

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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RICHARD D. MUDD,      :
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Plaintiff,           :
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v.                   :
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Civil Action No.     :
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97-2946              :
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LOUIS CALDERA, et al. :
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Defendants.           :
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Washington, D.C.
October 2, 2000
9:37 a.m.

Transcript of Motions Hearing
Before the Honorable Paul L. Friedman
United States District Court Judge

APPEARANCES:

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For the Plaintiff:    PHILIP A. GAGNER, ESQ.
                     CANDIDA S. STEEL, ESQ.

For the Defendants:  WYNEVA JOHNSON, ESQ.
                     JAMES R. AGAR, ESQ.

Court Reporter:      CHERYL GERBER
                     Miller Reporting Company, Inc.
                     735 8th Street, S.E.
                     Washington, D.C. 20003

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1 P R O C E E D I N G S

2 THE CLERK: Civil Action 97-2946, Richard D. Mudd
3 versus Louis Caldera, et al. Mr. Gagner and Ms. Steel for
4 the plaintiff. Ms. Johnson and Major Agar for the
5 defendant.

6 THE COURT: Good morning. I have a logistical
7 question. I've been looking for the administrative record
8 in this case. I had understood that in July of this year
9 defendants -- all I ever saw, until this morning when we
10 got something from the Clerk's Office, was defendants
11 filed a notice of filing of administrative record, and I
12 had been led to believe by reading the briefs that the
13 only thing that was included in that was a brief that had
14 been excluded from the earlier administrative record.

15 But this morning, I got from the Clerk's Office
16 something that has 28 tabs. So I'm wondering is this the
17 exact same thing as the old administrative record with one
18 addition or something else?

19 MR. GAGNER: Philip Gagner on behalf of the
20 plaintiffs, Your Honor.

21 If it's the binder I have with 28 black tabs,
22 then the answer is yes, it's the same as the
23 administrative record previously except that it has the
24 new notice of filing, and I hope it has the new decision.
25 I haven't checked that, but I think it does.

1 THE COURT: Because again, what I had been led to
2 believe by reading the briefs was there was -- I got a
3 separate filing which had the new decision, and I can't
4 remember whether plaintiff filed it or defendant filed it.
5 It doesn't really matter, but I guess Ms. Johnson is
6 saying --

7 MS. JOHNSON: I can answer that, Your Honor.
8 Good morning again.

9 THE COURT: Good morning.

10 MS. JOHNSON: Your Honor, we inadvertently did
11 not include the last decision when we filed it in July.
12 That was our error. So we filed that subsequently, but
13 when we did the filing in July, it included -- the only
14 additional thing was the brief.

15 THE COURT: So in other words, what was filed in
16 July was in fact the -- essentially everything that was in
17 the old administrative record plus the new brief.

18 MS. JOHNSON: Yes, that's correct.

19 THE COURT: So I don't have to go searching for
20 the old administrative records because everything I need
21 is here.

22 MS. JOHNSON: It's here, Your Honor, plus, the
23 additional filing of the decision.

24 THE COURT: Right, okay.

25 MR. GAGNER: I have one preliminary matter, Your

1 Honor.

2 THE COURT: Yes, sir.

3 MR. GAGNER: Candida Ewing Steel, who had been
4 my co-counsel -- who is my co-counsel in this case, has
5 accepted a position as an administrative law judge with
6 the Department of the Interior. Judge Steel is here in
7 the courtroom, but because of 18 U.S. Code 203, the
8 conflict of interest statute, cannot appear as counsel for
9 a party other than the United States of course.

10 Ms. Steel has asked and I therefore move that her
11 appearance in this case be suspended until such time as
12 Congress may act on a private bill that would allow her to
13 continue the representation.

14 THE COURT: Okay. I'll certainly grant that
15 motion that her appearance be suspended.

16 MR. GAGNER: The position is administrative judge
17 with the Board of Contract Appeals.

18 THE COURT: Okay. It's too bad she couldn't have
19 gotten herself appointed to the Board for Correction of
20 Military Records.

21 MR. GAGNER: Yes, Your Honor.

22 (Laughter.)

23 THE COURT: We're here then on plaintiff's second
24 motion for summary judgment, so I guess, Mr. Gagner,
25 you're up.

1 MR. GAGNER: Thank you, Your Honor.

2 This country, Your Honor, was founded on the
3 Constitution which begins "We, the people." We have a
4 delegated government, that is, a government of delegated
5 powers. The people delegated particular powers to that
6 government, and the Constitution sets out how the
7 government must apply those powers and how it must not
8 apply those powers.

9 The decision of Secretary Henry in this case
10 relies on extra constitutional factors, and I'm going to
11 talk a bit about those.

12 It also for the first time classifies Dr. Mudd as
13 an enemy belligerent. It does that because of a case Ex
14 Parte Quirin, which holds that under certain circumstances
15 enemy belligerents can be tried by military tribunals, and
16 the Ex Parte Quirin case contains language that the
17 alleged citizenship of one helped was not critical to the
18 Court's decision.

19 The reason the Secretary's reliance on Ex Parte
20 Quirin is arbitrary and capricious is because that case
21 lays out certain factors of when someone is and is not an
22 enemy belligerent. Dr. Mudd meets none of those factors,
23 not one.

