2006

The Last Civilian Court—Martial and Its Aftermath

Roger J. Miner '56

The Last Civilian Court Martial
And Its Aftermath

I believe that George E. Mounty was the last American civilian tried by general court-martial. The trial was held from over a period of four days in August 1958 at Camp Red Cloud, I Corps (Rear) Headquarters, Uijongbu, Korea. The story of the court-martial is a cautionary tale for it demonstrates the limitations and rigidity of the military justice system. Its echoes are heard in recent Congressional legislation providing for federal court jurisdiction over civilians who commit offenses while accompanying the armed forces as employees or dependents. The case has remained in my mind for nearly five decades, because I conducted the defense of Mr. Mounty during the course of my service in the Army as an officer in the Judge Advocate General Corps. (JAGC)

My path to the defense of Mr. Mounty commenced with my graduation from New York Law School and admission to the New York bar in 1956. Having been deferred from the draft during my student days, I soon found myself the recipient of the inevitable notice that I had been selected to serve my country. (Why they called it "selective service" I have no idea. They did not seem to be very selective in choosing me). As an enlisted man, I received basic military training at Fort Knox, Kentucky, then after the center of armored warfare training. After basic training,

2A

The basic training experience that stands out in my mind was a disciplinary punishment imposed on me by the first sergeant of my basic training company. It seems that I demonstrated a lack of understanding of the use of sanitary facilities during a field maneuver. For this transgression, the sergeant directed me ~~the punishment imposed was~~ to use my entrenching tool (a small shovel carried in a soldier's backpack) to dig a 6x6 hole. Apparently soldiers knew this to mean a hole 6 feet long, 6 feet wide and 6 feet deep. I dug a hole 6 feet long, 6 feet wide but only 1 foot deep when the company commander (CO) advised me that I was done. I told him that my hole was the same as the sergeant's hole and not a 6x6x6, and that he did not specify the depth of the hole. The CO opined that I was correct and ordered me to dig my hole deeper. I was a 5'4" sergeant with a "bad back" and he replied that I was an ass-kicking sergeant - 6'4" large. I was to meet the CO once again when I finished the demerit work. I was relieved to report that I had finished my punishment just prior to my graduation as a corporal. I had applied by a combination of 5'4" sergeant and 6'4" large assets.

Came home on leave for two weeks after basic training before I left for Korea.

the 510th Quartermaster Company,

I was assigned to the 510th Q.M. Co., Fort Lee, Virginia. Soon after I drove up to the unit headquarters, I observed a sign out front: "510th Q.M. Co. (BKRY)." I naturally assumed that this was an important Army unit, perhaps dealing with intelligence matters, for which I was probably well qualified by my educational background. Much to my consternation, I learned that BKRY meant bakery, and that the unit was to go into the field, train a large force, and produce that force's entire subsistence while on the battlefield. CO of the unit, Captain [illegible], then informed me that I was designated Executive Officer of the Company Chef responsible for the Bakery. He said that my highly educated [illegible] would be most appropriate.

Just prior to my induction as a draftee I had applied for a Reserve commission in the JAGC and I heard nothing while I filled my application out on a [illegible] afternoon in November 1956 at Fort Lee. I was then [illegible] to the 510th Quartermaster Company, advised that my commission had come through and selected me to be promoted from the rank of Private E-1 to First Lieutenant in one fell swoop by virtue of the "Act of Congress" commonly known as "an officer and gentleman by Act of Congress" which added an additional three years to my military service. The CO of the 510th advised that "it would no longer be necessary" for me to reside in the enlisted men's barracks and that I should go home

#

occurred on January 1 1952. The incident involved the shooting of a Japanese woman, Noka Sakai, whose ~~was killed during Catalina Corps~~ body was found on Hamilton Island by Lt William L Leonard of the 8th Cavalry Regiment. Leonard was the only known witness to Mrs Sakai's death, and he had not actually seen who had fired the shots. Many Commonwealth servicemen were outraged that Leonard could be tried by a Japanese court rather than by court-martial. In November 1947, the Japanese court handed down a three month suspended sentence, but Leonard and his Japanese wife were permitted to leave the country less than a month later. The head of the Claims Service, Lt Col Joseph L Harsley, who was one of the few Commonwealth officers who was fluent in Japanese and Ainu customs and dialects not only cooperated with the Sakai family but also expressed sympathy and drew attention on behalf of the United States to accounts such Japanese courts

I also sought much enjoyment from my time in the Claims Service, especially the interaction with officers of the Government of Japan as well as with the Japanese Kempeitai (Police) who were employed by the Claims Office to help me with the law of customs of Japan. However, I also enjoyed my time with the beautiful Japanese ladies and my colleagues

G(AAHC)

[illegible] upon myself for new assignment - The Judge Advocate General's School at Charlottesville, Virginia. My prior military service enabled me to avoid [illegible] or earlier military orientation program provided to my fellow students, [illegible] who came [illegible] then commissioned directly from [illegible] I took upon [illegible] telling them that they had not [illegible] and I took [illegible] after a [illegible] three month course in military law, [illegible] I was certified as competent [illegible] court martial [illegible] and was ready for my [illegible] assignment as a JAGC Officer. That assignment brought me to Camp Zama, Japan [illegible] in March 1952. Camp Zama, then was Headquarters of the Central Area Army, Far East and the Eighth Army, and later Headquarters for Central Area Army, Japan. From March 1952 to April 1954 I served with the 1st Army Claims Service, Far East, at Camp Zama. My duties included the processing and adjudication of claims submitted to the Service under the authority of the Administrative Agreement between the United States and Japan. The Administrative Agreement decreed not only that claims against the Central Area Army of Japan but also against [illegible] Japan and American service personnel [illegible] An incident that came [illegible] with Central

location
25 mi SW of Tokyo

If they served [illegible] remember, as a Judge Advocate I supervised the [illegible] appeals I [illegible] and worked [illegible] law.

on my exploration of the dump-forces of eight
or seven of Tokyo or Yokohama. I was finally returned
home, at expiration to begin my descent contract my
first born. I soon got my wish in the form of an
order transferring me to the office of the Staff Judge
Advocate, 7th Infantry Division, Camp Casey, Uijongbu, Korea.

Camp Casey was about 30 miles north of Seoul (main thoroughfare)
Seoul along a dusty dirt road known as Route 4 5 P.M.
July 27 '53 By the time I arrived - April 1953, the truce there
had ended the Korean war had been in place for over
3 years. The country still was in a devastated
condition, as a large American troop presence remained. The
small and village of Tongducheon lay outside the
gates of Camp Casey which was largely composed of a series
of quonset huts of different sizes. The JAG office was housed
in one such structure and had no partitions. [illegible]
[illegible] duties as Assistant Staff Judge Advocate, 7th Infantry
Division may duties included appearing as counsel in general
court-martial, rendering legal assistance and rendering
board action and pre-trial court-martial. The Staff Judge
Advocate for the Division was Lt Col Jackson K
Judy of Tampa, Florida, who desired a small staff of
JAGC officers including me. [illegible]
office In a glass case hanging on a wall in our office was
a copy of the Manual for Court-Martial in which there was
some changes were embedded during the late
hostilities. The Manual was at least good for stopping
shrapnel.

I finally attained my long sought-after goal and began trying general court-martial cases soon after my arrival at the 7th Infantry Division. The serious felony cases are tried by general court-martial, the less serious by special court-martial or Article 15 disciplinary proceedings. JAGC lawyers generally are not in attendance for the latter two types of proceedings. I was assigned prosecution as well as defense work and for the most part worked accident, stealing, assaults, larceny, absence without leave, ~~[illegible]~~ disobedience of orders ~~[illegible]~~ and black market trading. Drunkenness was a common cause of the offenses prosecuted. ~~[illegible]~~ For my first two cases, I was assigned as trial counsel (prosecutor), ~~and [illegible] promptly proceeded to~~ when they resulted in not guilty findings, Cole Judge, ~~who had recommended prosecution to the Commanding General whose~~ became apoplectic and assigned me to defense work for sometime thereafter. It seems that the Commanding General, whom he attended each day, chided him about referring the cases for trial. In my own defense I must say that the losses were largely attributable to the failure of Korean witnesses to identify the accused serviceman. In the words of one of my witnesses "They all look the same to me."

~~[illegible]~~

After only about 4 months of being trial experience, ~~[illegible]~~ Cole Judge based on the assignment

[illegible] [illegible] [illegible] [illegible]

that the recent events have refreshed in my memory. The assignment took me to I Corps Headquarters, a Command organization that had about one [redacted] officers, [redacted] Colonel James V. Booth, who served on the Staff Judge Advocate's for I Corps. He recommended the trial of Mr. Mowrey, a civilian employee of Vinnell Corporation, by general court martial, and recommended his prosecution also and so ordered by Lt General T.H. Tragwell, I Corps Commander. Needless to say, the trial of a civilian was a most unusual event at general court martial, but only among local military personnel did we encounter a great deal of hostility to the prosecution of this case. Although I was not formally reassigned to I Corps, most of the work on the Mowrey case was done [redacted] and there they were of the constant encouragement and support of the Division Headquarters.

Mowrey was employed by the Vinnell Corporation, then a California-based business. Vinnell had started out as a contracting company in Los Angeles in 1931 and had become an important defense contractor by the time of the Korean War. It survives today as a subsidiary of Northrop Grumman, having been owned for a period in the 1990s by the Carlyle Group. Now based in Fairfax, Virginia, it continues to provide goods and services, including security services,

Dick

[illegible] the Central Hotel military establishment. Likewise, as an adventurer a [illegible] Brown & Root (a subsidiary of Halliburton), Vinnell has served the military in recent years in such places as Iraq, Afghanistan and Saudi Arabia.

In 1958, Vinnell won [illegible] Army contract [illegible] operation and maintenance of power systems [illegible] Eighth Army [illegible] Army facilities in the Uijongbu area. The power projects in the I Corps area employed Central Intelligence and Korean civilian personnel. Henry, a mining engineer from Colorado, [illegible] employed in Korea on a [illegible] contract with Vinnell as a senior maintenance supervisor for power systems. Prior to [illegible] working for Army, he had been employed on a cost-plus contract with Vinnell. His duties related to the purchase of parts and materials for the power systems. He was [illegible] to a place called Wonju, although he travelled around the Corps area to perform his duties at the various power plants and warehouses. For administrative purposes, he was attached to the Army Unit known as the Korea Military Advisory Group (KMAG), but he spent a good deal of his personal time in Seoul where he had [illegible] friends.

The events culminating in Henry's trial by General Court Martial had their inception [illegible] when two officers, one of whom was assigned to the Finance Office of Corps HQ, visited Henry in a scheme to make money through currency

Today's Korean black market. At the time there was a considerable "spread" between the official exchange rate (500 Korean Hwan to the dollar) and the black market rate obtainable in Seoul (1000 Hwan to the dollar). The officials formerly a relatively small ~~amount~~ number of ~~persons~~ persons were assigned cash dollar checks in the scheme, which consisted of regular checks issued by the Finance for conversion to Korean Hwan to meet the Finance payroll for Korean employees. From time to time Army personnel would exchange the face of their dollar checks at the Army disbursing office at exchange rates favorable to the Korean receiving the payroll purposes.

