, Clement C. Clay[16], George Harper, George Young, and others unknown, to kill and murder, within the Military Department of Washington, . . ."

Not a single one of those listed in the charges against Dr. Mudd, was a member of the Confederate armed forces.[17] No claim is made in the Charge and

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[12] President of the Confederate States of America, the states formerly in rebellion.

[13] Publisher of the *Democratic Review* and a confederate sympathizer, but not a member of the armed forces.

[14] Believed to be the Beverly Tucker who authored the book "Partisan Notes" in support of the rebellion.

[15] Former U.S. Congressman and Secretary of the Interior who served in the Confederate forces. There was no evidence presented or offered that he knew of or supported Booth or the other accused either before or after the assassination. After his death in 1885, the U.S. Department of Commerce closed in his honor and lowered its flag to half-mast.

[16] United States Senator and later Confederate Commissioner to Canada. He was, on his return to the United States, arrested and held on unspecified charges of complicity in the assassination, but was later released as there was no evidence to support such a charge.

[17] Jefferson Davis was, of course, Commander in Chief of the armed forces. Following the war Davis was imprisoned at Fort Monroe, a military base, and charged (in part) with complicity in the assassination of Lincoln. The case against him fell apart, as the principal witness was convicted of perjury and was not presented. Davis petitioned for *habeas corpus,* and the government decided that such a trial would have to be held in a civilian court, rather than before a military tribunal, as the civilian courts were obviously open. The civilian trial would have been held before Circuit Court Judge John C. Underwood, widely known at the time for bragging to a Congressional Committee that he could pack a jury to assure a conviction.

Nevertheless, the government was concerned about having a trial in Virginia, and President Johnson was concerned that if Davis were acquitted, he (Johnson) would be impeached again. The government asked to delay the trial and Davis continued to be held in military custody. Davis' lawyers again petitioned for *habeas corpus.*

Chief Justice Salmon Chase, who presided over the Virginia Circuit, at first declined to issue a writ of *habeas corpus* for Davis, but later, together with an order from the President to the military authorities, ordered his transfer to civilian authorities in Richmond and Davis was released on bond on

Specifications that the alleged conspiracy was in any way connected with the Confederate armed forces. John Surratt, one of the alleged conspirators, who was later tried by a civilian court and set free after the jury was unable to decide the case against him, delivered an address at a courthouse in Rockville, Maryland on December 6, 1870, expressly disclaiming any involvement by the Confederate authorities in any such plot. In short, there was not a shred of evidence before the ABCMR, nor could there have been, that Dr. Mudd was an enemy belligerent.

Another difficulty with the Army's new position—that Mudd was an unlawful enemy belligerent—is that Mudd wasn't charged as an unlawful enemy belligerent. He was never notified that he was being tried as an unlawful enemy belligerent under the law of war. The defendants in *Quirin*, in contrast, clearly were put on notice that they were being tried as unlawful enemy belligerents. In effect, the Army claims, in hindsight, that Dr. Mudd was tried as a member of the Confederate armed

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May 13, 1867. A trial was set for November of that year. The government requested a continuance, which was granted. There the case lingered until Chief Justice Chase let it be known to Davis' lawyers and the government's lawyers that he believed that the passage of the 14th Amendment to the Constitution barred further prosecution of Davis on double jeopardy grounds.

Davis, however, wanted a trial, as he was certain that a trial would vindicate him of the charges and would protect the other Confederate leaders from similar prosecutions. In November of 1868, Davis' lawyers filed a motion requiring that the government attorneys show cause why the indictment should not be dismissed, and Justice Chase ruled in Davis' favor. Judge Underwood, also presiding, disagreed that the Fourteenth Amendment barred further prosecution, and the case went to the United States Supreme Court on this split decision.

The case lingered on the Supreme Court docket until 1869, when the government decided to dismiss *nolle prosequi* the indictment of Davis and thirty-seven other Confederate leaders. *See, e.g.*, Eberhard P. Deutsch, "*United States* v. *Jefferson Davis*: Constitutional Issues in the Trial for Treason," *American Bar Association Journal*, 52 (Feb. and March 1966): 139-45, 263-68, deals with the legal matters of the case. Roy F. Nichols, "United States vs. Jefferson Davis, 1865-1869," *American Historical Review*, 31(Jan. 1926): 266-84, covers many of the political issues involved. Bradley T. Johnson's detailed court record is reprinted in Davis, *Jefferson Davis, Constitutionalist*, edited by Dunbar Rowland (10 vols., 1923), 7:138-227.

forces—a fact not included in the charges, not conveyed to Dr. Mudd at the time of his trial by military commission, and not presented before the ABCMR.