24 We maintain it lays out five factors. The
25 government maintains it doesn't, but they never tell us

1 what it does lay out as a criteria. They say that if the
2 military says a person is an enemy belligerent, then a
3 person is an enemy belligerent. That's the end of it.
4 They have jurisdiction. They can pop him in jail and do
5 away with him or her.

6 The third point is a somewhat more technical one,
7 and it's the case the government raises in their last
8 reply brief. This case of course is here actually on
9 crossmotions. Both parties are asking for a summary
10 judgment, so the government got to go last, and they talk
11 about a case Valadingham, which is a Supreme Court case
12 denying review of the results of the Military Commission.

13 I'd urge Your Honor to read Valadingham. It's a
14 horror case. It's a case where the Military Commission
15 tried a civilian, trampled his rights, and the Court says
16 we can't review it, and the Court is probably correct.
17 The vehicle chosen by Valadingham to have the case
18 reviewed does not permit review.

19 That is, Valadingham applied for a petition for a
20 certiorari. He applied for an appeal. The Court said no,
21 we can't appeal a military -- we can't hear the appeal
22 from military tribunal because a military tribunal is not
23 a court; therefore, we don't have appellate jurisdiction
24 over it. That's exactly correct. They don't.

25 This case arrives here by a different route

1 entirely. The government argues repeatedly that the
2 Federal Courts do not have the power to review military
3 commissions, and that's plainly wrong. Milligan was a
4 case where they could by way of habeas corpus. This case
5 is a case where they can by way of the Administrative
6 Procedures Act.

7 THE COURT: But I'm not really reviewing the
8 decision of the Hunter Commission. I'm reviewing the
9 decision of the Secretary of the Army, aren't I?

10 MR. GAGNER: That's correct, Your Honor. But in
11 coming to a decision whether the decision of the Secretary
12 of the Army was arbitrary, capricious or not according to
13 law, the Court obviously has to determine what the law is.

14 The Military Commission determined it had
15 jurisdiction. The government says it does. If the
16 Military Commission was correct and had jurisdiction, then
17 the Secretary is correct, the ABCMR is incorrect, and the
18 decision is then not arbitrary and capricious. So in that
19 sense, you do have to reach that issue.

20 THE COURT: Well, I'm not sure I see it the same
21 way. It seems to me -- and this was the issue the last
22 time, and why isn't it the same issue this time? Namely
23 to say, whether or not the Secretary acted arbitrary and
24 capriciously.

25 And last time, I said that the Secretary acted

1 arbitrary and capriciously because the Secretary failed to
2 consider relevant evidence in the record and also failed
3 to consider a nonfrivolous argument that had been made.

4 So why isn't the only issue before me whether or
5 not the Secretary has now considered all of the relevant
6 evidence in the record and all of arguments that were
7 made, and based on all that information, reached a
8 decision which is not inconsistent with the evidence in
9 the record?

10 MR. GAGNER: I submit, Your Honor, it also has to
11 be not inconsistent with the law because the
12 Administrative Procedure Act talks about agency actions as
13 being consistent with law.

14 THE COURT: Well, let's deal with that point for
15 a second. I'm still not persuaded that that means that I
16 have to -- that I'm reviewing a decision of the Military
17 Commission as opposed to reviewing a decision of the
18 Secretary of the Army.

19 One of the questions that I have for you and for
20 Ms. Johnson both is if -- to what extent do I defer to an
21 agency decision if that agency decision is based on a
22 reading of a Supreme Court case which is wrong?

23 There's a lot of law about how you defer to a
24 decision of an administrative agency in interpreting a
25 statute, which is one of its organic or governing

1 statutes. There's a lot of law about how you defer to an
2 administrative agency in interpreting its own regulations.

3 But I don't think either of you cited, unless I
4 missed it, any law that talks about whether or not one
5 defers to an agency's reading of case law. There must be
6 some law on that issue.

7 MR. GAGNER: There must be, Your Honor. I
8 thought we had cited it.

9 THE COURT: Well, maybe you have.

10 MR. GAGNER: The answer I submit, Your Honor, is
11 that a Court owes no deference to an agency in determining
12 the meaning of Supreme Court cases or in otherwise
13 determining the meaning of positive law.

14 That is, an agency is particularly qualified to
15 determine the meaning of words of art used in a statute
16 that governs, for example, environmental protection.

17 Under the Railroad Labor Act case which we're
18 litigating, the agency is particularly qualified to
19 determine the meaning of terms in the transportation
20 industry. There's no doubt of that, and the examples of
21 that are countless.

22 But when it comes to interpreting a court case
23 and more particularly when it comes to interpreting the
24 constitutional implications of court cases, the Army has
25 no experience and no training and no authorization which

1 to allow -- which ought to compel or even urge any degree
2 of deference at all. That is our position as you owe no
3 deference to their interpretation.

4 Your Honor's point about reviewing the decision
5 of the Secretary only is a good one, and of course, we
6 agree with it. You are reviewing only the decision of
7 Secretary Henry. This is not an appeal of the Hunter
8 Commission. Plainly, the Court does not have appellate
9 jurisdiction over the Hunter Commission. We agree with
10 that. That's entirely right.