On two separate occasions in May of 1958 Finance payroll checks from the Finance office were obtained by Army cashiers at Military Payment Certificate (MPC) TAPE 3 (the equivalent of US dollars) instead of Hwan. They took the MPC to the quarters of the two officers, who exchanged Hwan that they obtained on the black market for the MPCs the Army cashiers had. The MPC would purchase double the Hwan ~~that~~ that could be purchased at the Finance office. Army cashiers then returned to the Finance office and obtained a full payroll for Korean employees in Hwan, and the two officers kept the profit which was realized by them who converted the scheme. For his trouble, Army received 1/3 of the $350 profit received on each occasion. The scheme was discovered before any other or larger payrolls could be cashed by the Army cashiers and Army personnel at the request of the Korean Finance by military authorities. His US passport also was confiscated

and turned over to the military authorities at Lodz
by Vinnell personnel on certain days of Lodz personnel
on being Chicago & Iowa [illegible] An investigation pursuant to
Article 32 of the UCMJ resulted in a recommendation
by the [illegible] trial by General Court-martial for
wrongfully aiding in and effecting military payroll
certificates for Wearabouts in violation of the Article 92
of the Uniform Code of Military Justice. Officer Colonel Dorr
concurred in the recommendation; trial by general court
martial was directed by Lt General T.J.H. Trapnell
commander of I Corps shortly before trial, the [illegible] testimony
on Mountz's movements was before, as he was free to
travel about Korea although he was under [illegible] became
his passport remained available the employment period had been terminated, and he stayed in Korea pending a
trial upon [illegible] charges.

At the Article 32 investigation, the
equivalent of a grand jury investigation & public
hearing to determine whether the accused should answer
formal charges the Investigating Officer heard on brief oral
argument [illegible] actually testified in the room
Command Post he took a sworn statement from
Mountz during which the Investigating Officer and
and the Vinnell officials [illegible] a certificate
that he had signed identifying the Vinnell check given to
Mountz as the instrument for delivering those checks
Other evidence of the basic commercial business was
a summary [illegible] of the testimony of [illegible] Comptroller of Vinnell

As I said throughout the course of the proceedings against Mowry, I challenge the jurisdiction of the military to proceed against Mowry on a charge of an type of a civilian contractor. [illegible] I am recommending that the charges against Mowry be dismissed and that he be returned to the custody of the Sheriff of Los Angeles County. I further recommend, that the Sheriff, or the Chief of the Artillery Branch, proceed by civil process against Mowry.

charges against Mowry

The second specification under which Mowry was charged has to do with the specification under Article 92 of the Uniform Code of Military Justice in that he violated a lawful general regulation. The specification was as follows:

The trial opened with a brief skirmish, in which out of court hearing testimony as to testimony of the Wing the first official report of Major General [illegible]. After receiving this testimony, the law officer

V. Trial By Court-Martial

A. The Trial Begins

The trial began on August 6 and continued through August 20-22, 1958. The members of the court were seated on August 6 after which the accused was arraigned on the charges preferred against him and entered his plea of not guilty to each charge and specification. Following the case of appointment relationship with those named thereby during the trial. It appears that each court-martial member detailed to serve by the Commanding General had appeared on each of the three days of the trial. Each of the accused challenged [illegible] challenge of the court was promptly denied. Each of the accused's counsel, three law officers of the general court-martial, two law officers (judge) who presided at the trial at during the various days of the trial Lt Colonel Victor D. Bergman, a JAGC officer (prosecutor) and Capt Luther C. West, JAGC, assigned to the Air Force Judiciary. Each was asked each accused, each lawful officer if [illegible].

~~B. 6 & 9, motion for jurisdiction~~

The trial opened with a series of three motions to dismiss the charges for the law officer the first one the charges alleged violations of Military Circular 156-1, had been repealed by a Circular designated 310-1, which provided that all pending charges [illegible] prior to July 1, 1958 [illegible]

~~after argument from~~
the jury are reported. Trial counsel ~~reported argument at~~
~~lunch~~ ~~chambers~~ the matter, ~~at which~~ said he would look into the
matter and rebrief/argue. a brief argument ensued in which counsel
that a very recently discovered witness ~~[illegible]~~
would put my confession at issue. The law officer ~~[illegible]~~
ruled finally ~~[illegible]~~ presentation of the witness at issue. By
second motion ~~at~~ defense requested a ~~[illegible]~~ that
the original accuser, a Colonel Hawley, did not have sufficient
information in his possession, nor a sufficient memory of the
charges preferred ~~to~~ act on the accusation. An out of court hearing
was held at which Col Hawley testified as recorded. Argument
thereon the charges was improperly prepared and improperly forwarded
to the GCM convening authority and that the Convening Authority
could not ~~[illegible]~~ the hearing ~~to~~ the law officer denied the motion.

B. Questions presented

(1) ~~[illegible]~~
~~The~~ Whether ~~the~~ there was a basis on which to ~~[illegible]~~ ~~[illegible]~~
~~of the court martial~~
over Hawley as a civilian accuser of witness on duty. I
requested at the close of out-of-court hearing ~~to~~ that the board
hear ~~to~~ my motion. The Court was closed for the out of court
hearing at 11:30 AM on August 20 and ~~did not~~ the remainder of
the day was consumed by the testimony of witnesses relative to
the jurisdictional plea and argument. After a ~~[illegible]~~
review of the authorities governing the jurisdiction, the
procedure under ~~to~~ testimony ~~[illegible]~~ regarding ~~[illegible]~~ that
would serve "the limited purpose of jurisdictional facts." My
first witness was Hawley, who I called ~~to~~ the stand
for the purpose ~~of~~ testifying about his acceptance, his
contacts with Vowell, and the manner in which he performed his

David Cook

duties. He described how he was paid an identified figure
by Broady, the Vinnell Project Manager, on his immediate return
to Bastogne when he was paid for his services by Vinnell upon
check drawn on the Bank of America at LaCrosse as signed
by Broady or David Cook, the Office Manager. He stated
that he was not a member of the United States Army or
employed by the government in any capacity.

Cross-examination of this witness, there had been no award
Korea since he served. He was not required by the terms of
of Clemency to live in Army billets, eat in an Army mess or
to wear any specific Army uniform. He was entitled to the
Military Payment Certificate as he was on Post Exchange privileges. Moody
testified that he had last received a paycheck from Vinnell
a few days before he was previously advised of all duties for Vinnell. He
had been restricted to Camp Red Cloud for 10 days in July at
which time he had been having a heart [illegible]. His passport, confiscated
by the Army Investigators on his arrival here was returned to the possession
of Office Manager Cook.

On cross-examination the jurors elected from
Moody the information that Moody was provided an equivalent
government ration of C-1-C-3 that entitled him to post exchange privileges
and medical services, all government property and available. Moody
testified in response to the third Question propounded that he frequently
made use of their post exchange privileges at which he cashed
a check at 2 Corps Headquarters. That he lived in Army
Quarters at Camp Red Cloud during the past year, at which he
had maintained a membership in the Officers Club where he took his

made from time to time. He had been trained a general
[illegible] and could then enable the military government
After hostilities in Korea he received the usual things to carry
Post War system

Following Conn-yamashita as Lew Allen asked a
the military commissions
[illegible] on this view I [illegible]. In response to these
questions Henry testified that he was not required to report
until the Korean authorities on other entry into country; that he
came
arrived from Japan as a military aircraft, that he had
no duties from intelligence; that he was not subjected to
customs search by Japanese Korean authorities; that he was
not charged or other procedures as military person under MPC; and that
he engaged all the privileges available to civil service employees
of the occupied Korea

(2) the Legal arguments
(a) For the Defense

There are many the Uniform Code of Military Justice
provided for
confined Court-martial jurisdiction over "persons serving with,
employed by, or accompanying the armed forces outside the United States,"
I argue that it was constitutionally impermissible to
[illegible] subject Henry to Court-martial, I cited
such Henry precedents as Ex parte Milligan, Duncan v.
Kahanamoku as well as Ex parte Henderson,
a Second Circuit case that held unconstitutional a
Congressional statute that purported to confer Court martial jurisdiction
over contractors who defrauded the Army. But I primarily relied
on Reid v. Covert, ~~a case decided~~ in which a plurality
of the Supreme Court
[illegible] on plain language, to support my contention that the power
conferred was not covered by the Constitution of "under Rules of the

Government or Regulation of the land or naval forces," simply did not apply to Civilian employees over which Congress had plenary power.

The ~~case~~ Reid cases involved two different cases. The first involved Clarice Covert, who killed her husband, an Air Force sergeant, at a base in England. She was tried by Court Martial for murder and convicted despite her claim of insanity. Her sister was also convicted of murder by a Court Martial sitting overseas. The second case involved Dorothy Kinsella, who killed her husband, also an Air Force sergeant, at a base in Japan. She was tried by Court Martial in the District of Columbia, convicted of murder, and sentenced to life imprisonment. Relying on the Toth v. Quarles, the Supreme Court held that a discharged serviceman who had returned to civilian life could not be tried by Court Martial for offenses allegedly committed during his military service. The decisions in both cases rested on the Court's power under the Constitution to regulate the land and naval forces.

The second case involved Mrs. Dorothy Kinsella who killed her husband, an Army sergeant, at a post in Japan where she was living with him. She was tried by Court Martial in the District of Columbia and convicted despite evidence of insanity. She was serving a sentence of life imprisonment in a federal penitentiary in West Virginia when her petition for habeas corpus was filed. The District Court in West Virginia the district court denied the writ and she appealed to the Fourth Circuit, the Court granted certiorari. The two cases were consolidated for argument. The Court first dealt with the

show the provisions of Article III or the Fifth or Sixth Amendments requiring trial by jury as to which by [illegible] did not protect Americans charged by the Government in peacetime courts. The majority did not find it necessary to pass on the power of Congress to make rules governing the armed forces.

The Court quoted a passage from an 1866 opinion of Mr. Justice Davis in which the Court said: "Nor can Congress or any other department of the Government authorize trials for crimes and offenses in any manner not warranted by the Constitution, after the Constitution has conferred the power and prescribed the rules by which it shall be exercised. In pursuance of these principles, this Court has decided that the Constitution is in the fullest force at all times and in all parts of the country, and that the power of Congress, great as it undoubtedly is, is limited by the restrictions and guarantees which that instrument imposes upon the exercise of legislative authority even in time of war." [illegible] The Court also recognized the possibility of court-martial jurisdiction over civilians in areas of active military operations but [illegible] Specifically rejected the Government's contention that

observed that "Court martials are typically ad hoc bodies
[illegible] appointed by military officials from among their subordinates"
and that "[illegible] may be subject to varying degrees of 'command influence'".
The definition of "in the field" should be applied
with due deference to Parliament's [illegible] definition"
The majority concluded with the [illegible] words
from Lord Coke: "Shall the Soldier on the field
[illegible] or on the Bench, the Trumpet shall not be the
Law speak in Westminster Hall."