Of course, merely making the charge would not support jurisdiction. Lambdin Milligan **was** charged with "military crimes" before a military commission: "conspiracy against the government of the United States; affording aid and comfort to rebels against the authority of the United States; inciting insurrection; disloyal practices, and **violation of the laws of war."** *Milligan*, *supra*, 71 U.S. at 6 (emphasis supplied). The substance of the underlying specifications were that he joined and aided a secret society "for the purpose of overthrowing the Government and duly constituted authorities of the United States, holding communication with the enemy, conspiring to seize munitions of war stored in the arsenals; to liberate prisoners of war . . . in Indiana . . . ." *Id*. at 7.

Of course, the Supreme Court in *Milligan* held that military commissions in a State "not invaded and not engaged in rebellion, in which the Federal courts were open, and in the proper and unobstructed exercise of their judicial functions, had no jurisdiction to try, convict or sentence **for any criminal offense, a citizen who was neither a resident of a rebellions State nor a prisoner of war, nor a person in the military or naval service.**" *Id* (emphasis suppled). This language leaves room for the result in *Quirin*, but leaves no room for Dr. Mudd's trial before the Hunter Commission.[18]

[18]Quirin may not be consistent with *Afroyim, supra*. The issue of citizenship was not directly addressed, and the Quirin court seemed to believe that citizenship could be lost by implicit action. *Afroyim* makes this contention impossible.

Executive authority to determine jurisdiction

Even more troubling in Mr. Henry's letter is his assertion that the power to decide whether an American citizen will be tried by a civilian court, or by a military commission when civilian courts are open, is a decision solely to be made by the President and his military advisors. Mr. Henry states that in cases like the one involving Dr. Mudd, it is "up to the President and other Executive Branch officials[19] to decide the appropriate forum," and that in the exercise of his discretion in Dr. Mudd's case, the President appropriately decided that Dr. Mudd should be tried by military commission.[20] Accordingly, Mr. Henry summarily states that "Dr. Mudd was charged with acting as an enemy belligerent by aiding and abetting those who had violated the laws and customs of war." [21]

What the President decided is that
"Dr. Mudd**",**
an American citizen,

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[19]Edward Bates, Attorney General under President Lincoln (3/6/1861-11/30/1864) made the following comments in his diary, edited by Howard K. Beale, House Document No. 818, 71st Congress, 33d Session, U.S. Government Printing Office, Washington, D.C. 1933: "I am pained to be led to believe that my successor, Attorney General Speed, has been wheedled out of an opinion, to the effect that such a trial is lawful. If he be, in the lowest degree, qualified for his office, he must know better. Such a trial is not only unlawful, but it is a gross blunder in policy: It denies the great fundamental principle, that ours is a government of Law, and that the law is strong enough to rule the people wisely and well. . . . the prisoners may yet be turned over to the Civil Courts!" Id. at 483. "Our fathers . . . taught us to believe that we lived under a government of law . . . . But now, the first law officer of the government assures us that this is all a mistake — that 'in time of war' — war with any body, great or small — the laws are silenced, and the military at its own caprice, can inflict whatever punishment it pleases, upon any person supposed (by 'the Military') to be guilty of some offense against the (unknown) Laws of war, or some offense commented by them as a public enemy ." Id. at 501. (Emphasis in the original.)

[20] On December 27, 1776, the Continental Congress passed a series of resolves that conferred on General Washington "the powers of a military dictator" Washington learned of this late on December 31, 1776 and wrote in reply "Instead of thinking myself freed from all *civil* obligations by this mark of confidence, I shall constantly bear in mind that as the sword was the last resort for the preservation of our liberties, so it ought to be the first to be laid aside when those liberties are firmly established." (Italics in the original). Ketchum, Richard M., The Winter Soldiers, Owl Books p. 280-281 (1973).

[21]This is either a very long reach to shoehorn the Mudd case into *Quirin* territory, or is intellectually disingenuous.

a civilian with no connection to an enemy belligerent military force,
a resident of Union Maryland where civilian court was open,
"was charged" by and at the discretion of the President of The United States,
with the offense of **"***combin[ing], confederat[ing] and*
conspir[ing] together at Washington City, and within
The intrenched fortifications . . . unlawfully, maliciously
And traitorously, to kill and murder Abraham Lincoln . . .
and . . . [with] aid[ing] and comfort[ing] the insurgents
*engaged in armed rebellion against said United States"***,**
[THE ACTUAL CHARGE AGAINST DR. MUDD]

Or:

"*with acting as an enemy belligerent by aiding and*
abetting those who had violated the laws and customs
*of war***", [MR. HENRY"S SUMMARY OF THE CHARGE]**
and tried by military commission convened by the President,
with a jury of military officers selected by the President, and
where Dr. Mudd would receive only the minimal due process
afforded non-citizen enemy belligerents,
who have no rights under the Constitution of
The United States.