11 We do urge, however, that insofar as the Hunter
12 Commission lacked jurisdiction, that's the particular
13 issue that the board was asked to hear. That's the
14 particular issue that the counsel for the Army prior to
15 that hearing had determined that the board could hear and
16 could resolve; and therefore, that's the decision that
17 Secretary Henry had to review, and that's how the case
18 arrives here.

19 It's analogous to habeas corpus. The case does
20 not arise here on direct review. It arises here by way of
21 the Administrative Procedures Act, by way of the statute
22 that created the ABCMR.

23 I'd like to return briefly to where I started.
24 That is, why the government's position is inimical to
25 constitutional government. The government is arguing that

1 the military gets to decide when military commissions have
2 jurisdiction, and their original brief contains several
3 paragraphs about that.

4 If that is true, then the Bill of Rights has
5 little meaning. The President could at any time declare a
6 national emergency. The President could at any time
7 declare that a person is an enemy of the state and enemy
8 of the military and go after them. There was a challenge
9 to that. The President could say no, no, it's a military
10 commission.

11 Now I believe even the government would agree
12 that Quirin requires it be in wartime, but the dangers in
13 wartime are no less. In fact, they may be greater than
14 the dangers in peacetime of that kind of activity.

15 When the people founded the Constitution, they
16 had no idea, I think, that that argument would ever be
17 made. When they passed the Bill of Rights, they had no
18 idea that the executive would say no, we can have the
19 military go pick people up and try them for various
20 offenses and call them war offenses.

21 We have not argued this time because we argued in
22 the prior briefs that the act of -- that the acts which
23 Dr. Mudd was accused of doing, that those acts are not law
24 of war violations. We argued that in the prior briefs.
25 We'd ask that those be incorporated. We didn't argue them

1 again.

2 In this brief, we primarily raised the point that
3 the status of Dr. Mudd, that is, that he met none of the
4 Quirin factors, was what made it arbitrary and capricious.
5 In the cases that followed the Quirin decision and the
6 cases that followed Milligan and Duncan and those cases,
7 they make it very plain that Quirin was a special case.

8 Quirin was a member of the German military. He
9 had been trained in Germany by the German military. He
10 entered the United States illegally as a member of the
11 German military, and he then did things which are not
12 permitted. He buried his uniform, which is a violation of
13 the law of war. He engaged on a campaign of sabotage,
14 didn't achieve any, but he engaged on that campaign, which
15 is a violation of the law of war.

16 I think what Quirin stands for -- insofar as it's
17 correctly decided, what it stands for is that a person who
18 becomes a member of a foreign military and then violates
19 the law of war subjects himself or herself to the
20 provisions of the law of war. The act of becoming a
21 member of the military does that, and that's what Quirin
22 did.

23 With that and the briefs, Your Honor, I submit
24 that the decision was no less arbitrary than the prior
25 decision, maybe more so, and it ought to be reversed.

1 We puzzled a little bit over the remedy to ask
2 for this case has been pending in the administrative
3 review phase for eight years. The Army has got an
4 incorrect -- before we submit they got it incorrect again.
5 We ask that if the case that the Court lay out the law in
6 the area for the Army that the Secretary review it but
7 that a time limit be put on that review.

8 THE COURT: Before you sit down, I have one more
9 question.

10 MR. GAGNER: Yes, Your Honor.

11 THE COURT: I just want to be clear on this. Is
12 your argument that the Secretary misapplied Quirin, the
13 Supreme Court decision in Quirin to the facts of this
14 case, or is your argument that Quirin doesn't apply at
15 all?

16 In other words, is there a conflict between
17 Milligan and Quirin and is the argument that Milligan
18 applies, or is it agreed that Quirin might apply but that
19 there are certain criteria that have to be met under
20 Quirin and its progeny in the Supreme Court that haven't
21 been that?

22 MR. GAGNER: Frankly, Your Honor, I was hoping
23 you wouldn't pin me down like that.

24 Our first position is that Quirin is either badly
25 written or badly decided. It's a hard case to read.

1 THE COURT: Well, I can't help it if it's badly
2 decided. That's the Supreme Court.

3 MR. GAGNER: That's correct, Your Honor, but that
4 is our position insofar as it says a civilian -- the
5 status of being a civilian is irrelevant. Insofar as it
6 says that, it's inconsistent with Milligan. It's
7 inconsistent with Duncan. It's inconsistent with all the
8 cases that follow it and precede it.

9 Having said that, we argue first that Quirin can
10 be interpreted in a way that makes it not applicable to
11 this case. Quirin was a law of war case.

12 The Mudd case is a more difficult one because
13 Mudd was never told and the Commission never determined
14 under exactly what theory that they were trying Dr. Mudd.
15 We established -- before the board, we established that it
16 could not have been under a martial law theory because
17 martial law wasn't really in effect in the District of
18 Columbia or if in effect was only partial martial law as
19 Dr. Horbaly talked about during his testimony.

20 We established that it could not be under a
21 military government theory because obviously there wasn't
22 a military government. We established that it was not
23 under the law governing the military governing its own,
24 and the only box remaining, therefore, that it could have
25 been under was law of war jurisdiction.