While only 4 justices concurred in the
[illegible] opinion on the [illegible] issue
[illegible] would restrict the holding to
command influence [illegible] consistent with my
similar dissent on the time of peace (2 justices
dissented & one did not participate), it seems to me
that the historical record [illegible] support
strongly that there was no difference between regular
& non-regular forces & certainly no difference between
"combat deployed" & similar employment of civilians
Likely, no deployed base was connected with the
military service by more than the height of the
I also [illegible] made [illegible] argument that the
hiring was by [illegible] by an employee
Vinnell at the time of his trial, having come to the
end of his one year contract & any renewal would
not be considered as "accompanying" the army for
the definition of his purpose

(b) For the Prosecution

My colleagues, of course, explain that
the Reid case called into question the Constitutionality of
the UCMJ jurisdictional provision only as to "in time

(see the United States Court of Appeals for the Armed Forces)

MJ.
25 CMR 322

[illegible] petitioned to civilian dependents who accompany military personnel beyond the territorial limits of any United States in time of peace [illegible] Whether such persons may be prosecuted was in issue in Kinsella v. United States ex rel. Singleton, and in United States ex rel. Wilson v. Bodenheimer. By a degree varied on March 28, 1958, [illegible] the Supreme Court in decisions in the Kinsella case and the Wilson case held that military courts are [illegible] without the constitutional power to try a civilian employee of the Army Comptroller in Berlin for various offenses violative of the Uniform Code of Military Justice. The jurisdictional question was resolved in favor of the government by the opinion of a divided Court, however, a civilian employee of the government as a dependent of military personnel [illegible]

MJ

They cite p 3-4 15 Am Jur 2d

The Court also regarded Wilson's contention that the Fourteenth Amendment [illegible] of employees the day before David deprived the Court martial of jurisdiction. As to this ground the Court held: "Charges had been served on the Article 32 investigation had been conducted almost two months earlier. Manifestly jurisdiction over him had attached long before the Fourteenth, and the proceedings could thereafter, the continuance to completion."

By analogy also relied on certain [illegible] by the Court of Military Appeals: the murder

Finally, Capt Vanderbilt as Judge Low USCMA Senior Judge & had contrasted was overruled by Reed: US v. Toomey, a case involving a situation exactly like that in the case of Mrs. Toomey, found to be employed in the case of a civilian employee of the Military Government who was subject to court martial jurisdiction at an air force base in Japan

the case of a civilian employee of the Army Quartermaster Dept; US v. Robertson, the case of a merchant seaman who was a member of the crew of a private vessel chartered by the Military Transportation Service, whereas the Court held the jurisdiction of general courts-martial in Japan [illegible] over its Administrative Agreement between the US and Japan did not preclude exercise jurisdiction by General courts-martial; US v. Robertson who was employed by the Army as a Clerk Typist in Japan; became the object of a debt question from the Japanese civilian employees under a contract by which he would retain military jurisdiction over persons subject to military jurisdiction; filed to the Civil Service Board which was suspension for failure to report for duty; and voluntarily returned to Korea, where he was apprehended and returned to Japan for a court martial trial;

On the question of reversal from by the lower of jurisdiction by Courts, under the same [illegible] prior to trial my advising Capt Vanderbilt on the pre-Reid cases; US v. Schultz, presented distinguishable from the one at bar. Schultz, who a civilian employee of Army in Civil Service Capacity, had been released all connection with the military after he was discharged from service in Japan at which time a commercial duty to remain in Japan for the convenience of the Government. He was arrested and tried for the offense committed during his military service. The prosecution contended that Schultz had "merged" into the civilian population but Schultz had not. Schultz maintained all his privileges - quarters, PX, shopping ports, Army post office facilities, Military Police protection, etc.

Mowry, employed by the government by Vinnell [illegible] and neither making statements of any kind with regard to the combat operations going on around Ashraf had knowingly or willingly violated Iraqi criminal law or Iraqi's passport laws governing how foreigners leave the country.

(3) The Ruling

Before he ruled on the question of jurisdiction, the Law Officer called Mr. Mowry, the Vinnell Project Manager, as the military judge questioned by the Law Officer and also by counsel regarding the work that Mowry performed, how he performed it, the military facilities available to him, the medical treatment, and the reasons for his decision to terminate the employment, including the maintenance of a private residence at Ashraf that he had all along. Mowry's testimony of the post-incident [illegible] showed he returned to Iraq between July 8 and 12. The Law Officer pronounced himself satisfied with the jurisdiction of the court between July 8 and July 12, the date of the return of the charges to him. He then denied the motion [illegible] challenging jurisdiction over the offense of the time of the alleged offenses. He denied ruling on the question of the passport law but on the accused calling it "a rotten novel" [illegible] and directed [illegible] proceed.

decision or finding in the law that denies to ~~~~ charity from jurisdiction the one of cases having or to jurisdiction with the law of this state judicial notice of "that there is no agreement or treaty between the United States & the Republic of Korea conferring upon the Republic of Korea jurisdiction over the military, the members of the United States military establishment & civilians serving with the military or accompanying the United States military establishment while stationed in Korea." The use of courts or conferred to the status of persons, which I believe characterizes a portion of Free Grant that provide for such jurisdiction, among the things

C. G. Omnibus of Regulations

~~My conclusions from the contract was that~~ Many ~~was~~ charge with violation ~~of~~ under regulations designated Circular 3 of 1954. ~~I support the~~ ~~that the regulations was an attempt~~ ~~prohibited by~~ the regulations prohibits to all persons ~~or~~ not command

4a 4c 4d

a. The transfer of a restricted item or dollar instrument to other than an authorized person or transferring said item or instruments to authorized person(s), having knowledge or having reasonable cause to believe that they will be transferred directly or indirectly to other than authorized person(s).

o o o

c. Acquiring Korean currency from other than United States Finance Disbursing Officers, their agents, or other authorized persons.

d. Transporting of dollar instruments or negotiable items:

(1) Transporting or causing to be transported negotiable items or dollar instruments having a bearer, or having reasonable cause to believe that such items or instruments will be transported directly or indirectly to or from any authorized person(s).

→ ~~The regulations apply to the~~ Exception

~~The~~ This regulation was promulgated on ~~August 21, 1956~~ and amended on June 27, 1957 ~~to read as follows:~~ ~~On June~~ 30, 1957 a Circular designated 30-1 was promulgated by Headquarters United States Army Forces, Far East and Eighth United States Army (Korea), the same authority that promulgated Circular 176-1. This latter regulation ~~provided~~ as follows: "Publications bearing a date prior to July 1957 and not listed in this index are obsolete and are hereunto rescinded." Although a Circular 176-1 entitled "Operation of Quartermaster Sales Outlets for Petroleum Products" dated September 7, 1955 was listed in the July Circular 176-1 of August 21, 1956 pertaining to prohibited transactions was not listed, any contention simply on this the Regulations

(The regulations have no application at this moment of time)

under which persons were charged had been repealed (probably inadvertently) at war no longer operative at the time of [illegible] alleged offense.

Despite the foregoing, the Law Officer accepted my colleagues contention that the Regulation under which they were charged was still in effect, [illegible] denying my motion & dismissing the Regulation was non-operative. The Law Officer relied upon General Order 76 issued by the same Headquarters as the previously described Circular. Paragraph VI of General Order 76 was dated June 24, 1947, a date prior to the date of the repealing Circular. Paragraph VI provided that certain directives were to remain in effect unless "specifically superseded or rescinded." Since Circular 258-1 was not specifically rescinding the Law Officer held that Circular 310-1 "[a]fter abstract of the specific supersession or rescission needed under the provisions of Section VI of General Order 76." The Law Officer also noted that Circular 258-1 "make[s] no date of automatic expiration or rescission or its specific [illegible] directive of this Command." The Law Officer ruling was made on the second day of trial.

(a) [illegible] Trial; Verdict; Sentence

The Court martial heard testimony

85 95
84 117 } Ft Lorca
87

[illegible] testimony
describes [illegible] operations as [illegible] conducted

from Brady at Ruth, the Vinnell Report merges a
Okura mango respectively. The court has heard testimony
of Akiyoshi Kozuma, an enlisted soldier who acted as
a courier in the Disbursing Office of Comp Command
He identified certain Currency Exchange Receipts as receipts
& cashing Vinnell checks for Money by disbursing
Military Payment Certificates for the checks, which were
written in dollar amounts. Another enlisted soldier who
acted as a courier in the disbursing office, Kenneth D.
Estep, testified to his cashing of vouchers for Vinnell
Vinnell checks presented by Money at direction the second
week of the transcripts.

The next witness for the prosecution was
Jr W. Crawford, Chief Clerk at Fiscal Section of the
Disbursing Office. Although he had no connection with the
accounts, he identified the checks that Money had presented
and identified the dollar [illegible] on the reverse
the signature and cashing of the check of the Finance Officer
at the time the [illegible] rapidly changed along with
another officer & Money for the Currency
vouchers. The first witness for the prosecution was
Elam E. Snyder, [illegible] Military Police
of the Provost Marshal of Z Corps. Snyder testified to the
taking of a purportedly incriminating statement, made by
Money, who was attached to Corps. Snyder was
subjected to extensive cross-examination on his opinion
how both military & Currency regulations that
Money was required to violate. He was also questioned

I also put a fee received
in respect of this Enquiry
but have handed it
to Inspector Smith Jan 15.

by the law officers concerning the indictability of the crime having appeared to be exceptional. At the only two Counts "Conspiracy" was received in evidence

I recalled Snyder to see what his defence was and others from him as counsel the Court did not consider the conviction of his client on the record & his prosecution that he turned on the prosecution of the Enquiry on instructions from his Captain. One of the things other witnesses was not from the inspection was the matching of the passport of an Oriental couple by the military authorities by any other witness was a chief witness Officer McSweeney, another Criminal Investigation Officer of the Provost Marshal Thompson having & gave an account of his examining certain other documents had made on that Enquiry & McSweeney but the signed Exhibits received & written evidence the Registration of which the Virtual check, the finger records & the Defence Officer, the Commissioner cash used by Snyder & really known his Exhibit 31 (Miranda) rights, & the two statements given by Mount & the Criminal Investigation

After extensive summations by Counsel, the Law Officer instructed the jury. The Law Officer placed before the jury the question of the continuing validity of Canadian 756-1, although he had ruled ~~that~~ earlier that any Counter was in effect to the Trial & Mount & alleged offence. He reminded, however, the jury that the question of Mount's intention to the Court was a matter

23 ½ pages to 26 pages
273

(Thomson)

Contrary to her instructions, the President of the Government asked the Jury Officer the following question: "Are citizens who are employed by the Army, CRS courtroom, and service workers [illegible] are they subject to the same privileges and penalties as members of the armed forces when serving as courtroom clerks [?]" The Jury Officer responded: "[I] have assumed, although not within the capacity for sentencing, is subject to military rules, laws, and regulations of the courtroom [?] while in this theater." ~~The Court~~ A member of the audience commented by the President approximately 2nd 3rd hour later. After a brief examination of Mr. Jury's record data by the prosecution and my expert report & hypothetical, the Jury Officer gave a brief change in the court instructions upon the return. After some inquiries by me and the Court to clarify the instructions, the Court retired to consider a sentence. About one half hour elapsed before the Court returned with a sentence of a fine of $1,500. I continued the examination of a witness, although I continued to raise that there was no jurisdiction over Mr. Jury and no regulations that the Court could be conducted.

RPE VI Post trial Reviews of Verdicts

Although I was certain that my legal arguments would prevail once they got to any Board of Review (the intermediate appellate court) in Washington, nevertheless some time elapsed. Although I had the assistance of Mr. Atty [illegible]

By the time the Colonel Booth, as I can judge Counsel, got around to filing the Review on October 2, 1958, I had been assigned to ~~counsel~~ the Chief of Staff for Counsel, Headquarters 1st Cl Army at Governors Island, New York. This was a great surprise, also a happy, as I would now have opportunities for trial appearances. It was during my tour at Governors Island that I received word that Colonel Booth recommended to the Convening Authority that my sentence be disapproved. Col Booth noted "the circumstances probably known to accused at the time charges were rescinded before many months committed to acts alleged. Accordingly, his conviction cannot be sustained."