Mr. Henry asserts that the President and his military advisors have the power to decide which American citizens will be tried for treason in civilian courts and which American citizens will be arbitrarily declared unlawful enemy belligerents to be hanged by military commission when civilian courts are open and functioning. Thus, by fiat, he asserts that even when civilian courts are open, a President can dispense with an American's Consitutional rights as a citizen to trial by jury and

procedural due process. Dr. Mudd's counsel Thomas Ewing, Jr. argued against such an understanding of the source of the military commission's jurisdiction by stating

> The President, under the 5th amendment to the Constitution, may constitute courts pursuant to the Articles of War, but he can not give them jurisdiction over citizens.[22]

Plaintiff respectfully submits that if by simply labeling an American citizen an unlawful enemy belligerent, a President and his military advisors can render meaningless an American's citizenship in the United States and a citizen's rights to procedural due process guaranteed by the Constitution, then the rights of American citizens under the Bill of Rights and the Constitution are neither protected nor guaranteed from abuse by the President or the military. This is contrary to established law, but it is the basis of Assistant Secretary Henry's decision.[23] The Supreme Court in *Milligan* declared:

> Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and ... [f]or this, and other equally weighty reasons, [our forefathers] secured the inheritance they had fought to maintain, by incorporating in a written Constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President or Congress, or the Judiciary disturb . . . 71 U.S. at 297.

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[22]Argument on the Plea to the Jurisdiction of the Military Commission by Thomas Ewing, Jr., Pitman at 264, Exhibit C to Opposition to Motion to Dismiss and for Summary Judgment.

[23]"Have the principles and practices developed during the birth and growth of our political institutions been such as to persuade us that Congress intended that loyal civilians in loyal territory should have their daily conduct governed by military orders substituted for criminal laws, and that such civilians should be tried and punished by military tribunals?" *Duncan*, *supra*, at 319.

While Mr. Henry is not a wicked man, the basis for his decision is inimical to democratic form of government, is inconsistent with accepted and fundamental constitutional principles, is contrary to the Constitution, and is not supported by the Supreme Court's decisions in *Milligan, Duncan, Quirin, Tomoya Kawakita, Cramer and Haupt (Sr.).***,** ***supra.*** Leaving the jurisdictional decision to the military may be expedient, but as the Supreme Court (Justice Murphy concurring) held in *Duncan, supra,* at p. 332 ,

> the mere fact that it may be more expedient and convenient for the military to try violators of its own orders before its own tribunals does not and should not furnish a constitutional basis for the jurisdiction of such tribunals when civil courts are in fact functioning or are capable of functioning. Constitutional rights are rooted deeper than the wishes and desires of the military.

Army ignores holdings in cases contemporary to *Quirin*

A number of cases also arising out of World War II and heard by the Supreme Court were discussed extensively in Plaintiff's brief presented to the ABCMR in 1992 and in his prior Opposition to Summary Judgment. *Haupt v. United States, supra*, (naturalized US citizen father of one of the saboteurs in *Quirin* who gave him shelter, helped him get a job and an automobile, all alleged to be with knowledge of the son's mission, was tried for treason in civil court), *and Cramer, supra,* (U.S. citizen who met with and held money for another *Quirin* defendant, was tried for treason in civil court), regard co-defendant "aiders and abetters" of the *Quirin* saboteurs. With the case of *Tomoya Kawakita, supra,* (an enemy belligerent and a U.S. citizen

performing the same acts are treated differently), these cases set forth in detail the distinctions between citizens and belligerents, especially in the context of charges of treason. These arguments will not be repeated wholesale here, but are incorporated by reference. *Tomoya Kawakita*, *Cramer*, and *Haupt*, *supra*, all involve conduct committed by the defendants when the United States was at war, conduct deemed by the government to be treasonous, that is, involving adherence to the enemy and giving aid and comfort to the enemy and collusion between enemy aliens and American citizens.In each case the enemy belligerents were tried by military commissions for violations of war and the American citizens were tried in civilian courts for treason.

One hundred and thirty four years ago in the case of *Ex Parte Milligan*, the United States Supreme Court made very clear that a citizen's right to trial by civilian jury was inestimable and inalienable:

> No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law. If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings. The decision of this question does not depend on argument or judicial precedents [which] inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials. Congress has declared the kinds of trial and the manner in which they shall be conducted, for offenses committed while the party is in the military or naval service. Every one connected with these branches of public service is amenable to the jurisdiction which Congress has created for their government, and while thus serving, surrenders his right to be tried by the civil courts. All other persons, 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. When peace prevails, and the authority of the government is undisputed, there is no difficulty in preserving the safeguards of liberty for the ordinary modes of trial are never neglected, and no one wishes it otherwise. The Constitution goes no further. It does not say after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of common law. If it had intended this result, it was easy by the use of direct words to have accomplished it."

Ex Parte Milligan, at 119-127.

In 1946, the Supreme Court also reviewed the law regarding the use of military commissions to try civilian citizens when martial law was declared in wartime. The lead case, *Duncan v. Kahonomoku*, 327 U.S. 304, was extensively discussed in the brief submitted to the Board as well as Plaintiff's prior Opposition to Motion for Summary Judgment, and the arguments made there are incorporated herein. Although Mr. Henry stated that he had based his review on the record in this case before the remand, he did not discuss those cases, which are directly opposed to his interpretation of *Quirin*. "Military trials of civilians charged with crime ... [are] obviously contrary to our political traditions and our institution of jury trials in courts of law..." according to *Duncan*, and that case quotes and reinforces the teaching of *Milligan* that "civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish." *Milligan* at 125.