1 That is not to say at all that we argued that the
2 government had jurisdiction under law of war.

3 THE COURT: I understand that.

4 MR. GAGNER: Okay. So we're saying it doesn't
5 apply.

6 If it does apply, then we're saying that to
7 determine that Mudd was an enemy belligerent is arbitrary
8 and capricious because he meets none of the factors, none
9 of the factors laid out in Quirin.

10 If I could suggest to the government what they
11 might answer is what factor he did meet. What is the test
12 of whether someone is an enemy belligerent or not?

13 Now I hope I haven't dodged Your Honor's question
14 again. I tried to answer it.

15 THE COURT: No. I appreciate it. Thank you.

16 MS. JOHNSON: Your Honor, since I was assigned
17 this case, Major Jim Agar of the Army has been an active
18 and important member of our litigation team, and he is
19 going to present the argument for the government on our
20 crossmotion for summary judgement and in opposition to the
21 plaintiff's motion.

22 THE COURT: Can I get your name again, Major.

23 MR. AGAR: Good morning, Your Honor. My name is
24 Major Jim Agar, spelled A-G-A-R.

25 THE COURT: Go ahead, sir.

1 MR. AGAR: Your Honor, to address the questions
2 you first brought up to opposing counsel, the government
3 believes that Quirin is applicable to this case and the
4 Secretary's reliance thereof was appropriate.

5 Furthermore, we would point out that if there is
6 in fact a misinterpretation as to the law in this case
7 that that is an issue which cannot be addressed under the
8 Administrative Procedure Act because it is a question of
9 law that pertains to a military commission, and we refer
10 this Court --

11 THE COURT: I can't accept that. I just think
12 that's got to be wrong. That's got to be wrong.

13 You can't tell me that I have to defer to the
14 Army on how to read a Supreme Court decision if that's
15 what you're saying.

16 MR. AGAR: No, Your Honor. But in the terms of
17 the question as to whether or not the Hunter Commission
18 had jurisdiction, that issue would be a matter that cannot
19 be touched by the Court because military commissions are
20 prescribed from review under the Administrative Procedure
21 Act.

22 THE COURT: So why are we here and why were we
23 here last time?

24 MR. AGAR: Well, Your Honor, the last review was
25 a review of the Secretary's decision. This Court still

1 has jurisdiction to review the Secretary's decision in
2 regards as to whether the Secretary's decision-making
3 process was deficient, not whether the decision itself may
4 be incorrect.

5 THE COURT: What if it's otherwise inconsistent
6 with the law, which is what the APA says?

7 MR. AGAR: If this Court would find that it is
8 inconsistent with the law and that the Hunter Commission
9 did not have jurisdiction, which would have to be the
10 finding of this Court --

11 THE COURT: I don't think that would have to be
12 the finding. I think the finding would be that it's
13 inconsistent with the Supreme Court's decision in Quirin.

14 MR. AGAR: Our argument would be, Your Honor,
15 that under those circumstances that would be review of the
16 jurisdiction of the Military Commission.

17 THE COURT: See, I just don't follow the
18 argument. I just don't follow that argument. I read that
19 in your brief, and I said this can't possibly be right.

20 You cannot tell an Article 3 Judge that he has to
21 defer to the Secretary of the Army on the Secretary of the
22 Army's reading of a Supreme Court decision. Cite me a
23 single case that says that I have to defer to the
24 Secretary of the Army or anybody else on the reading of a
25 Supreme Court decision.

1 MR. AGAR: Your Honor, I have no such authority
2 before me.

3 THE COURT: Okay. Probably because there is
4 none.

5 MR. AGAR: However, there in fact is no case law
6 where the Military Commission has been reviewed by a
7 Federal District Court using any other vehicle but the
8 writ of habeas corpus. That is not before the Court
9 today.

10 THE COURT: You're talking in circles. We're
11 here under the APA. You conceded that jurisdiction long
12 ago in this case. You conceded that the Board for the
13 Commission for the Review of Military Records had the
14 authority to look at whether the Hunter Commission had
15 jurisdiction.

16 You conceded that they had the authority. The
17 Secretary reviews it. You conceded that I had authority
18 under the Administrative Procedure Act. That's why we're
19 here.

20 Now if I find that the Secretary's second
21 decision is arbitrary and capricious because he misapplied
22 the law, that he misread Supreme Court precedent, that's
23 not a review of the Hunter Commission. That's a review of
24 the Secretary's decision under the APA.

25 MR. AGAR: Your Honor, getting to that question,

1 the issue before this Court is precisely that, whether the
2 Secretary of the Army decision of March 6th, 2000 was
3 arbitrary or capricious.

4 We would point out to the Court in the remand
5 order of October 29th, 1998, this Court directed two
6 specific objectives on the part of the Secretary of the
7 Army.

8 The first is that the Court or rather the
9 Secretary consider the issue of Dr. Mudd's citizenship in
10 Maryland, which was then a non successionist state and
11 while the civilian courts were open; and the second was
12 that matters outside the record not be considered by the
13 Secretary of the Army as had been done before.

14 The Secretary of the Army through his adjutant
15 Assistant Secretary of the Army for Manpower Reserve
16 Affairs, Mr. Patrick Henry, rendered his decision on
17 March 6th, 2000, and that decision, Your Honor, squarely
18 comported with this Court's remand order and thoroughly
19 reviewed the issues identified by this Court.