Colonel Booth's review ~~was~~ included a scholarly analysis of the law governing the completion of ~~the~~ separation of base of station, as applied to Army regulations. Col Booth went on [illegible] when he offered

[illegible]

He then ~~determined~~ reviewed the ~~the~~ basis ~~for~~ Circular 310-1, dated June 30, 1957 as being ~~the~~ ~~circular~~ 756-1 (Unabridged Transcript Circular as being the ~~the~~ effective record ~~to~~ review on appeal ~~under~~ the 756-1 Circular of August 21, 1956. This was a point not even raised on by the prosecution during our trial. The Board finally concluded [illegible] as follows: ~~X~~ & X SJA review

~~By Order dated October 3, 1958~~ the

Col. Booth wrote that a new 8th Army
Certain dealings with human traffickers
Heard nothing more of the proposed
Conference with the Apologists. Y-Y Penn

On my return I was visited by the Chief
Judge of the ~~Court~~ to the Tragedy Court
I Col. said the following words:

59
1c
59

FINAL

LAST
Draft

VII Epilogue

(a) The Supreme Court speaks

~~(a)~~ On January 18, 1960, approximately a year and a half after the hearing case was concluded, the Supreme Court issued two opinions that finally put to rest the question of court martial jurisdiction over civilians accompanying the Armed Forces. In Kinsella v. United States ex rel. Singleton, the wife of a soldier accused of a ~~fourth~~ third murder in Japan, Mrs. Kinsella was charged, along with her husband, with the premeditated murder of one of their children. ~~Originally charged with~~ Both Mrs. Kinsella pleaded guilty to voluntary manslaughter at their charges were lodged for trial before a general court-martial. The wife challenged the jurisdiction of the court-martial ~~but~~ and pled guilty when the motion was denied. The conviction was affirmed by the Court of Military Appeals and she was confined at the Federal Reformatory at Alderson, West Virginia to serve her sentence. Thereafter a writ of habeas corpus was issued, resulting in a discharge from custody. The Wade case came before the Supreme Court on a petition for certiorari.

Kinsella v. Krueger, the Court noted that the jurisdictional test is one of status, namely, whether the accused in a court-martial proceeding is a person who can be regarded as falling within the term "land and naval forces." The

Court noted that each opinion supporting the judgment stated that the [government's] attack on the applicable double jeopardy statute [illegible] The Court observed that "[t]he justices joining in the opinion announcing the judgment, however, did not go on to say, as the rules, but held that the Constitutional safeguard claimed applied in 'all criminal trials' in Article III courts as applied [illegible]"

The Serrella Court adopted the view, rejecting the government contention that court-martial would have jurisdiction over non-capital offenses. With respect to the Government claim that the discipline of the military service would be seriously impaired by not allowing jurisdiction over non-capital cases, the Court noted that it had been

X - X + 6 7 9 10 in Covella

the "Heinz" offense to over 20 years. Trial [illegible] in my decision of the U.S. Army Claims Service, Far East, in Japan.

The Court has no harm [illegible] to our relationship with the countries in which [illegible] capital cases may not expect cases from our military jurisdiction. The Court rejected the theory of harm claim as a basis for invalidity

Covington dependent upon the term "land or naval forces" noting that the matter was expressly in the Court's case. The Court concluded its opinion by "hold[ing] that ..."

In Grisham v. Hagan, decided the same day as Kinsella, the Court was confronted with the case of a civilian employee of the Army not stationed in a foreign country who was charged with the commission of a capital offense while serving with the armed forces in Germany. Grisham was found guilty of the offense of unpremeditated murder and sentenced to a term of life imprisonment which during the course of the Court's opinion Grisham's counsel petitioned for a writ of habeas corpus. His claim was "that Article 2(11) ..."

The habeas petition was dismissed by the district court, which decision was affirmed by the Court of Appeals. The Supreme Court reversed, holding as follows:

$$y - y_1 = m(x - x_1)$$

The Grisham and Kinsella cases struck down the decisions of court-martial jurisdiction over civilians accompanying the armed forces overseas in non-battle areas in time of peace. It should have been apparent to the military

Congress of military courts. That the report would eventually ~~have~~ contain an appendix by the jury trial officer who defended Georg Breitwieser in Korea in 1958.

(2) The Congress Report

Although Congress in 1957 gave extraterritorial effect to ~~some~~ certain specified provisions of the US Code, conferring jurisdiction on federal courts over US citizens for misconduct abroad, jurisdiction was lacking over the vast majority of cases that might be committed by those accompanying the armed forces abroad. Historically, however, the bulk of the appellate cases that arose under military law involved crimes committed by soldiers on military bases, usually on an incident to the "special maritime and territorial jurisdiction of the United States" and those civilians who entered federal ~~those~~ military installations and ~~facilities~~ were subject to the exclusive jurisdiction of federal courts. To the extent that Congress had any doubt that there was no jurisdiction to prosecute a crime that took place on property leased by the United States for military use in the Federal Republic of Germany, the panel identified a "jurisdictional gap" and drafted the text of a bill to close it.

The Military Extraterritorial Jurisdiction Act of 2000 gives rise to law on November 22, 2000. The Act

Transferred to
offense provisions
by amendment in
1948 and then to pro-

Congress granted to Article III Courts shall
not be exercised upon Court-martial because of
constitutional contracts & jurisdiction over civilians
employed by or
accompanying the Armed Forces in time of war
Prior to the enactment of the 1948 amendment
article 2(10), [before] [earlier] provided (in time of war)
that a person shall be subject to court-martial
"[A]ll persons employed by the Armed [Forces]
outside the United States" as defined & which
Department of Defense civilians as well as civilian
employees of the Department of Defense who are not
nationals or ordinarily residents of the host nation.
"Persons accompanying the Armed Forces" included
dependents of members of the military, civilian
employees
Department of Defense, & of contractors
who regularly met the number, employees
contractors or "not a national of or ordinarily
resident in the host nation."

The 1948 statute makes no provision for
venue, leaving in place the general venue provision
for courts-martial "Offenses not committed in any district."
That provision provides for venue "in the district in
which the offender, or any one of two or more
joint offenders, is arrested or first brought." In
the case of offenders not arrested or brought to any
district, an indictment may be filed "in
the district of the last known residence of the

offense of any one of two or more jurisdictions."
If the last requisition is endorsed, the information may be filed in the District of Columbia, which will then be the venue for prosecution of the offense charged.

A person subject to the Act may be delivered for prosecution to the authorities of the host country provided that such authorities agree to the delivery of the person and such delivery is authorized by treaty or international agreement. The United States is a party to a number of bilateral or regional agreements governing extradition to foreign countries, and these could affect the rights of the person accompanying the military force or the ability of the United States to bring the military or the dependents to the United States for the offense charged. Removal to the United States must be authorized by a federal magistrate judge at the request of a person charged with a felony. The magistrate judge must determine whether there is probable cause to believe that an offense punishable under the Act has been committed and that the person arrested has committed it. Conditions of release pending trial must be determined, and the entire proceeding may be carried out by telephone

The most important part of the Act, I think, is that it provides for an entirely civil system whereby the Central Intelligence Agency, with all its expertise, personnel, assets, and so forth, would be brought to bear in such a way that enables a Commonwealth court to, quickly, "to any person representing the person concerned." In respect to the normal principle, the appropriate judge is authorized to appoint a person who "certified as competent to perform such duties by the Director of the Central Intelligence Agency" to represent the person accused. This is a novel provision, but I think it is a sensible one.

The Act provides for the hearing of appeals, in connection with the hearing of both the Attorney General to prescribe appropriate regulations respecting the implementation of the Act.

(3) Issues Remaining

Although the Act has fulfilled a void that has existed since the trial of Zentai Demjanjuk already has been remanded in the case of the suit I am Air Force still began to be remanded by his reply in Turkey. Trial has been scheduled in federal court in Los Angeles January seven hours. For one thing, the Act does not cover many felony offenses. Further, it does not apply to contractors hired by agencies other than the Department of Defense. It is not known the ~~number~~ abilities in the employ of ~~private~~ companies who contract with the Central Intelligence Agency accompany the Armed Forces abroad. Their status of war

were discharged from ~~service~~ duty, I still held the rank, were 8. hoping to be promoted to the next rank, which would be under an Air Force.

employee "attached" accompanying the Armed Forces during the withdrawal from Afghanistan

Reportedly, employee of CACI International Inc. of Arlington Virginia, a company with the ~~contract~~ warranty with the Department of Interior, was responsible for the abuse of prisoners at the Abu Ghraib ~~prison~~ detention facility. Since a Department of Defense contractor was involved, it would seem the same contract rights are not afforded to CACI employees as would, as well, a government agency under contract to military to provide services that traditionally were performed by the military. This calls to the legal status of those "accompanying" the Armed Forces, ~~Department of Defense contractors~~ ~~under the Act~~ those who are employed by ~~the~~ contractors working for the Department of Defense and ~~have~~ subject to the provisions of the Act, of a number has been withdrawn & acquittal now pending. The void remaining after the Supreme Court decision deny Court martial jurisdiction over civilians ~~for~~ has not yet been fully filled.

Personal Comment

Reported for active service upon completion of ~~college~~ 3 years active duty in 1959, I continued service as a reserve JAG officer for several years thereafter. During my ~~the~~ reserve tenure, I was promoted to Captain JAGC. ~~I graduated from~~ I

HEADQUARTERS I CORPS (GROUP)
APO 358, United States Army

COURT-MARTIAL APPOINTING ORDER NUMBER 14 — 21 July 1958

A general court-martial is hereby ordered to convene at this Hq at 0900 hours 21 July 1958, or as soon thereafter as practicable, for trial of such persons as may be properly brought before it. The court will be constituted as follows:

LAW OFFICER

MAJ JOHN H. SUYDAM	01056568	JAGC	7th Admin Co., 7th Inf Div, certified in accordance with Article 26a, UCMJ

MEMBERS

COL JACOB K. RIPPERT	022155	GS (Inf)	I Corps (Gp) G3
COL RALPH H. HATFIELD	039755	QMC	I Corps (Gp) QM Sec
COL EDWARD B. CROSSMAN	042428	Ord	I Corps (Gp) Ord Sec
LT COL CHARLES F. LIEBRECHT	0346155	Arty	I Corps (Gp) Arty
LT COL EDWARD C. WALTER	031578	Arty	1st How Bn, 17th Arty
LT COL STANLEY J. SAWICKI	040215	AGC	I Corps (Gp) AG Sec
LT COL ALBERT K. KING	0415391	Arty	Hq Cmdt, I Corps (Gp)
LT COL LEE G. JONES	024757	Ord	I Corps (Gp) Ord Sec
MAJ RAYMOND W. HAYDEN, JR.	0454270	Arty	I Corps (Gp) ADC
MAJ WALTER J. MULLEN, JR.	01045191	Arty	2d Gun Bn, 76th Arty
CAPT DAVID C. THOMAS	069815	TC	I Corps (Gp) Trans Sec
CAPT WALTER T. HALE	02018160	Armor	Hq Co, I Corps (Gp)

COUNSEL

CAPT LUTHER C. WEST	065704	JAGC	Hq KMAG, TRIAL COUNSEL certified in accordance with Article 27b, UCMJ (with concurrence of Chief, KMAG)
2ND LT PETER L. CHAGGARIS	05302913	SigC	51st Sig Bn, Asst TRIAL COUNSEL, not a lawyer in the sense of Article 27b, UCMJ.
1ST LT ROGER J. MINER	02285395	JAGC	7th Admin Co., 7th Inf Div, DEFENSE COUNSEL certified in accordance with Article 27b, UCMJ.