In sum, *Duncan* reaffirms that American citizens must be tried in civilian courts when such courts are open and available, as opposed to being tried before military tribunals.

Was this a time of war?

Finally, Mr. Henry contends that trial of Dr. Mudd by military commission was permissible because 1) conditions tantamount to a state of war existed at the time of the assassination and at the time of trial, 2) notwithstanding that Dr. Mudd could also have been tried in civilian courts. As was discussed above, the military does not have “concurrent” jurisdiction with the judiciary to try civilians, at the election of the executive. We address briefly, however, the question of whether the nation was still at war at the time of Dr. Mudd’s trial.

In July of 1865, after Dr. Mudd’s trial by military commission, Attorney General Speed expanded his one-sentence opinion of May 1865, concluding that the Civil War was still going on; that Washington was a city under "siege" and was surrounded by fortifications; that the President was the Commander-in-Chief of the Armed Forces; and that the laws of war were in existence at the time of the incidents in question. It is instructive to note that President Andrew Johnson, in fact, "declared hostilities over" as early as May 10, 1865 (the first day of Dr. Mudd's trial). Civil War Times, Special Issue, May 2000, page 36.

While it is true that the District of Columbia had been fortified, and those fortifications were manned continuously by the military, it also is true that at all times

relevant to this action, martial law had not been formally declared in the District of Columbia or the State of Maryland. In Washington, D.C., some policing functions were performed by the military and public buildings were guarded by the military. However, Attorney General Speed acknowledged in his July 1865 Opinion that "the civil courts were open and held their regular sessions, and transacted business as in times of peace".[24] A time of peace is not “tantamount to a time of war.” No evidence was presented before the ABCMR that would support a conclusion that the situation was tantamount to a state of war.

The Military Commission had no jurisdiction to try Dr. Mudd

As this court clearly understands, military court jurisdiction can be exercised in only four situations: (1) when persons (members of armed forces) subject to military justice are prosecuted for violating provisions of the military code; (2) when military government is imposed on occupied foreign nations in wartime, or in the United States in time of civil war or rebellion; (3) when martial rule is declared by the government and the domestic courts have ceased operation; and (4) when alien belligerents are prosecuted by the government for violations of the law of war.

The military commission was created to try special kinds of criminal acts committed during wartime. The three types of criminal cases tried by military commissions are: (1) "offenses against the laws of war"; (2) "breaches of military regulations"; and (3) "civil crimes which, where the ordinary courts have ceased to

[24] Opinion of Attorney General Speed, AR 18 at 360.

function, cannot be tried normally."[25] Although military commissions can try violations of the laws of war,[26] this exception applies only to those deemed to be enemy belligerents. As noted supra, an enemy belligerent is one who

1. is affiliated with the enemy military;
2. acts under the instruction of the enemy military;
3. is in the pay of the enemy military;
4. violates of the law of war by, for example, disguising that belligerent relationship by ruse, such as burying the enemy uniform; and
5. crosses into territory controlled by the United States.

See Quirin at 185-186.

Dr. Samuel A. Mudd, a citizen of the United States and resident of Maryland, was charged with conspiring with others to assassinate President Lincoln, with knowledge of the traitorous conspiracy with the intent to aid, abet and assist them. At no time did the government ever identify Dr. Mudd to be anything other than a citizen of the Union State of Maryland and the United States. There is no evidence, in other words, that the government could properly consider to determine that Dr. Mudd was an enemy alien, an enemy belligerent, or an unlawful belligerent. As noted, the specifications against Dr. Mudd do not even charge him with violating the laws of war.[27]

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[25] C. FAIRMAN, THE LAW OF MARTIAL RULE 266 (Chicago, Illinois: Callaghan & Co., 2nd ed. 1943), cited hereafter as THE LAW OF MARTIAL RULE.

[26] DIGEST OF JUDGE ADVOCATE GENERAL OPINIONS 1880 para. 1 at 328 (Washington, D.C.: U.S. Government Printing Office, W. Winthrop ed., 1880).

[27] See In re Yamashita, 327 U.S. 1, 13-14 (1946), where the defendant was specifically charged with violating the laws of war:

> The charge, so far as now relevant, is that petitioner, between October 9, 1944 and September 2, 1945, in the Philippine Islands, "while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against the people of the United States and of its allies and dependencies, particularly the Philippines; and he . . . thereby violated the laws of war." Id.

