

DEPARTMENT OF THE ARMY  
BOARD FOR CORRECTION OF MILITARY RECORDS  
1941 JEFFERSON DAVIS HIGHWAY, 2ND FLOOR  
ARLINGTON, VA 22202-4508

PROCEEDINGS

IN THE CASE OF: MUDDO SAMUEL A., M.D.  
(Deceased)

BOARD DATE: 22 January 1992  
DOCKET NUMBER: AC91-05511

I certify that hereinafter is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in the case of the above-named individual. The following members, a quorum, were present.

Mr. Charles A. Chase	Chairperson
Mr. James C. Hise	Member
Mr. John Lee	Member
Mr. James T. Lucas	Member
Mr. Eugene P. Visco	Member
Mr. David R. Kinneer	Executive Secretary
Mr. Richard H. Allen	Examiner

The applicant, who is the grandson of Dr. Mudd, appeared before the Board and was represented by counsel.

The applicant requests correction of military records as stated in the application to the Board and as restated herein.

The Board considered the following evidence:

Exhibit A - Application for correction of military records  
Exhibit B - Summary of Archival Records (including advisory opinions)  
Exhibit C - Case Summary  
Exhibit D - Transcript of Hearing

FINDINGS:

1. The applicant has exhausted all administrative remedies afforded by existing law or regulations.

2. The applicant requests, in effect, that his grandfather, Dr. Samuel A. Mudd, now deceased, who was tried and convicted by a "Military Commission" in June 1865 of conspiracy to assassinate President Lincoln, be declared innocent.

3. The applicant states that his grandfather's trial was illegal because the civilian courts were open and functioning. Further, that his grandfather's only act was to medically treat and harbor a disguised John Wilkes Booth while not then knowing that President Lincoln had been assassinated.

4. The applicant submits a copy of Dr. Mudd's defense counsel's argument to the Military Commission in May 1865, questioning whether the Commission was even a court and whether it had jurisdiction over his client and the other seven individuals with whom he was jointly tried, or over the crimes with which they were charged. A copy of the defense counsel's argument on the pertinent law and the evidence in Dr. Mudd's case is also submitted. Two independent reports to contemporary Presidents are also submitted, one by the applicant, the second by a Lincoln scholar, which attempt to prove Dr. Mudd's innocence. He also submits correspondence from several members of Congress who support the granting of the requested relief, and he states that a number of state legislatures have gone on record supporting relief. Finally, he submits information intended to show why Dr. Mudd did not know about the plans of John Wilkes Booth to kidnap President Lincoln and a map which he contends shows that the route most likely to have been used to move the kidnapped President to the Confederate lines was not even close to his grandfather's home.

5. The applicant has made two prior applications to this Board. Until now, the Department's position had been that while this Board might have jurisdiction to review the case, the Secretary of the Army did not have the authority to set aside the conviction. The applicant had also previously been advised by the Office of the President that no Presidential relief, other than the pardon issued by President Andrew Johnson, could be granted by that office.

6. Then, on 7 December 1990 and 24 June 1991, in connection with the applicant's current submission, the offices of The Judge Advocate General and the Army General Counsel, opined that not only may it review the case, but that this Board, under certain circumstances, may recommend to the Secretary that he set aside the conviction. In expansion of their opinions, each stated, in essence, that the Board may review the record of conviction, but only to determine whether the Commission lacked jurisdiction over Dr. Mudd, or over the offense (that is, he was convicted of an offense for which he was not charged, or not arraigned, or which was not a crime at all) or that Dr. Mudd was denied due process to such an extreme extent that it amounted to fundamental unfairness. The General Counsel also opined that since clemency has already been granted in the form of the pardon by President Johnson, the only meaningful relief that could be granted by the Secretary would be to set aside the conviction.

7. History records that Dr. Mudd was born on 20 December 1833, in Charles County, Maryland. He was educated at several institutions of higher learning and was certified as a physician in 1856. He then returned to his home in Charles County, where he set up a medical practice and farmed tobacco. He married and fathered nine children. He never served in the military, and during the Civil War continued to practice medicine and to farm. On 21 April 1865 he was arrested by Federal authorities on suspicion of being involved in the plot to assassinate President Lincoln. He was subsequently tried and convicted of conspiracy to assassinate the President and then spent 4 years of a "life" sentence in military confinement. After his pardon in 1869, he returned to his home in Maryland and resumed his medical practice and farming. He died in January 1883 at the age of 49 from pneumonia.