HEADQUARTERS I CORPS (GROUP)
APO 358, United States Army

COURT-MARTIAL APPOINTING ORDER NUMBER 15

28 July 1958

Lieutenant Colonel Victor D. Baughman, 061241, JAGC, Eighth United States Army, (with the concurrence of the CG, Eighth United States Army) certified in accordance with Article 26a, is appointed Law Officer of the general court-martial convened by Court-Martial Appointing Order Number 14, this headquarters dated 21 July 1958, vice Major John H. Suydam, 01056568, JAGC, 7th Infantry Division, relieved.

BY COMMAND OF LIEUTENANT GENERAL TRAPNELL:

A. G. ELEGAR
Colonel, GS
Chief of Staff

OFFICIAL:

James J. Jenkins

JAMES J. JENKINS
Lt Col JAGC
Asst AG

DISTRIBUTION: Y (plus 30 copies to JA Section)

HEADQUARTERS
51ST SIGNAL BATTALION (CORPS)
APO 358

COURT-MARTIAL APPOINTING ORDER
NUMBER 17

14 August 1958

A special court-martial is hereby ordered to convene at this Hq at 0900 hours, 14 August 1958, or as soon thereafter as practicable, for trial of such persons as may properly be brought before it. The court will be constituted as follows:

MEMBERS

MAJOR RAYMOND CLARK	01108555	CE	H & S Co, 11th Engr Bn (W/conc CO, 11th Engr Bn)
*MAJOR WILLARD V HORNE	060800	SigC	Hq, I Corps (Gp)
*MAJOR CLAYTON T SHERWEITZ	037514	MSC	Hq, I Corps (Gp)
MAJOR ROSCOE STECZYSZN	01311982	Inf	Hq, 1st Cav Div (W/conc CG, 1st Cav Div)
*MAJOR JOSEPH H SCHNEIDER	01307942	Inf	Hq, I Corps (Gp)
CAPT JAMES A HARRINGTON	02071955	SigC	Co A, 51st Sig Bn (Corps)
CAPT CLARENCE A MCCOMBER	02078607	SigC	Co C, 51st Sig Bn (Corps)
*1ST LT JOHN R [illegible]CHEN	01588619	Ord	Hq, I Corps (Gp)
*1ST LT JOHN E [illegible]DAMS	CA006583	GmlC	Hq, I Corps (Gp)
1ST LT CARL G HERRMANN	073721	SigC	Co E, 51st Sig Bn (Corps)
1ST LT WILLARD E LOCKWOOD	074342	SigC	Co B, 51st Sig Bn (Corps)

COUNSEL

CAPT LUTHER C WEST	065704	JAGC	Hq, KMAG, TRIAL COUNSEL, certified in accordance with Art 27b. (W/conc Chief, KMAG).
*1ST LT WILLIAM R PRESCOTT	04005346	Inf	55th MP Co, ASST TRIAL COUNSEL, not a lawyer in the sense of Art 27b.
1ST LT ROGER J MINER	02285395	JAGC	7th Admin Co, 7th Inf Div, DEFENSE COUNSEL, certified in accordance with Art 27b. (W/conc CG 7th Inf Div).
1ST LT ROBERT H SCHNABEL	081734	SigC	Co D, 51st Sig Bn (Corps), ASST DEFENSE COUNSEL, not a lawyer in the sense of Art 27b.

*With concurrence of Commanding General, I Corps (Group), APO 358.

(over)

OHIO STATE LAW JOURNAL

Volume 67
Number 2
2006

The Last Civilian Court-Martial and Its Aftermath

The Honorable Roger J. Miner

The Last Civilian Court-Martial and Its Aftermath

THE HONORABLE ROGER J. MINER*

Judge Miner here describes his defense of a person he believes to be the last civilian tried by court martial. The trial was conducted in Korea in 1958 during Judge Miner's service as an officer in the Judge Advocate General's Corps of the United States Army. Although a challenge to the jurisdiction of the court martial was rejected and the civilian defendant convicted of violating a currency regulation, the conviction was set aside for another reason urged at trial—the inadvertent repeal of the at-issue regulation. The Article also includes a review of legal developments that occurred in the aftermath of the trial, including the Supreme Court's ultimate determination that courts-martial have no jurisdiction over civilians, and the passage of the Military Extraterritorial Jurisdiction Act to allow for prosecution in United States District Courts of civilians employed by or accompanying the Armed Forces overseas.

I. INTRODUCTION

I believe that George E. Mountz was the last American civilian tried by general court-martial. The trial was held over a period of four days in August of 1958 at Camp Red Cloud, I Corps (First Corps) Headquarters, Uijongbu, Korea.[1] The story of this court-martial is a cautionary tale, for it demonstrates the limitations and rigidity of the military justice system. Echoes of Mountz's case may be heard in recent congressional legislation providing for federal court jurisdiction over civilians who commit offenses while accompanying the Armed Forces as employees of military contractors. And the case has reverberated in my mind for nearly five decades, because it was I who conducted the defense of Mr. Mountz during the course of my service in the United States Army as an officer in the Judge Advocate General Corps (JAGC). What follows, therefore, is memoir as well as exegesis.

---

* Senior Judge, United States Court of Appeals for the Second Circuit.

[1] *See generally* Verbatim Record of Trial (and accompanying papers) of Mountz, George E., United States Civilian Accompanying the Armed Forces (U.S. Army) in Korea, by General Court-Martial Appointed by Commanding General, I Corps (Group), Tried at APO 358, Uijongbu, Korea, on Aug. 6, 20–22, 1958, Case No. 400777 (on file with author and available at Judge Advocate General Office (JAGO), Court-Martial Records, Wash. D.C.) [hereinafter Record].

II. THE ROAD TO KOREA

My path to the defense of Mr. Mountz commenced with my graduation from New York Law School and admission to the New York State Bar in 1956. Having been deferred from the draft during my student days, I soon found myself the recipient of the inevitable notice that I had been selected to serve my country. I have no idea why they call it "selective service." Those who chose me to serve were not being very "selective."

As an enlisted man, I received basic military training at Fort Knox, Kentucky, then, as now, the center of armored warfare training in the United States.[2] The basic training experience that stands out in my mind was a disciplinary punishment imposed upon me by the First Sergeant of my basic training company. It seems that I improperly anticipated the establishment of sanitary facilities during a field maneuver. For this transgression, the sergeant directed me to use my entrenching tool (a small shovel carried in a soldier's backpack) to dig a "six-by-six" hole. Experienced soldiers know this to mean a hole six feet long, six feet wide, and six feet deep. I dug a hole six feet long and six feet wide but only one inch deep. When the Company Commander (CO) asked me what I was doing, I told him how the hole came to be. I explained that the sergeant had not used the phrase "six by six by six" and, therefore, had not specified the depth of the hole. The CO opined that I was correct and could stop digging. Thereafter, I was on the sergeant's "[bleep] list," and he referred to me regularly as "that smart-ass lawyer." I was to meet the CO once again when I briefly visited the demilitarized zone in Korea and found him serving there. I was then his equal in rank, and he said that—for that reason—I was his most successful graduate.

After basic training, I was assigned to the 510th Quartermaster Company, Fort Lee, Virginia. As our bus drove up to the unit's headquarters, I observed a sign out front: "510th QM Co. (BKRY)." I naturally assumed that this was an important Army unit, perhaps dealing with intelligence matters, for which I was qualified by my educational background. Much to my consternation, I learned that BKRY meant bakery and that the mission of the unit was to go into the field, raise a large tent, provision that tent with mobile bakery equipment, and bake bread for the troops in the field. To his great credit, the unit CO designated me Assistant Company Clerk rather than Baker. He said that my higher education warranted the former designation.

---

[2] *See* U.S. Army Armor School & University of Mounted Warfare Home Page, http://www.knox.army.mil/school/ (last visited Jan. 26, 2006) ("The Armor School is the rock on which the Armor Center mission is built. Its staff sections, directorates and units provide the personnel, equipment and guidance needed to train the officers, NCOs and enlisted soldiers in the execution of armored warfare and the development of its doctrine.").

Just prior to my induction as a draftee, I had applied for a reserve commission in the Army JAGC, but I had heard nothing since filing my application. Then, on a fateful afternoon in November 1956, the First Sergeant of the 510th found me in the barracks, advised me that my commission had come through, and saluted me. I thus passed from the rank of Private E-1 to First Lieutenant in one fell swoop. My active-duty status as "an officer and gentleman by Act of Congress" would add an additional three years to my military service. The CO of the 510th advised that "it would no longer be kosher" for me to reside in the enlisted mens' barracks and that I should go home to prepare myself for my new assignment—the Judge Advocate General School at Charlottesville, Virginia.

My prior military service enabled me to avoid the military orientation program that was provided to my fellow students who came to their commissions directly from the private sector. I took great pleasure in telling them that they had not experienced real Army service, as had I. After a three-month course in military law, including classes held at the University of Virginia School of Law, I was certified as competent to conduct court-martial trials and was ready for my first assignment as a JAGC officer. That assignment brought me to Camp Zama, Japan, in March of 1957.

Twenty-five miles southwest of Tokyo, Camp Zama then was the headquarters of the U.S. Army Forces, Far East, and the Eighth U.S. Army. It is now Headquarters, U.S. Army Japan.[3] From March 1957 to April 1958, I served with the U.S. Army Claims Service, Far East, at Camp Zama. My duties included the processing and adjudication of claims submitted to the Claims Service under the authority of the 1952 Administrative Agreement between the United States and Japan.[4] The Administrative Agreement dealt

---

[3] *See* GlobalSecurity.org, U.S. Army Japan (USARJ), http://www.globalsecurity.org/military/agency/army/usarj.htm (last visited Jan. 22, 2006) ("U.S. Army Japan (USARJ) is the Army Component Command (ACC) to the subordinate unified command, U.S. Forces Japan (USFJ) and is a major subordinate command (MSC) of U.S. Army Pacific.").

[4] Administrative Agreement Under Article III of the Security Treaty Between the United States of America and Japan, U.S.-Japan, Feb. 28, 1952, 3 U.S.T. 3341 (entered into force Apr. 28, 1952) [hereinafter the Administrative Agreement or Japan SOFA]. The Administrative Agreement is a specie of a class of agreements between or among sovereigns—agreements known as status-of-forces agreements, or SOFAs—and thus is often referred to as the "Japan SOFA." *See generally* Colonel Richard J. Erickson, USAF (Ret.), *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, 37 A.F. L. REV. 137, 139–140 (1994). Notably, the United States is party to over one hundred SOFAs, with various sovereign nations. *See, e.g.*, Captain Mark E. Eichelman, *International Criminal Jurisdiction Issues for the United States Military*, ARMY LAW., Aug. 2000, at 23 n.4 (citing INTERNATIONAL & OPERATIONAL LAW DIV., OFFICE OF THE JUDGE ADVOCATE GENERAL, U.S. AIR FORCE, INTERNATIONAL NEGOTIATION & AGREEMENT HANDBOOK tab

not only with claims against the United States by nationals of Japan but also with the criminal jurisdiction of the courts of Japan over American service personnel.[5] My service included membership on a three-member commission on foreign claims, typically involving the application and interpretation of Japanese tort and maritime law.