In his letter, Mr. Henry argues that the Commander-in-chief was assassinated, that the office of Commander-in-chief was a *military* position, and that the offense therefore was a military crime. Mr. Henry argues that the military commission's jurisdiction to try Dr. Mudd is based on the status of the victim, and not on the status of the defendant, Dr. Mudd.[28] However, this Court, citing *Frizelle,* found Ms. Lister's decision to be arbitrary and capricious, in part because she failed to address the issue of whether Dr. Mudd was a citizen of the Union State of Maryland. Mr. Henry similarly fails to address whether Dr. Mudd was a civilian citizen of Maryland, avoiding the issue by finding instead that he was not "formally a member of the Union or Confederate armies during the Civil War." Either Dr. Mudd is a member of (or in the employ of) an enemy armed force, or he is not. If he is not, then he is not a belligerent. The ABCMR found explicitly that Dr. Mudd never served in the military and continued to practice medicine and to farmduring the Civil War. ABCMR recommendation at ¶7.

Mr. Henry asserts that Mudd was tried for violations of the law of war and therefore that the military commission which tried Dr. Mudd had jurisdiction.[29] His

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[28] No other case has been located in which the argument that because assault was made on the Commander in Chief jurisdiction lies with a military commission. In fact, this was a political crime, attacking the politicians. See statement of the Hunter Commission prosecutor, Brig. Gen. Joseph Holt, *supra* at p. 8.

[29] As stated by Justice Stone,

> "**We must therefore first inquire whether any of the acts charged** is an offense against the law of war cognizable before a military tribunal, and if so, whether the Constitution prohibits the trial. We may assume that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war **which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war, or because they are of that class of offenses constitutionally triable only by a jury. It was upon such grounds that the Court denied the right to proceed by military tribunal in *Ex parte Milligan*.**

317 U.S. at 29 (emphasis added).

conclusion that Dr. Mudd could be tried for violating the laws of war is in error for four reasons:

First, Article III, Section 3, Clauses 1 and 2, of the Constitution defines Treason. Dr. Mudd was charged and convicted of treasonous activities, that is, conspiring and giving aid and comfort to the enemy.

Second, there is no evidence in the original record to show that the government considered Dr. Mudd to be an unlawful enemy belligerent, or that in fact he was proven to be so by the Hunter Commission, unlike the *Quirin* defendants. Dr. Mudd did not admit to being an unlawful enemy belligerent. Like the defendants in *Tomoya Kawakita, Cramer*, and *Haupt*, Dr. Mudd was and had always been a citizen of the United States and of the nonsecessionist State of Maryland. He was never affiliated with or resided in territory commanded by the Confederacy, and he never stated that he was an unlawful enemy belligerent in the instruction and pay of an enemy sovereign.

Third, to allow some American citizens, like the defendants in *Tomoya Kawakita*, *Cramer*, and *Haupt (Sr.)*, to be tried in civilian court while permitting Dr. Mudd to be tried by a military commission for the same offense is a denial of equal protection.

Fourth, it is inconsistent, given the same constitutional provisions on treason today as in 1789, to interpret those provisions one way in the 19th century and

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The Court in footnote 10 of *Quirin, supra*, lists those Civil War Cases tried by a valid Military Commission for "Law of War" violations and does *not* cite either the Lincoln conspiracy or Milligan cases.

another way in the 21st century. Treason during time of war is treason during time of war. The rights of the citizens under the Constitution should remain constant unless the document is amended and should not be subjected to the vicissitudes of those in command of the armed forces.[30]

Relief Sought

In granting partial summary judgment to plaintiff on October 29, 1998, this Court was careful not to overstep its jurisdiction to review the discretionary decision of the Secretary of the Army as made by Ms. Lister. Upon finding that her action was arbitrary and capricious and contrary to law, the court provided the "usual remedy" in such cases: Ms. Lister's decision was vacated and the case was remanded to the Army for further review. After sixteen months, the Army issued a three-page letter again refusing on erroneous legal grounds to adopt the ABCMR's recommendation and set aside the conviction of Dr. Samuel Mudd.. The original recommendation was made by the ABCMR in January of 1992. The Army has tried three times over eight

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[30] As an example of such vicissitude, haste to convict was deplored by Justice Jackson in *Yamashita, supra*, 327 U.S. 1 at 5. On September 25, 1945, the defendant was served with a specification

> purporting to charge petitioner with a violation of the law of war. On October 8, 1945, petitioner, after pleading not guilty, was held for trial before a military commission of five Army officers . . . On the same date a bill of particulars was filed . . . The trial then proceeded until its conclusion on December 7, 1945, the commission hearing two hundred and eighty-six witnesses, who gave over three thousand pages of testimony. On that date petitioner was found guilty of the offense as charged and sentenced to death by hanging." Writing in dissent, Justice Jackson stated, the grossest vice was . . . service of the supplemental bill on the eve of trial, a procedure which taken in connection with the consistent denials of a continuance and the commission's later reversal of its rulings favorable to the defense was wholly arbitrary, cutting off the last vestige of adequate chance to prepare defense and imposing a burden the most able counsel could not bear. This sort of thing has no place in our system of justice, civil or military. Without more, this wide departure from the most elementary principles of fairness vitiated the proceedings. When added to the other denials of fundamental right . . . it deprived the proceeding of any semblance of trial as we know that institution.