20 In reviewing those issues, the Court did examine
21 also the Supreme Court case of Quirin versus Cox, which
22 this Court and opposing counsel have already referred to.
23 Nevertheless, Your Honor, opposing counsel have not met
24 their burden of demonstrating that the Secretary's
25 decision in this case was arbitrary and capricious.

1 First, because it complied with the remand order.
2 Second, because the Secretary fully considered the entire
3 administrative record before this Court today. And third,
4 because there may be reasonable disagreement as to the
5 interpretation of the law, the Secretary's wide latitude
6 of discretion as permitted in case law cited by both
7 counsel and by the Court would permit a ruling on behalf
8 of the government that the Secretary's decision was
9 neither arbitrary or capricious.

10 Your Honor, the burden of proof in this case is
11 by clear and convincing evidence, and the burden squarely
12 lies on the shoulders of the plaintiff. In that regard,
13 they have brought forward a number of different matters
14 claiming that the Secretary's decision was somehow
15 arbitrary and capricious. They are questions of law as
16 opposed to arbitrary or capriciousness, and they deal
17 squarely with the interpretation of Quirin.

18 The first, as was pointed out by cocounsel -- or
19 opposing counsel, was that Dr. Mudd was supposedly not an
20 enemy belligerent because he was not affiliated with the
21 Confederate States of America.

22 But Your Honor, the Supreme Court language in
23 Quirin is very broad. It does not use the term "soldier"
24 or "combatant." The express term "belligerent" is
25 utilized by the Court envisioning the possibility that

1 civilians, citizens of the United States can be tried by
2 military commissions for violations of the law of war.

3 Now my opposing counsel has said that's the
4 Army's decision and the Army decides who is tried and who
5 is not. No, Your Honor. It is the decision of the
6 Executive Branch, and in this particular case, it was the
7 decision of our Commander in Chief at the time President
8 Johnson who determined that a military commission was
9 appropriate. This is the same president who later went on
10 to pardon Dr. Mudd.

11 Now the interpretation of Quirin by the Secretary
12 is such that a civilian could under limited circumstances
13 be brought before a military commission for the purposes
14 of trying crimes in violation of the law of war. Your
15 Honor, today there is precedent for that. Rauteman
16 Korotic, Solmadon Milosevitch currently are indicted as
17 war criminals. They are civilians, Your Honor.

18 THE COURT: They're not under the U.S.
19 Constitution, though.

20 MR. AGAR: That is correct, Your Honor.

21 THE COURT: I think that's totally irrelevant. I
22 thought that part of your brief was totally irrelevant.

23 MR. AGAR: Your Honor, it deals with the common
24 law, which the Supreme Court referred to both in Quirin
25 and also in Milligan in terms of whether or not this

1 constitutes a war crime. There is a precedent being set
2 in current modern law.

3 But Mudd's crime were indeed law of war
4 violations, Your Honor, because he is charged with being a
5 coconspirator in aiding and abetting those who would have
6 assassinated the Commander in Chief of the Union Army and
7 Navy, and that was expressly put forward in the charge
8 against Dr. Mudd in the administrative record at page 410.
9 That charge constitutes a military crime.

10 Now there has been talk by opposing counsel that
11 the Secretary's interpretation of Quirin is contrary to
12 law and how could this be a military crime or a law of war
13 violation. But Your Honor, a Federal District Court has
14 reviewed this question, and Judge Boyton's opinion back in
15 1868 pursuant to the writ of habeas corpus brought by
16 Dr. Mudd himself ruled that this was a military crime,
17 that the germ of this crime, Your Honor, was to eliminate
18 the Commander in Chief of the Armed Forces of the United
19 States. That constituted a military crime, that Dr. Mudd
20 was properly before a military tribunal.

21 The question for the plaintiff is this: How
22 could the Secretary of the Army's decision be contrary to
23 law when the only Federal District Court to directly rule
24 on the jurisdiction of Dr. Mudd under the Hunter
25 Commission has ruled that the Secretary's decision was

1 indeed in accordance with the law?

2 The Secretary relied on that specific decision.
3 He also relied on the interpretation of Attorney General
4 Speed, who also found that this was a war crime under the
5 law of war, that it was indeed a military crime. Based
6 upon that and the interpretation of Quirin, the Secretary
7 came to the proper conclusion that this was a law of war
8 violation.

9 THE COURT: Remind me again, obviously, at the
10 time of Judge Boyton's decision, Quirin was not on the
11 books. It came along much later in history. Was this
12 just before or just after the Supreme Court decided
13 Milligan?

14 MR. AGAR: It was after Milligan. In fact, Judge
15 Boyton directly addressed the applicability of Milligan in
16 this case and determined that Milligan was not applicable
17 precisely because it was a military crime. It was a law
18 of war violation.

19 THE COURT: I have read Boyton's decision but not
20 recently, so I appreciate that.

21 MR. AGAR: Understood, Your Honor.

22 Your Honor, there have also been some other
23 assertions brought forward by opposing counsel that this
24 was supposedly not a time of war. Suscittion of
25 hostilities had certainly commenced. There had been the

1 surrendered Appomattox. There was certainly the breaking
2 out of peace, but not all confederate units had yet
3 surrendered. And furthermore, the insurrection itself was
4 not declared at an end until 1866, over a year after
5 Dr. Mudd had been tried and convicted.