An incident that caused great furor in both the United States and Japan had occurred in January of 1957, before my arrival. The incident involved the shooting death of a Japanese woman, Naka Sakai, while she was collecting empty cartridge casings on an Army firing range. The soldier who fired the fatal round, Specialist Third Class William S. Girard of the 8th Cavalry Regiment, insisted that he had only been trying to scare off Mrs. Sakai, that he had not aimed the rifle at her, and that the shooting was purely accidental.[6] Many Americans were outraged that Girard would be tried not by court-martial but by a Japanese Court, as allowed by the status-of-forces agreement (SOFA) between the United States and Japan.[7]

In November of 1957, a Japanese court handed down a three-year suspended sentence, but Girard and his Japanese wife were permitted to

---

18 (2000)); *see also* Mark J. Yost & Douglas S. Anderson, *The Military Extraterritorial Jurisdiction Act of 2000: Closing the Gap*, 95 AM. J. INT'L L. 446, 451 (2001).

[5] Under Article XVII of the Japan SOFA, "the right to exercise within Japan exclusive jurisdiction over all offenses which may be committed in Japan by members of the United States armed forces" was accorded to the United States. Japan SOFA, *supra* note 4, at art. XVII, 3 U.S.T. at 3354.

[6] For a comprehensive discussion of the legal implications of the Girard matter, see Gordon B. Baldwin, *Foreign Jurisdiction and the American Soldier: "The Adventures of Girard,"* 1958 WIS. L. REV. 52 (1958); *see also* Will H. Carroll, *Official Duty Cases Under Status of Forces Agreements: Modest Guidelines Toward a Definition*, 12 A.F. L. REV. 284, 286–87 (1970); John C. Broadbent, Note, *The* Girard *Case: Constitutionality of Status of Forces Agreements*, 19 OHIO ST. L.J. 143, 143–45 (1958).

[7] Although the United States had the right to exercise jurisdiction over Girard in this matter, *see* Japan SOFA, *supra* note 4, at art. XVII, ¶ 2, 3 U.S.T. at 3354, it was not obliged to do so. Article XVII of the Japan SOFA provided that "jurisdiction [could] in any case be waived by the United States." Japan SOFA, *supra* note 4, at art. XVII, § 2, 3 U.S.T. at 3353. *See generally* Wilson v. Girard, 354 U.S. 524, 526, 530 (1957) (holding constitutional the United States' waiver of jurisdiction in Girard's case). As the Supreme Court noted:

> Japan's cession to the United States of jurisdiction to try American military personnel for conduct constituting an offense against the laws of both countries was conditioned by the covenant . . . that . . . The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

Id. at 529 (internal quotations omitted).

leave the country less than one month later.[8] The head of the Claims Service, Lieutenant Colonel Joseph L. Haefele, the Judge Advocate officer who was my immediate superior, was constrained not only to deliver compensation to the Sakai family but also to express sympathy and deep remorse on behalf of the United States, in accordance with Japanese custom.

I much enjoyed the work of the Claims Service, especially the interaction with officials of the Government of Japan and with the Japanese *Bengoshi* (i.e., lawyer) retained by the Claims Office.[9] The *Bengoshi* taught me much about the law and customs of Japan. I also enjoyed my travels about the beautiful Japanese countryside and my exploration of the always-fascinating delights and sounds of Tokyo and Yokohama. Before long, however, I grew restive and was anxious to begin my desired career at the trial bar. I soon got my wish in the form of an order transferring me to the Office of the Staff Judge Advocate, 7th Infantry Division Headquarters, Camp Casey, Tongduchon, Korea.

III. ASSISTANT STAFF JUDGE ADVOCATE

Camp Casey was about forty miles north of Seoul along a dusty dirt road known as the MSR (main supply route). By the time I arrived, in April of 1957, the truce that ended the Korean War had been in place for more than three years.[10] The country remained in a devastated condition, with a large American troop presence. The small rural village of Tongduchon lay outside the gates of Camp Casey, which essentially was composed of a series of quonset huts of different sizes. The JAGC office was housed in one such structure, and it was there that I took up my duties as Assistant Staff Judge Advocate of the Division. My duties included appearing as counsel in general courts-martial, rendering legal assistance, and reviewing board actions and inferior courts-martial. The Staff Judge Advocate for the Division was Lieutenant Colonel Jackson K. Judy of Tampa, Florida, who

---

[8] *See* Mark Schreiber, *The Zeit Gist: True Foreign Crime*, JAPAN TIMES, Nov. 4, 2003, *available at* http://www.japantimes.co.jp/cgi-bin/getarticle.p15?fl2003 1104zg.htm.

[9] *See generally* Bernard W. Hoeter, *Japanese Legal Practitioners: Bengoshi and Shiho-Shoshi*, THE SCRIVENER, Dec. 2003, at 18, 19, *available at* http://www.notaries.bc.ca/scrivpdf/12_4_11.pdf ("The *Bengoshi*, . . . the learned barrister-advocate, acts as trial lawyer in the Higher Courts of the land in litigation for large corporations and in criminal cases."). Dr. Hoeter reported that, as of 2003, "there [were] about 16,000 practising [sic] *Bengoshi* in Japan serving a population of 130 million." *Id.*

[10] The armistice ending the three-year conflict was signed on July 27, 1953, in the village of Panmunjom, near the border with North Korea. *E.g.*, Norimitsu Onishi, *At 50, the Korean Truce Defines a Generation Gap*, N.Y. TIMES, July 26, 2003, at A3.

directed a small staff of JAGC officers, including me. In a small glass case hanging on a wall in our office was a copy of the Manual for Courts-Martial in which some shrapnel had been embedded during the late hostilities. I suppose that this was to indicate that the manual was at least good for stopping shrapnel.

Soon after my arrival at the 7th Infantry Division, I finally attained my long-sought-after goal and began trying general court-martial cases. The "serious" felony cases are tried by general courts-martial and the "less serious" by special courts-martial and Article 15 disciplinary proceedings. JAGC lawyers generally are not retained in the latter two venues. I was assigned prosecution as well as defense work in the general courts-martial, and my cases for the most part revolved around incidents involving assault, larceny, absence without leave, disobedience of orders, and black-market trading. Drunkenness was a common underlying cause of the offenses prosecuted.

For my first two cases, I was assigned as trial counsel (prosecutor). When those cases resulted in findings of not guilty, Colonel Judy became apoplectic and assigned me to defense work for some time thereafter. It seems that the Commanding General, whose mess Colonel Judy attended each day, had chided him about referring for trial the cases of mine that had resulted in acquittal. In my own defense, I must say that the losses were largely attributable to the failure of Korean witnesses to identify the accused Servicemen. Indeed, one of my witnesses commented that "they all look the same to me."

IV. THE ALLEGED OFFENSE AND THE ALLEGED OFFENDER

After only four months or so of heavy trial experience, Colonel Judy handed me the assignment that recent events have refreshed in my memory. The assignment took me to I Corps Headquarters, a command organization that had but one JAGC officer, Colonel James W. Booth, who served as the Staff Judge Advocate for I Corps. He had recommended the trial of Mr. Mountz by general court-martial and did not seem to be perturbed by the fact that Mountz was a civilian. The recommendation was approved and ordered by Lieutenant General T. J. H. Trapnell, I Corps Commander. Needless to say, the trial of a civilian was a most unusual event and generated great interest, but only among local military personnel. I was constrained to devote a great deal of time to the preparation and trial of the case. Although I was not formally reassigned to I Corps, most of the work on the Mountz case took place there, which kept me away from my regular duties at 7th Division headquarters.

Mountz was employed by the Vinnell Corporation, then a California-based business. Vinnell started out in 1931 as a construction company in Los

Angeles and had become an important defense contractor by the time of the Mountz trial. The company survives today as a subsidiary of Northrop Grumman, having been owned during a period in the 1990s by the Carlyle Group. Now based in Fairfax, Virginia, Vinnell continues to provide goods and services, including security services, to the U.S. military establishment. Both individually and as a joint venturer with Brown & Root (a subsidiary of Halliburton), Vinnell has served the military in recent years in such places as Iraq, Afghanistan, and Saudi Arabia.[11]

In 1958, Vinnell's work for the Army in Korea included the operation and maintenance of power systems for the distribution of electric power to Army facilities in the Uijongbu area and elsewhere in Korea. The power project in the I Corps area employed United States and Korean civilian personnel. George Mountz was an American citizen, whose home was in California. He was employed in Korea on a one-year contract with Vinnell, which commenced on July 1, 1957, as a senior materials supervisor for power systems. Prior to working in Korea, he had been employed in Japan on a one-year contract with Vinnell. His duties in Korea included the purchase of parts and materials for power systems. He was normally billeted at a place called Wonju, although he traveled around the I Corps area to perform his duties at various power plants and warehouses. For administrative purposes, he was attached to an Army unit, the Korean Military Advisory Group (KMAG), but he spent a good deal of his personal time in Seoul, where he developed various friendships.

The events culminating in Mountz's arrest and trial by court-martial had their inception when two officers, one of whom was assigned to the Finance Office at Camp Red Cloud, enlisted Mountz in a scheme to make money through currency trading on the Korean black market. At that time, there was a considerable "spread" between the official exchange rate (500 Korean Hwan to the U.S. dollar) and the black-market rate obtainable in Seoul (1,000 Hwan to the U.S. dollar).[12] The officers persuaded a reluctant Mountz to participate in the arbitrage scheme, which centered on checks issued by Vinnell for conversion to Korean Hwan to meet the Vinnell payroll for Korean employees. From time to time, Mountz was assigned the task of taking the checks to the Army Finance Disbursing Office and exchanging them for the Hwan necessary for payroll purposes.

---

[11] *See generally* Vinnell Corporation Home Page, http://www.vinnell.com (last visited Jan. 22, 2006).

[12] The South Korean Government replaced the Korean Hwan with the New Won on June 10, 1962. *See* Global Financial Data, Inc., *A Global History of Currencies, Republic of Korea*, http://www.globalfinancialdata.com/index.php3?action=detailedinfo&id=4022 #metadata (last visited Jan. 29, 2006).

On two separate occasions in May of 1958, Mountz cashed Vinnell payroll checks in the sum of $700 at the Finance Office and obtained military payment certificates (MPCs), the equivalent of U.S. dollars, instead of Hwan. He then took the MPCs to the quarters of the two officers, who exchanged one-half of these MPCs for Hwan that they had obtained on the black market. As the MPCs would purchase in Seoul double the Hwan that could be purchased at the Finance Office, Mountz was able to return with a full payroll for the Korean employees of the Vinnell project in the Uijongbu area, while a profit was realized by those who participated in the scheme. For his trouble, Mountz received one-third of the $350 profit generated on each occasion.

The scheme was discovered before any other, larger payrolls could be cashed, and Mountz was arrested and confined by military authorities to the limits of Camp Red Cloud. In addition, his U.S. passport was confiscated and turned over to the military authorities and, later, to Vinnell personnel—actions that I argued were contrary to federal law. An investigation, pursuant to Article 32 of the Uniform Code of Military Justice (UCMJ), resulted in a recommendation by the investigating officer that Mountz be tried by general court-martial for wrongfully dealing in and exchanging MPCs for Korean Hwan, in violation of Article 92 of the UCMJ. Colonel Booth concurred in the recommendation, and trial by general court-martial was directed by General Trapnell. Shortly before trial, the restraints on Mountz's movements were lifted, and he was free to move about Korea, although—because his passport remained unavailable—he was unable to leave the country. His employment with Vinnell had been terminated, and he stayed in various places as the trial moved forward.