Id. at 60-61.

and one half years to justify its decision to refuse to adopt the unanimous recommendation of the ABCMR. The Army has failed grievously in its latest attempt.

The Army has the discretion to refuse to adopt a recommendation of a Board, but it must not do so arbitrarily and capriciously, against the weight of the evidence before the Board, or contrary to law. Plaintiff respectfully submits that the Army has exhausted its authority, and it is proper and appropriate for this Court to direct the Army in the matter. The Court on October 29, 1998 remanded for further agency action not inconsistent with its decision, and yet the Army created facts out of whole cloth, misapplied the law, and produced a letter which was entirely inconsistent with the Court's remand .

The general rule, as previously followed by this court and enunciated in *PPG Indus., Inc. v. United States*, 52 F.3d 363, 365 (D.C. Cir. 1995) is that in administrative law cases remand is the "usual remedy"[31]. In most cases the court orders a remand after the agency's legal error was revealed during the course of judicial review and the agency is directed to take further action consistent with the corrected legal standards. *Id*.

[31]Generally speaking, district courts reviewing agency action under the APA's arbitrary and capricious standard do not resolve factual issues, but operate instead as appellate courts resolving legal questions. *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996), cert. denied, 519 U.S. 1077 (1997)*See also, Los Angeles v. Shalala*, 192 F.3d 1005 (D.C. Cir. 1999).

In this case, the Army's error renders a remand for reconsideration an empty exercise and an unnecessary formality. *Rhode Island Higher Educ. Assistance Auth. v. Secretary, U.S. Dept. of Educ.* , 929 F.2d 844, 857 (1st Cir.1991), *National Labor Relations Board v. Food Store Employees Union, Local 347*, 417 U.S. 1 (1974). The Army has had before it, in the form of Plaintiff's 1992 brief, the ABCMR's decision, and the briefs filed in this Court, a correct statement of the law regarding jurisdiction of military commissions over citizens, and has refused on three occasions to follow the law. In this case, the Army already has enjoyed "an ample opportunity to bring its expertise to bear upon the correct legal standard; [and] the agency failed to avail itself of this opportunity." *Cissell Manufacturing Co. v. United States Department of Labor*, 101 F.3d 1132 (6th Cir. 1996) (dissent). Three bites of the apple are surely sufficient.

This is the unusual case where this reviewing Court can order the Army to provide the relief it denied Dr. Mudd. As can be seen above, this Court must conclude that the underlying law and facts are such that the Army has no discretion to act in any other manner. Plaintiff respectfully requests that this Court conclude that after the Army's three attempts over eight and one half years to fashion a legitimate basis for denial of the ABCMR recommendation, a further open-ended remand to the agency would produce substantial injustice in the form of further delay of the action to which the Plaintiff is clearly entitled. Davis & Pierce, Administrative Law

Treatise, Vol. III, §18.1 Third Ed. (1994). This is particularly important in light of the Plaintiff's advanced age.

All essential factual issues have been resolved in this case, and the record and the law establish Plaintiff's entitlement to enforcement of the Army Board for Correction of Military Record recommendation to set aside Dr. Samuel Mudd's conviction on the ground that the military commission did not have jurisdiction to try him. *Faucher v. Secretary of Health & Human Services*, 17 F.3d 171, 176 (6th Cir. 1994), *Cissell Mfg. Co. v. Department of Labor*, 101 F.3d 1132 (6th Cir. 1996) (dissent); *Ward v. Grown*, 22 F.3d 516, 522-23 (2d Cir. 1994). The Army must now be told what that law is, and if the case is remanded, it should be done for the very limited purpose of implementing an order from this Court that the Army adopt the recommendation of the ABCMR to set aside the conviction of Dr. Samuel Mudd.

CONCLUSION

Plaintiff respectfully submits that the military commission which tried Dr. Mudd did not have jurisdiction to do so. After reviewing the evidence and argument in the record presented to it, the ABCMR unanimously concluded that the military commission which tried Dr. Mudd did not have jurisdiction to try him. The decision of Mr. Henry refusing to approve the ABCMR's finding rests solely on the Supreme Court decision in *Quirin*. In its brief to the ABCMR and in its filings before this Court, Plaintiff directed the Army's attention to the Supreme Court's decisions in

U.S. v. Tomoya Kawakita, 344 U.S. 850 (1952), *Cramer v. United States,* 325 U.S. 1 (1945), and *Haupt (Sr.) v. United States,* 330 U.S. 631 (1947), all of which are precedent for trying citizens of the United States for treasonous conduct in civilian courts while unlawful enemy belligerents charged with the same conduct are tried by military commission. Mr. Henry's letter fails to address the Supreme Court's holdings in those cases. Mr. Henry's decision is not based on substantial evidence in the record, and is not in accordance with law. His legal conclusion is incorrect and cannot be upheld under the Administrative Procedure Act (APA). Section 706 of the APA clearly provides that agency decisions which are ”not otherwise in accordance with law" cannot be upheld.