6 That is significant because as we cited in In Re
7 "Umoshida," United States Supreme Court in 1946 stated
8 that it is incumbent on the political branch of the
9 government, specifically Congress in the Executive Branch,
10 to determine when peace is proclaimed, and that determines
11 when the state of war has ended and when jurisdiction of
12 military commissions terminates. In this case, Your
13 Honor, that occurred well after the time frame when
14 Dr. Mudd was tried.

15 Your Honor, there is significant support in the
16 law for the Secretary's decision. He did not decide it in
17 his decision. However, it remains on the books to this
18 day. We of course refer to Ex Parte Valadingham in which
19 the Court said we uphold this jurisdiction of a military
20 commission for what were inarguably less military crimes
21 or certainly less a violation of the law of war than what
22 Dr. Mudd did.

23 All the party did in Ex Parte Valadingham is
24 claim to be against the war, to be something of a pacifist
25 in fact and speak out against United States government and

1 the war, and for that reason, he was convicted by a
2 military commission and sent beyond the lines into
3 confederate territory.

4 But that conviction was nonetheless upheld by the
5 Supreme Court primarily because he didn't pursue a writ of
6 habeas corpus. Nonetheless, the jurisdiction of the
7 Court -- of the tribunal was respected.

8 We would also point out, Your Honor, that there
9 are two requests for relief that have been made by the
10 plaintiff in this case. The first is an order to the
11 Secretary of Army to set aside Dr. Mudd's conviction and
12 expunge his records from the Archives of the United
13 States.

14 The second is a declaratory judgment finding that
15 Dr. Mudd's conviction at the hands of the Hunter
16 Commission was in violation of the due process clause of
17 the Fifth Amendment.

18 Your Honor, this Court has already reviewed those
19 two basis for relief and stated that the Court has no
20 jurisdiction for those two particular forms of relief.

21 THE COURT: I thought we were in agreement that
22 those questions were not back before me. I thought we
23 were in agreement, although there was some disagreement
24 earlier about whether or not, if I have my counts right,
25 Count 2 and 3 were still alive and well.

1 I believe that Count 1 dealt with whether the
2 original decision of the Secretary was arbitrary and
3 capricious and I remanded on that. I dismissed Counts 2
4 and 3, which I think are the counts you're referring to
5 now. And then there was an amendment to the complaint
6 which added a Count 4 to deal with Secretary Henry's more
7 recent decision.

8 So Count 2 and 3 are gone. Count 1 was remanded,
9 and it's come back, but I really think that the only issue
10 I need to deal with is Count 4.

11 MR. GAGNER: We agree with that, Your Honor. The
12 dismissed counts are not before Your Honor at this time.

13 MR. AGAR: Am I to understand, Your Honor, that
14 the request for relief does not deal with either an order
15 to set aside Dr. Mudd's conviction or declaratory
16 judgement in this case?

17 THE COURT: Well, I'm not sure whether Count 4
18 asks for a declaratory judgement or just for -- exactly
19 what it asks for.

20 But as I understand it, the only thing we're here
21 talking about is whether or not Secretary Henry has
22 violated the Administrative Procedure Act. I think that's
23 all we're here about.

24 We dealt with whether Secretary Lister violated
25 the Administrative Procedure Act. That was the thrust of

1 the remand. I dismissed the other two counts. I think
2 the plaintiffs either tried to or arguably tried to raise
3 the other two counts, which are the ones I think you've
4 just eluded to, and in my opinion or order of a few months
5 back -- you may not have been as involved in the
6 procedural back and forth, Major, but I think I -- I tried
7 to make clear in that order that the issues you've just
8 raised are not before me at this point.

9 MR. AGAR: Very well, Your Honor.

10 THE COURT: Just Secretary Henry's decision.

11 MR. AGAR: Very well, Your Honor.

12 Your Honor, we implore the Court to look at the
13 case of Ex Parte Valadingham.

14 We also -- in regards to the issue of the treason
15 matter that was brought before this Court in plaintiff's
16 brief, we would also ask the Court to look at the fact
17 that that is a matter of discretion on the part of the
18 Executive Agency, and that the Executive has the
19 discretion to determine whether or not treason is charged,
20 and that's purely a discretionary matter.

21 In this case, the Chief Executive determined that
22 it was appropriate, that this was a law of war crime and
23 should be brought before the military commission as
24 opposed to perhaps a civil jury. Though, our position is
25 such, Your Honor, that there is concurrent jurisdiction

1 here.

2 We acknowledge there's a possibility that
3 Dr. Mudd could have been tried in a civilian court, but it
4 is not the exclusive remedy available to the Executive
5 agency because of the unusual nature of the crime
6 committed by Dr. Mudd and the other coconspirators in
7 Lincoln's assassination.

8 THE COURT: So I mean is that argument -- is that
9 argument that the Executive has a choice of a civilian
10 court or a military court, but if he chooses the military
11 court, he has to meet the requisites, whatever they are,
12 for law of war jurisdiction?