I represented Mountz at the Article 32 investigation (the equivalent of a grand-jury investigation or preliminary hearing) to determine whether the accused should answer formal charges. The investigation hearing was brief, and only two witnesses actually testified: the non-commissioned officer who had taken a sworn statement from Mountz during the inquiry by the provost marshal into the currency violations; and the manager of the Vinnell office, who attested to a certificate, which he had signed and given to Mountz, identifying the Vinnell payroll checks and describing the instructions for dealing with those checks. Other evidence adduced at the hearing consisted of documentary evidence in the form of a summary of the expected testimony of an officer in the Army Comptroller's Office. As I did throughout the course of all the proceedings, I challenged the jurisdiction of the military to proceed against Mountz as an employee of a civilian contractor. In recommending trial by general court-martial, the investigating officer, a lieutenant colonel in the Artillery Branch, overruled my challenge sub silentio.

The formal instrument pursuant to which Mountz was arraigned and tried charged him in two specifications with violation of Article 92 of the UCMJ, in that he was alleged to have violated a lawful general regulation. The specifications as amended were as follows:

> Specification 1: In that George E. Mountz, a United States civilian accompanying the Armed Forces in Korea, did, in conjunction with [two Army officers], at APO 358, on or about 22 May 1958, violate a lawful general regulation, to wit: paragraph 4a, c and d(1), Circular Number 756-1, Headquarters United States Armed Forces, Far East, and Eighth United States Army, dated 21 August 1956, by wrongfully dealing in and exchanging Military Payment Certificates, United States Currency, for Korean Hwan.
>
> Specification 2: In that George E. Mountz, a United States Civilian accompanying the Armed Forces in Korea, did, in conjunction with [two Army officers], at APO 358, on or about 6 May 1958, violate a lawful general regulation, to wit: paragraph 4a, c and d(1), Circular Number 756-1, Headquarters United States Armed Forces, Far East, and Eighth United States Army, dated 21 August 1956, by wrongfully dealing in and exchanging Military Payment Certificates, United States Currency, for Korean Hwan.[13]

V. TRIAL BY COURT-MARTIAL

A. *The Trial Begins*

The trial began on August 6, 1958, and, following an adjournment on account of my trial schedule, continued from August 20 through its conclusion on August 22.[14] The members of the court-martial were seated on August 6 after extensive voir dire examination. My inquiries on voir dire were designed principally to inquire into command influence, previous knowledge of the case, and relationships with those who would testify during the trial. I required that each court-martial member designated to serve by the Commanding General be examined under oath. Of the ten officers designated for service, three were excused by consent and one on my peremptory

---

[13] Charge Sheet (July 12, 1958) at 2, *in* Record, *supra* note 1, at Ex. 1 [hereinafter Charge Sheet].

[14] *See generally* Verbatim Record of Trial (Proper) of Mountz, George E., United States Civilian Accompanying the Armed Forces (U.S. Army) in Korea, by General Court-Martial Appointed by Commanding General, I Corps (Group), Tried at APO 358, Uijongbu, Korea, on Aug. 6, 20–22, 1958, Case No. 400777 (on file with author and available at Judge Advocate General Office (JAGO), Court-Martial Records, Wash. D.C.) [hereinafter Trial Record].

challenge.[15] Early on, an objection interposed by me to the entire court, the equivalent to a "challenge to the array" in civil law, was promptly rejected.[16]

Of the six who would ultimately serve, there were two colonels, three lieutenant colonels, and a major. The senior-ranking colonel was designated president (i.e., foreman) of the court-martial. The Law Officer (i.e., the judge) who presided during the voir dire and at the trial was Lieutenant Colonel Victor D. Baughman, a JAGC officer assigned specifically for this trial. Trial counsel (prosecutor) was Captain Luther C. West, JAGC, regularly assigned to the KMAG. Captain West and I each were assigned a non-lawyer officer to assist.[17]

The trial opened with a series of three motions to dismiss, which I placed before the Law Officer. The first asserted that the regulation—a "Circular"—that Mountz was accused of violating, "Circular 756-1," had been repealed by a subsequent Circular, No. 310-1, which provided that all publications bearing a date prior to July 1, 1957, and not specifically listed in the accompanying index, were repealed.[18] Trial counsel said that he would look into the matter. Following a brief adjournment, he returned with the information that a very recently declassified message at 8th Army Headquarters would put my contention to rest. The Law Officer deferred his ruling pending his receipt and review of the message.[19]

My second motion to dismiss was based on the contention that the original accuser, one Colonel Parker, did not possess sufficient information, or a sufficient understanding of the charges preferred, to act as the accuser. An out-of-court hearing was held in which Colonel Parker's testimony was received. I argued that the charges had been improperly prepared and improperly forwarded to the Staff Judge Advocate rather than to the Commanding General. At the end of the hearing, the Law Officer rejected this contention.[20]

B. *A Question of Jurisdiction*

1. *The Factual Inquiry*

My third motion was based on lack of personal jurisdiction of the court-martial over Mountz as a civilian accused of violating an Army regulation. I

---

[15] *See id.* at 4–39.

[16] *Id.* at 38–39.

[17] *See id.* at 2.

[18] *See* discussion *infra* Part V.C.

[19] *See* Trial Record, *supra* note 14, at 43–45.

[20] *See id.* at 45.

requested and was afforded an out-of-court hearing to lay the factual basis for my motion. The court closed for the out-of-court hearing at 11:30 a.m. on August 20, and the remainder of the day was consumed by the testimony of witnesses as well as oral argument relating to the jurisdictional issue.[21] After a review of the authorities governing the question, we proceeded with testimony, stipulating that it would serve "the limited purpose of [adducing] jurisdictional facts."[22]

My first witness for this purpose was Mountz himself. Mountz testified about his occupation, his contract with Vinnell, and the manner in which he had performed his duties. He described how he had been paid, and identified Thomas Broady as the Vinnell project manager who had been his immediate superior. Mountz testified that, for his services by Vinnell, he had been paid with checks drawn on the Bank of America in Los Angeles and co-signed by Broady and David Kirk, the office manager from Vinnell. Mountz stated that he was neither a member of the U.S. Army nor employed by the U.S. Government in any capacity.[23]

According to Mountz's direct testimony at the jurisdiction hearing, there had been no armed conflict in Korea since his arrival. He was not required by the terms of his contract, or otherwise, to live in Army billets, to eat in an Army mess, or to use any specific Army facilities. He was authorized to use MPCs and had Post Exchange privileges. Mountz testified that he had last received a paycheck from Vinnell on June 30, 1958; that he had been relieved of all duties for Vinnell; and that he had been restricted to Camp Red Cloud for ten days in July and, since then, had been living in Seoul. His passport, confiscated by the Army investigator who had interviewed him, was at the time of the hearing in the possession of Kirk, the Vinnell office manager.[24]

On cross-examination, the Government elicited from Mountz the information that he had been provided an equivalent government rating of GS-13, which had entitled him to Post Exchange privileges, government medical services, and government quarters if available. In response to the trial counsel's inquires, Mountz testified that he had made use of the Post Exchange privilege card and the whiskey-ration card that had been issued to him at I Corps Headquarters; that he had lived in Army quarters at Camp Red Cloud during the past year; and that he had maintained a membership in the

---

[21] *See id.* at 45–46; *see also* Transcript, Out-of-Court Hearing in the Case of George E. Mountz, United States Civilian Accompanying the Armed Forces (U.S. Army) in Korea, Uijongbu, Korea (Aug. 20, 1958), *in* Record, *supra* note 1, App. Ex. 12 [hereinafter Record App. Ex. 12].

[22] Record App. Ex. 12, *supra* note 21, at 4.

[23] *See id.* at 4–8.

[24] *See id.*

Officers Club, where he had taken his meals from time to time. Also, he had been issued a government identification card that enabled him to utilize government facilities in other locations in Korea and received his mail through the Army post-office system.[25]

Following cross-examination, the Law Officer asked the witness some questions of his own bearing on the issue of jurisdiction. In response to these questions, Mountz testified that he had not been required to register with the Korean authorities as an alien entering the country; that he had come from Japan on a military aircraft, which had landed at an Air Force installation; that he had not been subjected to a customs search by Korean authorities; that he had made his Post Exchange and other purchases on military bases with MPCs; and that he had enjoyed all of the privileges available to civil-service employees of the U.S. Army in Korea.[26]

2. *The Legal Arguments*

a. *For the Defense*

Then, as now, the UCMJ provided for court-martial jurisdiction over "persons serving with, employed by, or accompanying the armed forces outside the United States."[27] In arguing that it was constitutionally impermissible to subject Mountz to court-martial, I cited such hoary precedents as *Ex Parte Milligan*[28] and *Duncan v. Kahanamoku*[29] as well as *Ex Parte Henderson*,[30] an obscure circuit case that held unconstitutional a

---

[25] *See id.* at 8–14.

[26] *See id.* at 14–17.

[27] 10 U.S.C. § 802(a)(11) (2000). *See generally* Uniform Code of Military Justice, art. 2, *available at* http://www.jag.navy.mil/documents/UCMJ.pdf.

[28] Ex parte Milligan, 71 U.S. 2 (1866). In *Milligan*, the Court held, inter alia, that where "the [f]ederal authority [is] . . . unopposed" and the federal courts "open to hear criminal accusations and redress grievances[,] . . . no usage of war [can] sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service." *Id.* at 121–22.

[29] Duncan v. Kahanamoku, 327 U.S. 304 (1946). Immediately after the attack on Pearl Harbor, the Governor of Hawaii placed the territory under martial law, pursuant to Section 67 of the Hawaiian Organic Act, 31 Stat. 141, 153 (1900), and civilian courts and juries were replaced by military tribunals. *See id.* at 307–08. The Court, ordering the release of two Hawaiian men tried and convicted in such tribunals, held that the term "martial law," though not expressly defined in the Act, was intended to empower the military to maintain "an orderly civil government" and to defend "against actual or threatened rebellion or invasion," but "was not intended to authorize the supplanting of courts by military tribunals." *Id.* at 324.

[30] Ex parte Henderson, 11 F. Cas. 1067 (C.C.D. Ky. 1878) (No. 6349).

congressional statute that purported to confer court-martial jurisdiction over contractors who defrauded the Army.[31] But I principally relied on *Reid v. Covert*[32] (*Reid II*), an opinion issued by the Supreme Court just one year earlier, to support my contention that the power conferred upon Congress by the Constitution to "make Rules for the Government and Regulation of the land and naval Forces"[33] simply did not allow for jurisdiction over civilians such as Mountz.