8. On 3 March 1863, because of the Civil War existing between the various states, Congress passed "An Act Relating to Habeas Corpus and Regulating Judicial Proceedings in Certain Cases." In effect, this law authorized the President to suspend the right to request a writ of habeas corpus from a civilian court in any part of the United States, whenever

it was deemed necessary to ensure the public safety. This empowered the military to establish martial law in any given area of the United States and to arrest violators, either military or civilian. Under this law, not only were military personnel to be tried by courts-martial for violations of military rules and regulations, but civilians who violated any laws, military rules or regulations, or the laws of war, were also subjected to immediate arrest by military authorities. Theoretically, these civilians could then be tried by a military commission comprised of military officers, and if convicted, fined, imprisoned, or even put to death. A military commission was, therefore, akin to a military court-martial and operated under the same general principles.

9. As is generally accepted by historians, John Wilkes Booth, a fairly famous actor in 1865, entered the Presidential Box at Ford's Theater on Friday evening, 14 April 1865, at approximately 2215 hours, and shot President Lincoln in the head while he was watching a play at the theater. Booth then jumped from the box to the stage, injuring his left ankle/leg, but escaped on horseback. At about the same time, an unsuccessful attempt was made by Lewis Payne (AKA Powell) elsewhere in Washington to assassinate Secretary of State William Seward. Early the next morning, Booth and a companion, Davic E. Herold, knocked on the door of Dr. Mudd's home and requested medical assistance. The story ostensibly given was that Booth's horse had fallen on his leg and ankle. Dr. Mudd examined the leg and found that it was broken just above the ankle. After cutting off his boot, Dr. Mudd placed a homemade cast on Booth's leg and fashioned some crude crutches. Supposedly, he was paid \$25.00 for this treatment. Later in the morning of the same day, Dr. Mudd and Herold attempted to rent a carriage in the area for movement of Booth, but were unsuccessful. While the two men were still at his home, Dr. Mudd is said to have gone into the nearest town where he learned of the assassination of President Lincoln. Federal troops were already in the area looking for the assassin. Booth and Herold supposedly left Dr. Mudd's home on horseback, at about the time he returned in the late afternoon, having asked for directions to a minister's house, which was across a large swamp near Dr. Mudd's farm.

10. On the next day, after attending Easter Sunday church services, Dr. Mudd, expressing no sense of urgency, asked his cousin, a respected local citizen and also a physician, to report the details of the visit of the two "strangers" to his home to the military authorities in the nearby town. His cousin informed the local military authorities on Monday; however, the local military authorities did not visit Dr. Mudd until Tuesday, and then asked only a few questions before leaving. On Friday, 21 April 1865, Dr. Mudd was arrested. At that time Booth's boot, which had been left behind, was produced by the family. Two written statements were also obtained from Dr. Mudd that day. In both statements he maintained that he had not recognized Booth, claiming the injured man had been wearing false whiskers. These disclaimers were made despite the fact that Dr. Mudd supposedly knew Booth, having met him on one or more previous occasions. He was then taken to Washington and held in a military prison, along with the other alleged conspirators, and witnesses in the case. There is no evidence that he was ever charged with any offense during the investigative phase of the case.

11. Booth was subsequently killed on 26 April 1865 in a tobacco barn on the Garrett farm, near Bowling Green, Virginia. Herold was taken prisoner at that time and was also taken to Washington to await trial.

12. On 1 May 1865 President Andrew Johnson ordered the establishment of a military commission by the Department of War to try the persons implicated in the assassination of President Lincoln and the attempt on the life of the Secretary of State. This order was supported by a one-line opinion from the Attorney General that the military had jurisdiction in the case.

13. Accordingly, on 9 May 1865 a military commission was convened at the Old Penitentiary Building located on the Washington Arsenal, now known as Fort McNair. The nine-member Commission, chaired by Major General David Hunter, consisted of six more general grade officers, a colonel and a lieutenant colonel. The chief prosecutor was Brigadier General Joseph Holt, Judge Advocate General of the Army. He was assisted by a special prosecutor, the Honorable John A. Bingham, a former Congressman, and Brevet Colonel H. L. Burnett.

14. Eight persons, including Dr. Mudd, were arraigned and charged on 9 May 1865 with conspiring to kill the President and other Government and military officials. Dr. Mudd was also specifically charged with conspiring with the named conspirators to aid and assist in their escape from justice after the assassination.

15. The Commission's rules were established at the first session. The eight defendants, all of whom were handcuffed and some of whom were also in foot chains, were to be tried jointly. The defendants were entitled to defense counsels (but were unable to obtain them until after the initial session on 9 May. The actual trial process began on 10 May.) The Commission overruled all requests for a change in venue to the civilian courts in the District of Columbia, which were open and functioning. Several requests by some of the defendants to separate the trials were also denied. The defense attorneys were to present evidence only on matters raised by the prosecution or the Commission. Dr. Mudd and the other defendants were not permitted to testify in their own behalf. The trial lasted from 10 May to 30 June 1865.