13 MR. AGAR: That is correct, Your Honor. Absent
14 those prerequisites, there would be no jurisdiction for
15 the military commission and then the civilian courts would
16 be the sole remedy.

17 For example, if it were not a time of war and the
18 Commander in Chief were assassinated, such as occurred
19 with Presidents McKinley and Garfield, then the civilian
20 courts would be the sole forum that could then try that
21 case.

22 THE COURT: So I mean basically what you're -- I
23 take it then that you and the plaintiffs are at this point
24 at least in agreement and maybe always were in agreement
25 that there are only four bases for military courts to have

1 jurisdiction and that when you analyze them this is the
2 appropriate basis to look at, law of war jurisdiction, not
3 any of the other three; and the only difference between
4 you is whether or not the necessary predicate for a law of
5 war jurisdiction was appropriate at that time.

6 MR. AGAR: That is correct, Your Honor. We
7 concur with that, and the Secretary in his opinion on
8 March 6th, 2000 asserted law of jurisdiction and not
9 marital law jurisdiction as the basis for the Hunter
10 Commission.

11 THE COURT: Right. Therefore, the question is
12 whether or not the Secretary in reviewing the Hunter
13 Commission's determination and rejecting the
14 recommendation of the Board for Correction of Military
15 Appeals was within the range of reasonableness as opposed
16 to being arbitrary and capricious.

17 MR. AGAR: That is correct, Your Honor. And in
18 reading Quirin versus Cox, it is clear that the
19 Secretary's interpretation would be supported by the case
20 law.

21 Your Honor, we would submit that the government
22 and the Secretary of the Army have not acted arbitrary or
23 capriciously in the capacity of the decision on March 6th,
24 2000. The Secretary's decision is sound, that it is
25 supported by the law in this case and by the

1 administrative record which we submitted to this Court.

2 We submit that the Secretary properly determined
3 that the Hunter Commission had jurisdiction over Dr. Mudd
4 because of the nature of his crimes, and because of the
5 nature of his crimes, as the Federal District Court in
6 Florida pointed out with Judge Boyton, a military
7 commission could assert jurisdiction under the law of war
8 because of this nature of the military crime.

9 Because the Secretary relied on Quirin, because
10 the Secretary relied on Judge Boyton's opinion and because
11 the Secretary complied with this Court's remand order, the
12 decision by Secretary Henry is in complete accordance with
13 the law in this case, and we respectfully request that
14 this Court grant summary judgement in favor of the
15 defendant. Thank you, Your Honor.

16 THE COURT: Thank you, Major.

17 Mr. Gagner.

18 MR. GAGNER: Thank you, Your Honor. I actually
19 join with the government in yet another issue, which is
20 urging the Court to read Valadingham, which is the case
21 that they seem to be relying on.

22 The case goes to the method by which -- cases in
23 controversies have to arrive in the courts in order for
24 the courts to have jurisdiction. That's all it deals
25 with. It does not deal with the jurisdiction of military

1 tribunals at all, and it says not one word about the
2 jurisdiction of military tribunals.

3 The case arrived on a petition. The petition
4 wasn't appealed. The case wasn't in appeal, and the Court
5 said we're a government of limited powers. The courts
6 have been delegated limited powers. Because of that, we
7 can't hear this case. It's outside of what the
8 Constitution gives us.

9 That's the problem with the Army's position in
10 this case. There are no limits on the powers that the
11 Army claims the Executive Branch has. The case, they say,
12 is up to the decision of the Executive Branch. I said the
13 Army. They say the Executive Branch. In my view, there's
14 little difference.

15 The President does not get to decide who the
16 Constitution applies to, who gets the protection of the
17 Bill of Rights. The President doesn't have that power and
18 never has. That's why the decision of Judge Boyton was
19 incorrect.

20 As we went around on last time, the decision of
21 Judge Boyton was in a habeas petition, that was dismissed
22 on appeal because of muteness and as is the case in --
23 that kind of cases, that's not binding precedent on this
24 Court.

25 Judge Boyton in his written opinion appears to

1 incorporate some of the language in Attorney General
2 Speed's opinion regarding military jurisdiction and
3 necessity and the law of necessity. And over the weekend,
4 we were on vacation, and I took the administrative record
5 along with me and I read Judge Speed's opinion again.

6 THE COURT: Attorney General Speed.

7 MR. GAGNER: I'm sorry, Your Honor, Attorney
8 General Speed's opinion.

9 THE COURT: His one-page opinion or the longer
10 one?

11 MR. GAGNER: No. There was a longer one, and the
12 more I read it, the more nefarious it became.

13 It claims that the military is the backstop
14 authority of government, that in cases of necessity it
15 takes over and it rules because it can. And that's what
16 the government is arguing here, that the Executive makes
17 the decision who is charged. They decide what they're
18 charged with.

19 The reason we talked about treason in our brief
20 and whether Dr. Mudd was de facto charged with treason is
21 because the Constitution provides for the punishment of
22 one crime only. That is, it only mentions one crime, and
23 it talks about what happens in that case. It defines
24 treason as giving aid and comfort to the enemy or adhering
25 to the enemy, which is exactly the language that's used in

1 the charge against Dr. Mudd.

2 In any Article 3 Court, that count would have
3 been treason, and because the Constitution requires a
4 certain evidentiary standard in treason cases, he would
5 have been entitled to it.