For the reasons stated above, the Plaintiff respectfully requests that the Court grant Plaintiff's second motion for summary judgment and direct the Army to adopt the Board's recommendation. Judgment should be entered for the plaintiff and against the defendants, the Army and the Secretary of the Army.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

For the reasons stated in the Memorandum opinion dated _____, it is this ____ day of _____,2000, hereby

ORDERED that Plaintiff's motion for summary judgment be granted and it is further

ORDERED that the Army shall direct 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 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; and it is further

ORDERED that the Secretary of the Army shall take any further corrective action required in accordance with my Memorandum Opinion, and it is further

ORDERED, that the Secretary of the Army will report back to this court within fifteen days as to the actions he has taken or caused to be taken by the Archivist of the United States, and that this court shall retain jurisdiction to enter whatever relief that may be necessary.

_____

UNITED STATES DISTRICT COURT

Copies to:

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Wyneva Johnson
Assistant United States Attorney
555 Fourth Street, N.W. -- Rm. 10-810
Washington, D.C. 20001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD D. MUDD, M.D.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 97-2946(PLF)**
	)	
LOUIS CALDERA, JR., SECRETARY OF THE UNITED STATES DEPARTMENT OF THE ARMY, et al.,)	)	
	)	
Defendants.	)	
	)	

SECOND MOTION FOR SUMMARY JUDGMENT

Plaintiff hereby requests that summary judgment be entered as set forth in the attached Memorandum of Points and Authorities..

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD D. MUDD, M.D.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 97-2946(PLF)**
	)	
LOUIS CALDERA, JR., SECRETARY OF THE UNITED STATES DEPARTMENT OF THE ARMY, et al.,	)	
	)	
Defendants.	)	
_____	)	

Joint Scheduling Order

The parties have agreed on the schedule set forth on the attached order.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD D. MUDD, M.D.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 97-2946(PLF)**
	)	
LOUIS CALDERA, JR., SECRETARY OF THE UNITED STATES DEPARTMENT OF THE ARMY, et al.,	)	
	)	
Defendants.	)	
_____	)	

Order

This court having reviewed the schedule proposed by the parties, it is, by this Court, this _____ day of _____, 2000, hereby ORDERED,

That Defendant shall file a supplemental Administrative Record on or before July 21, 2000, that Plaintiff shall file his Second Motion for Summary Judgment together with a Statement of Material Facts not in Dispute and a Memorandum in Support thereof on or before July 24, 2000, that Defendant shall file any opposition to the second motion for summary judgment and any cross-motion for summary judgment together with supporting documents on August 18, 2000, that Plaintiff shall file a response to the opposition and opposition to the cross-motion on August 28, 2000, and that the Defendant shall file any response to the opposition to its cross-motion for summary judgment on September 15, 2000.

DATE:

_____
PAUL L. FRIEDMAN

United States District Judge

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Certificate of Service

I hereby certify that on a copy of the foregoing consent scheduling order, second motion for summary judgment together with accompanying memorandum, statement of material facts not in dispute and order was sent to Wyneva Johnson , AUSA, Room 10-810, 555 Fourth Street, N.W., Washington, D.C. 20001, by first class mail, postage prepaid.

Candida Steel

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD D. MUDD, M.D.,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Civil Action No. 97-2946 (PLF)**
	)	
TOGO D. WEST, JR., SECRETARY OF THE DEPARTMENT OF THE ARMY, et al.,	)	
	)	
	)	
Defendants.	)	
	)	

PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE, IN SUPPORT OF PLAINTIFF'S SECOND MOTION FOR SUMMARY JUDGMENT

1. Starting on May 9, 1865, a proceeding was held before a nine-member Military Commission (hereinafter "the Hunter Commission") in which Samuel A. Mudd, M.D., along with several others, was accused and tried on charges related to the assassination of President Abraham Lincoln. AR[32] 409.

2 The charges against Dr. Mudd were that he, "maliciously, unlawfully, and traitorously, and in aid of the existing armed rebellion against the United States of America … did … 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 aforesaid and with the intent to aid, abet, and assist them in the

[32] At the time of this filing, counsel for Plaintiff has not received the supplemental administrative record scheduled to be filed July 21, 2000. Therefore, all references to the Administrative Record in this case are to the original record filed with this Court.

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. Dr. Mudd was a citizen of the United States and a resident of the Union State of Maryland.

4.. Dr. Mudd was not a member of any armed forces or in the employ of any armed forces at the time of the Civil War or afterward.

5. Dr. Mudd was not an enemy belligerent.

6. Dr. Mudd was not an unlawful belligerent.

7. Dr. Mudd, through counsel Thomas Ewing, Jr., pleaded to the jurisdiction of the tribunal, that it lacked jurisdiction to try Dr. Mudd.