16. Dr. Mudd had two defense counsels, Mr. Thomas Ewing, Jr., formerly a brigadier general and military lawyer, and Mr. Frederick Stone, a well-known local attorney. Twenty-four witnesses were presented by the Government against Dr. Mudd. Seventy-four witnesses appeared on his behalf.

17. All eight of the conspirators were found guilty of the charge and specification. Four were sentenced to be hanged and were hanged after review of their sentences by the President. Dr. Mudd and two other conspirators were sentenced to life imprisonment, initially at Albany, New York. The place of confinement was later changed to Fort Jefferson, Dry Tortugas, Florida (a military prison on an island, approximately 70 miles by water from Key West). The eighth conspirator was sentenced to 6 years in prison.

18. In the summer of 1867 a very serious yellow fever epidemic struck Fort Jefferson. After the regularly assigned military medical officer died early in the epidemic, Dr. Mudd served for a time as the prison

physician. He was credited with saving many lives, both prisoners and military troops assigned to guard the prison. He, himself, contracted the disease, but survived.

19. On 9 February 1869 President Andrew Johnson issued a pardon directing that Dr. Mudd be released from Fort Jefferson. In the pardon, the President stated that Dr. Mudd's direct involvement in the assassination was only after the fact, that it was within the obligations of professional duty and that there was uncertainty as to the true measure and nature of his complicity in the escape of the assassins. The President then cited Dr. Mudd's dedicated efforts during the yellow fever epidemic.

20. After the War had ended, John Surratt, a named conspirator who had escaped to Canada before the trial, and the son of Mary Surratt, the lone woman conspirator who was hanged, was found in Europe and brought back for trial. He was tried by a civil court in Washington in the summer of 1867. The jury, however, was unable to reach a unanimous verdict; therefore, it was dismissed, and the Government chose not to prosecute the case further.

21. In July 1865 the Attorney General issued a written opinion expanding his earlier guidance to the President in May 1865 in which he had stated that a military commission had jurisdiction to try the eight conspirators for the assassination of the President. His assessment was that the Civil War was still going on; Washington was a city under "siege" and was surrounded by fortifications; the President was the Commander-in-Chief of the armed forces; and the laws of war were in existence at the time of the conspiracy and assassination. Referencing the Constitution, which speaks of "law of nations" and the "laws of war," he opined that since the offenses were essentially against the President and the military, and the acts were a violation of the laws of war, the offenses should be tried by the military authorities, under such rules and regulations that were in effect at the time. The Attorney General went on to state that if the offenses had been civilian in nature, then the matters could have been settled in the civil courts, which he acknowledged were open and in operation.

22. On 3 April 1866 the United States Supreme Court decided by a vote of five to four in Ex Parte Milligan, that the military authorities in Indiana had not had jurisdiction to try a citizen of the United States for such offenses as conspiracy against the Government in the time of war or for inciting insurrection. In the opinion of the Court, as written by Justice Davis, it was noted that the 3 March 1863 Act of Congress authorizing the President to suspend the right of a citizen to request a writ of habeas corpus, required that if the military had arrested a civilian, that fact and the particulars of the case must be reported to a civilian judge of the nearest district or circuit court within 20 days of the arrest. Further, it was noted the law required that if a grand jury then met and did not indict or present the case for trial, the individual should be released from military confinement and discharged. In reviewing the Milligan case, the Court observed that he was a United States citizen of a non-secessionist state; that he was not held as a prisoner of war; and that he had never served in the military or naval service. The Court also noted that his arrest by the military had never been reported to a Federal court as required by the Act.

23. The Supreme Court's opinion went on to note that the Constitution guarantees the right of trial by jury in all cases involving a crime, except impeachment. Further, the Fifth Amendment to the Constitution states "that no person shall be called to answer for a capital or otherwise infamous crime unless on presentment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of public danger, nor be deprived of life, liberty, or property without due process of law." The opinion next noted that "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, under all circumstances." The Court then questioned the judicial power of the commission which tried Milligan and his companions, stating that the commission was not a court ordained or established by Congress; rather, it had been created at the mandate of the President, who is charged with the execution of the law, not to make laws. The Court noted there is "no unwritten criminal

code to which resort can be had as a source of jurisdiction." Therefore, the rights of Milligan were infringed upon because he and his companions were tried by a court not ordained and established by Congress, and not composed of judges appointed "during good behavior."

24. The Court emphasized that martial law could not be imposed solely by a military commander because of a "threatened" invasion; it must be an actual invasion, with closure of the courts and loss of civil administration. That had not been the case in Indiana in 1864 and 1865. The civilian courts had been open and operating. The Court also noted that the imposition of martial law should only be temporary, until the return of civilian law and the civilian courts were again in operation; any further imposition of martial law beyond that point would be a "gross usurpation of power."