6 Because the Executive, according to the Army,
7 gets to pick who to charge and what to charge them with,
8 Dr. Mudd gets none of those protections. That's why --

9 THE COURT: Well, the Executive always picks who
10 to charge and what to charge them with. The question in
11 this case -- I mean that's just --

12 MR. GAGNER: Who to charge -- well --

13 THE COURT: But I thought the issue in this case
14 was in this case they also got to pick in what forum to
15 charge the person and that one forum has fewer protections
16 than the other forum.

17 I mean the point of --

18 MR. GAGNER: Yes.

19 THE COURT: The prosecutor always decides whether
20 to charge first degree murder or second degree murder or
21 whether to charge treason or something less than treason.
22 But once they make that decision, certain consequences
23 follow.

24 This case is not about that I take it so much as
25 it is about a choice of forum and one forum has fewer

1 protections than another forum.

2 MR. GAGNER: That's correct, Your Honor. With an
3 Article 3 Judge looking over the shoulder of the
4 prosecutors, some choices don't last very long. And in
5 that sense, the --

6 THE COURT: That was even more true before the
7 Sentencing Guidelines.

8 MR. GAGNER: It was, Your Honor. That's true.

9 The final point I'll make is that I asked the
10 government, both in the brief and here, to point out why
11 it was that Dr. Mudd was an enemy belligerent. That is,
12 this goes to the arbitrary and capricious part. This
13 doesn't -- well, it may go to contrary to law, but it
14 definitely goes to the arbitrary and capricious part.

15 How do we know that Dr. Mudd was an enemy
16 belligerent? What piece of evidence, what tiny shred of
17 evidence is there in the entire administrative record that
18 Dr. Mudd was an enemy belligerent?

19 The answer was well, he was charged with a
20 heinous crime, that of assassinating the Commander in
21 Chief, but there's not one shred of evidence that he in
22 any way allied himself with the confederate forces, and in
23 the entire administrative record, there's not one shred of
24 evidence that he crossed enemy lines. None of the things
25 that Quirin talks about are there.

1 The only answer the government had is well, we
2 charged him, that is, the Executive chose to charge him
3 with a heinous crime, and that's the essence of arbitrary
4 and capricious.

5 THE COURT: Wasn't the crossing of enemy lines or
6 the lack thereof a slightly different issue during the
7 Civil War than it was during War World II? I mean --

8 MR. GAGNER: It would have been except for the
9 case of Holt who arguably was a U.S. civilian under
10 Quirin.

11 THE COURT: But -- well, it seems to me that
12 during the Civil War there may have been lots of people
13 that were -- that never left a union state, for example,
14 who were in fact aligned with the confederacy or vice
15 versa.

16 MR. GAGNER: But they didn't commit an act of --
17 act of war of violations. The act of war of violation
18 that Quirin talks about is that Quirin was a member of the
19 enemy military who behaved in an impermissible military
20 way. That is, he violated the laws of war, which require,
21 among other things, you leave on your uniform. That's why
22 Quirin was a law of war case.

23 Nothing about Mudd made it a law of war case. No
24 contact with the enemy forces, nothing.

25 THE COURT: Okay. Do you have anything you want

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1 to add, Major?

2 MR. AGAR: Yes, Your Honor.

3 Your Honor, in regard to the issue of whether a
4 military commission must be formed or a charge of treason
5 must be brought in civilian court, we implore the Court to
6 look at the case of Colepaugh versus Luney. The citation
7 is 235 F2nd 429.

8 THE COURT: How do you spell the first name?

9 MR. AGAR: C-O-L-E-P-A-U-G-H, Colepaugh versus
10 Luney, 235 F2nd 429. It's a 1956 case in which a person
11 was charged for law of war crimes under -- by a military
12 commission as opposed to being brought into treason, the
13 exact same arguement being brought by opposing counsel
14 here.

15 The Tenth Circuit ruled that's a matter under the
16 circumstances for the Executive Branch to decide what is
17 charged and what forum to try it under under the
18 circumstances.

19 Your Honor, also, The gravamen of the offense in
20 the Quirin case was specifically that they had crossed
21 enemy lines. Here the gravamen of the offense is
22 different. This is providing, number one, being involved
23 in a conspiracy; but number two, aiding and abetting an
24 attempt on the life of Secretary Seward, also the
25 assassination of President Lincoln, a potential attempt on

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1 General Grant, and a possible attempt as well on then Vice
2 President Johnson.

3 So the gravamen of the offence is different from
4 that in Quirin, but we also submit the gravity of that
5 offense is far greater than anything that was accomplished
6 in the Quirin case.

7 Therefore, Your Honor, we respectfully request
8 that this Court grant summary judgment on behalf of the
9 United States Government.

10 THE COURT: Well, thank you all very much. Here
11 we are again, round two for you. For me round two. For
12 you, many more rounds than round two I guess. This has
13 gone on for a very long time, and so I will do my best to
14 decide it as soon as I can.

15 (Whereupon, at 10:30 a.m., the hearing was
16 adjourned.)
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CERTIFICATE OF REPORTER

I, Cheryl Kay Gerber, Court Reporter, do hereby testify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true record and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

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