8. On June 30, 1865, Dr. Mudd was convicted and sentenced to life at hard labor and life imprisonment. He was imprisoned in a military prison outside Key West, Florida. AR 401.

9. On July 7, 1865, Mary Surratt, a co-defendant of Dr. Mudd, filed a petition for habeas corpus, but the petition was returned by President Johnson, noting that he had suspended the writ of habeas corpus.

10. In December 1866, Dr. Mudd filed a petition for a writ of habeas corpus with Chief Justice Samuel Chase, who returned the writ to Dr. Mudd, directing him that it must be filed with the United States District Court in Florida. AR at 394.

11. On September 9, 1868 the United States District Court for the Southern District of Florida denied the petition for a writ of habeas corpus. AR 21, at 395-397.

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

13. Dr. Mudd died in 1883 (AR 437) leaving several children and heirs, one of whom is Dr. Richard Mudd, the petitioner in this action. Dr. Richard Mudd filed a request for the correction of the military records of his grandfather before the Army Board for Correction of Military Records (hereinafter "ABCMR") on October 15, 1990. AR 46 at 213. Dr. Samuel Mudd and his descendants have continued to suffer injury to the present. Affidavit of Dr. Richard Mudd, Tab A.

14. The ABCMR waived the applicable statute of limitations and agreed to hear the matter. AR 17.

15. On January 22, 1992, a hearing was held before the ABCMR. Transcript of hearing, AR 13 at 214-345.

16. At the hearing, petitioner requested that the conviction be vacated and the records be corrected because, *inter alia*, the Hunter Commission lacked jurisdiction to try the accused Dr. Mudd.

17. On January 22, 1992, the ABCMR issued a decision consisting of Findings, Conclusions, and a Recommendation. AR 5 at 18-30.

18. In its Findings the ABCMR discussed the holding and rationale of the Supreme Court's decision in *Ex Parte Milligan*. AR 5 at 25-26. The ABCMR considered that Dr. Mudd's habeas petition was brought before Justice Chase of the Supreme Court, and that a federal district court in Florida had denied his petition for relief. AR 5.

19. In its Recommendation, the ABCMR recommended, AR 5 at 30,

> "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 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."

20. On July 22, 1992, William D. Clark, then Acting Assistant Secretary of the Army, declined to adopt the ABCMR recommendation. AR 11 at 43-44 and denied the petitioner's application for correction of military records. AR 11 at 45.

21. On August 14, 1992, petitioner requested Michael Stone, then Secretary of the Army, to reverse Acting Secretary Clark's decision. AR 4 at 15-17.

22. Brigadier General Harold W. Nelson wrote a memorandum dated March 10, 1993, stating that the resolution was a matter of opinion, not fact. AR 25 at 442.

23. In his memorandum, General Nelson noted that at the time of the trial, General Lee's Army of Northern Virginia as well as all forces east of the Mississippi had surrendered, and that the nearest armed insurgent forces were in North Carolina, and that by the time the Hunter Commission trial was completed, there were no active engagements.

24. In an affidavit submitted in this case, Mr. Michael W. Kauffman, a well-respected Lincoln scholar whose work has focused on the political ramifications of the Lincoln assassination, points out that by the time the trial commenced there were no enemy

forces east of the Mississippi, and on May 26, 1865, the western Confederate forces surrendered. Kauffman Affidavit, Tab B.

25. During the time immediately preceding the assassination, and on the day of the assassination, Abraham Lincoln traveled around Washington, D.C. without an escort, military or otherwise, and Lincoln noted "no pass is necessary to authorize any one to go to & return from Petersburg & Richmond. People go & return just as they did before the war. A. Lincoln." Kauffman Affidavit,Tab B to Plaintiff's Statement of Material Facts in support of his Opposition to Motion for Summary Judgment and Cross-motion for Summary Judgment.

26. Lincoln further stated that "Maryland presents the example of complete success. Maryland is secure to Liberty and Union for all the future. The genius of rebellion will no more claim Maryland." Kauffman Affidavit, Tab B, citing COLLECTED WORKS OF ABRAHAM LINCOLN, Vol. VIII, pp. 148-149.

27. On February 2, 1996, Sara E. Lister, then Assistant Secretary of the Army, relying on General Nelson's memorandum and a memorandum written by JAG Officer Major Stahl , AR 26 denied petitioner's request for review and affirmed the earlier denial of relief.

28. The Complaint in this action was filed within six years of the final administrative decision, and all administrative remedies have been exhausted.

29. On October 29, 1998, the United States Court for the District of Columbia reversed and remanded the decision of Assistant Secretary Lister.

30. The Court has retained jurisdiction in this matter.

31. On March 6, 2000, Assistant Secretary of the Army Patrick Henry issued a new decision again denying the relief recommended by the ABCMR.

Respectfully submitted,

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