25. The minority opinion in that case, which was written by Chief Justice Chase, while concurring in the granting of the writ of habeas corpus in the Milligan case, stated that Congress could, in fact, legislate the imposition of martial law, even if the civilian courts were open and operating during the time of war.

26. Dr. Mudd's case was appealed to the Supreme Court early in 1867, and to a district court in the state of Florida later in 1867, citing the decision in Ex Parte Milligan. However, the appeals were denied.

27. In the processing of this case, the staff of the Board has reviewed the Articles of War, 1806 (Chapter XX, Statute I, Ninth Congress, session 1) and the Articles of War, 1874 (Title XIV, United States Code, chapter 5), as well as various treatises written between 1841 and 1943 on the subject of military courts-martial and military commission rules of operation, including "The Practice of Courts Martial" by Major General Alexander Macomb, 1841; "Observations on Military Law, and the Constitution and Practice of Courts Martial" by Captain William C. De Hart, 1846 and 1859; 'A Treatise on Military Law and the Practice of Courts-Martial' by Brevet Lieutenant Colonel S. V. Benet, 1866 and 1868; "An Abridgment of Military Law"

by Lieutenant Colonel W. Winthrop, 1892 and 1893; "A Treatise on the Military Law of the United States" by Major General George B. Davis, 1898, 1913 and 1915; and "The Law of Martial Rule" by Lieutenant Colonel Charles Fairman, 1930 and 1943. There appears to be a general consensus that an accused should be presented (arraigned on) the charges on a timely basis, that the trial should be held within a short period of time (the term of 8 days is sometimes quoted) and that the accused had the right to a defense counsel. It appears that in the mid-1800's the accused was expected to conduct his own defense, with the assistance of counsel; however, the counsel usually was not permitted to verbally present any matters to the court. One more recent authority (ibid, Fairman) noted that military commissions, while generally following the procedural methods of a court-martial, could make deviations which would not entitle the accused to an acquittal.

28. The official record of the proceedings before the Hunter Commission is not maintained by the Department of the Army. That record, entitled: "Investigation and Trial Papers Relating to the Assassination of President Lincoln," consisting of more than 4400 handwritten pages, all of which were reviewed by the staff of this Board, is maintained by the Archivist of the United States, under Record Group 153, Office of the Judge Advocate, War Department. It is also available on microfilm, National Archives Microcopy No. 599. In addition, several other references were reviewed by the staff of the Board, to include the Pitman and Poore versions of the testimony before the Commission, in the book "Come Retribution" by William A. Tidwell, with James O. Hall and David Winfred Gaddy, 1988, and "The Milligan Case" by Samuel Klaus, 1929.

29. During the formal hearing before this Board, the 90-year old applicant appeared with counsel, two of them being descendants of Dr. Mudd, the third being a descendant of Mr. Ewing, Dr. Mudd's primary defense counsel in 1865. Several expert witnesses were called. Much of the testimony centered on the lack of proof of direct involvement of Dr. Mudd in any conspiracy to assassinate or kidnap the President. Another witness testified as to the professional requirement for Dr. Mudd to provide medical treatment for the injured Booth, irrespective of whether he knew

him. 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 World 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.

30. Title 10, United States Code, section 1552, provides, in pertinent part, that the Secretary of a military department, acting through boards of civilians, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. The statute further provides that except when procured by fraud, a correction under this authority is final and conclusive on all officers of the United States.

#### CONCLUSIONS:

1. The record of Dr. Mudd's conviction is a military record over which this Board has jurisdiction under Title 10, United States Code, section 1552.
2. Under that authority and within the guidelines set forth in the recent opinions of The Judge Advocate General and the Army General Counsel, this Board has carefully reviewed the available records to determine if the Military Commission had jurisdiction over Dr. Mudd and, if so, whether he was denied due process to such an extent that it amounted to fundamental unfairness. Those guidelines do not authorize the Board to consider the innocence or guilt of Dr. Mudd.

3. In its analysis of the case the Board has had the advantage of hindsight and, therefore, has looked at the facts and circumstances of the case with more calmness, deliberation and detachment than was possible in the emotionally charged atmosphere that existed after the Civil War.

4. Another advantage the Board has had is the availability of the Supreme Court's decision in Ex Parte Milligan, which was decided after Dr. Mudd's trial, but which the Board finds so analogous to Dr. Mudd's case that it should not be ignored.

5. 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.

6. Furthermore, the Board notes that 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.

7. Under these circumstances, the Board finds no good reason(s) why Dr. Mudd should not have been tried by a civilian court. It, therefore, unanimously concludes that the Military Commission did not have jurisdiction to try him, and that in so doing denied him his due process rights, particularly his right to trial by a 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.

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.

Charles A. Chase Chairperson