The *Reid II* opinion covered two different cases: *Reid v. Covert* and *Kinsella v. Krueger*.[34] The former involved Mrs. Clarice Covert, who had killed her husband, a sergeant in the U.S. Air Force, at a military base in England. She was tried by court-martial for murder and convicted despite her claim of insanity. Her sentence was affirmed by the board of review but reversed by the U.S. Court of Military Appeals (now the U.S. Court of Appeals for the Armed Forces) for errors pertaining to the insanity defense. While held in the United States pending retrial in the District of Columbia, she filed a habeas corpus petition challenging court-martial jurisdiction.[35] Relying on *United States ex rel. Toth v. Quarles*,[36] in which the Supreme Court held that a discharged serviceman who had returned to civilian life could not be subjected to trial by court-martial for offenses allegedly committed during his military service,[37] the district court granted the writ. The Government appealed directly to the Supreme Court.[38]

The other case involved Mrs. Dorothy Smith, who had killed her husband, an Army officer, at an Army post in Japan where she had been living with him. She, too, had been tried for murder and convicted despite evidence of insanity. While she was serving a sentence of life imprisonment in a federal penitentiary in West Virginia, her father, Walter Krueger, filed a petition for habeas corpus on her behalf, but in her case the district court denied the writ. While an appeal was pending in the Fourth Circuit, the

---

[31] *See id.* at 1078. While acknowledging that "[c]ourts-martial are lawful tribunals existing by the same authority [as] that [by which] other courts exist," the court cautioned that the jurisdiction of military tribunals "is limited and special, being confined to military persons charged with military offenses." *Id.* at 1068.

[32] *Reid II*, 354 U.S. 1 (1957).

[33] U.S. CONST. art. I, § 8, cl. 14.

[34] *See* Reid v. Covert (*Reid I*), 351 U.S. 487, 488 (1956); *see also* United States *ex rel.* Krueger v. Kinsella, 137 F. Supp. 806 (S.D. W. Va. 1956), *aff'd*, Kinsella v. Krueger, 351 U.S. 470, 487 (1956), *rev'd on reh'g sub nom Reid II*, 354 U.S. 1.

[35] *See Reid I*, 351 U.S. at 488.

[36] United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).

[37] *See id.* at 14–15.

[38] *See Reid I*, 351 U.S. at 488; *see also Reid II*, 354 U.S. at 4.

Supreme Court granted certiorari at the Government's request and consolidated the two cases for argument.[39]

In the first of a pair of decisions in the case, the Court found that the provisions of Article III and of the Sixth and Seventh Amendments, requiring trial by jury after indictment by grand jury, did not protect American citizens tried by the Government in foreign countries.[40] The majority did not find it necessary to pass on the constitutional provision governing the power of Congress to make rules governing the Armed Forces.[41] After granting a rehearing,[42] however, the Court heard additional arguments and withdrew the previous opinions. The Court held in its new opinion "that Mrs. Smith and Mrs. Covert could not constitutionally be tried by military authorities."[43]

Undertaking an exhaustive historical examination, the Court rejected the notion that the Constitution never could be applied to protect U.S. citizens abroad. The Court, holding "that the Constitution in its entirety applied to the trials of Mrs. Smith and Mrs. Covert," concluded that "their court-martial[s] did not meet the requirements of Art. III, § 2 or the Fifth and Sixth Amendments."[44] Accordingly, the Court undertook to divine whether "anything *within* the Constitution . . . authorizes the military trial of dependents accompanying the armed forces overseas."[45]

The Court found no such authorization in the empowerment of Congress to make rules governing the military forces. The Court

> recognize[d] that there might be circumstances where a person could be "in" the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform. But the wives, children and other dependents of servicemen cannot be placed in that category, even though they may be accompanying a serviceman abroad at Government expense and receiving other benefits from the Government. We have no difficulty in saying that such persons do not lose their civilian status and their right to a civilian trial because the Government helps them live as members of a soldier's family.[46]

The Court also recognized the possibility of court-martial jurisdiction over civilians in battlefield areas:

---

[39] *See Kinsella*, 351 U.S. at 471–73; *see also Reid II*, 354 U.S. at 5.

[40] *See Kinsella*, 351 U.S. at 476, 478–79.

[41] *See id.* at 476.

[42] Reid v. Covert, 352 U.S. 901 (1956).

[43] *Reid II*, 354 U.S. at 5.

[44] *Id.* at 18–19.

[45] *Id.* at 19.

[46] *Id.* at 22–23 (footnote omitted).

> There have been a number of decisions in the lower federal courts which have upheld military trial of civilians performing services for the armed forces "in the field" during *time of war*. To the extent that these cases can be justified, insofar as they involved trial of persons who were not "members" of the armed forces, they must rest on the Government's "war powers." In the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefront.[47]

Specifically rejected, however, was the Government's contention that civilians "in the field" should include dependents of military personnel accompanying them overseas in times of "world tension."[48] The plurality opinion, observing that "[c]ourts-martial are typically ad hoc bodies appointed by a military officer from among his subordinates" and that courts-martial "have always been subject to varying degrees of command influence," concluded with these interesting words from Lord Coke: "Shall the Souldier and Justice Sit on one Bench, the Trumpet will not let the Cryer speak in Westminster-Hall."[49]

While only four justices concurred in the plurality opinion, and the two separate concurring opinions restricted the holding to the circumstances of the cases sub judice,[50] I nonetheless believed that the handwriting was on the wall. Accordingly, in defending Mountz I argued strongly that in the context of rights afforded to individuals accompanying military personnel overseas, there is no difference between capital and noncapital cases and certainly no difference between civilian dependents and civilian employees of contractors. Indeed, dependents have a stronger connection to the military, by reason of the extensive benefits provided to them by the Government. I also argued that Mountz was no longer an employee of Vinnell at the time of his trial—as he had come to the end of his one-year contract in any event—and, therefore, could not be considered as "accompanying" the Army, but for the detention of his passport.

---

[47] *Id.* at 33 (footnote omitted).

[48] *Id.* at 34.

[49] *Reid II*, 354 U.S. at 36, 41 (internal quotation marks and emphasis omitted).

[50] *See id.* at 49 (Frankfurter, J., concurring) ("I therefore conclude that, in capital cases, the exercise of court-martial jurisdiction over civilian dependents in time of peace cannot be justified . . . ."); *see also id.* at 65 (Harlan, J., concurring) ("I concur in the result, on the narrow ground that where the offense is capital, Article 2(11) cannot constitutionally be applied to the trial of civilian dependents of members of the armed forces overseas in times of peace." (footnote omitted)). Two justices dissented and one declined to participate. *See id.* at 41 (noting that Whittaker, J., "took no part in the consideration or decision of these cases"); *id.* at 78 (Clark & Burton, J.J., dissenting).

b. *For the Prosecution*

My adversary, of course, argued that the *Reid* case called into question the constitutionality of the UCMJ jurisdictional provision only to the extent that it pertained to civilian dependents who accompany military personnel beyond the territorial limits of the United States in time of peace. That indeed was the interpretation given to *Reid* by the Court of Military Appeals in *United States v. Wilson*,[51] a decision issued on March 28, 1958, within one year of the Supreme Court's decision in *Reid*.

In *Wilson*, the highest military court was confronted with the conviction by court-martial, for various sex crimes violative of the UCMJ, of a civilian employee of the Army Comptroller in Berlin. The jurisdictional question was resolved in favor of the Government by an expedient: The court simply drew a distinction between overseas employees of the government and overseas dependents of military personnel. As to the former, the Court of Military Appeals wrote:

> They both live and work in a military community. They are required for, and are depended upon to carry out, the assigned missions of the military forces overseas. Functionally, as well as practically, they are either "part of the armed forces" or "so directly connected with such forces" as to be inseparable from them for the purpose of observing the standards of conduct prescribed by Congress for the government of the military.[52]

The court also rejected Wilson's contention that his tender of resignation from his employment the day before trial deprived the court-martial of jurisdiction. In this regard, the court held: "[c]harges had been served and the Article 32 pretrial investigation had been conducted almost two months earlier. Manifestly, jurisdiction over him had attached long before the tender, and the proceedings could, therefore, continue to completion."[53]

My adversary also relied on earlier opinions of the Court of Military Appeals sustaining court-martial jurisdiction: *United States v. Marker*, the case of a civilian employee of the Tokyo Ordnance Depot;[54] *United States v. Robertson*, the case of a merchant seaman who was a member of the crew of a private vessel chartered to the Military Sea Transportation Service, wherein the court held that the Japan SOFA's provision of jurisdiction in the Japanese courts did not preclude concurrent jurisdiction in courts-martial;[55] and *United*

---

[51] United States v. Wilson, 25 C.M.R. 322 (C.M.A. 1958).

[52] *Id.* at 324 (footnotes omitted).

[53] *Id.*

[54] United States v. Marker, 3 C.M.R. 127 (C.M.A. 1952).

[55] United States v. Robertson, 19 C.M.R. 102 (C.M.A. 1955).

States v. Rubenstein, the case of a man who was originally employed by the Army as a clerk-typist in Japan, who became the manager of a club operated for the benefit of Air Force civilian employees under a contract by which he would retain military privileges and remain subject to military jurisdiction, and who fled to the United States while under suspicion of black-market activities and voluntarily came to Korea, where he was apprehended and returned to Japan for a trial by court-martial.[56] Finally, Captain West cited as good law a Court of Military Appeals opinion that I contended had been overruled by *Reid*: *United States v. Burney*,[57] a case involving a situation on all fours with the case at bar. In *Burney*, jurisdiction was upheld in the case of a civilian employee of the Philco Corporation who had been assigned to maintain technical equipment at an Air Force base in Japan.[58]

On the question of the loss of jurisdiction by severance of any connection with the Armed Forces prior to trial, my adversary argued that another pre-*Reid* decision that I had cited, *United States v. Schultz*,[59] presented a case distinguishable from the one at bar. *Schultz* involved a former Air Force Captain who was separated from service in Japan and issued a commercial entry permit to remain in the country. The high military court held that he had severed all connection with the military, had been allowed to "merge" with the civilian population, and, therefore, was not amenable to trial by court-martial for the offense of manslaughter committed during his military service.[60]

Captain West contended that whereas Schultz had merged into the civilian population, Mountz had not. My adversary noted that Mountz had maintained all of his prior Army privileges—including the use of his quarters, the Post Exchange, his whiskey-ration card, Army post-office facilities, and MPCs. It seemed to me, however, that Mountz—in the absence of employment by the government or by Vinnell, and without any military status of any kind—had "merged" into the civilian population just as effectively as had Schultz. Moreover, only the illegal confiscation of Mountz's passport prevented him from leaving the country during trial.

3. *The Ruling*

Before he ruled on the question of jurisdiction, the Law Officer called Mr. Broady, the Vinnell project manager, to the witness stand. Broady was

---

[56] United States v. Rubenstein, 22 C.M.R. 313 (C.M.A. 1957).

[57] United States v. Burney, 21 C.M.R. 98 (C.M.A. 1956).

[58] *See id.* at 103–04, 125.

[59] United States v. Schultz, 4 C.M.R. 104 (C.M.A. 1952).

[60] *Id.* at 110–11.

questioned extensively by the Law Officer, and also by counsel, regarding the work that Mountz had performed, how he had performed it, and the military facilities that had been available to him.[61]

I then recalled Mountz to the stand in an effort to show his disconnect from the military after the termination of his employment, including his use of a private residence in Seoul that he had maintained even prior to the termination of his contract. Mountz's testimony at this point revealed his restricted activities between July 8th and 12th.[62]

The Law Officer pronounced himself satisfied with the whereabouts of Mountz between those dates, which was when the charges were served upon him.[63] The Law Officer then denied the motion challenging jurisdiction over the accused at the time of the alleged offenses.[64] He deferred ruling on the question of the present jurisdiction of the court-martial over Mountz—calling it "a rather novel point"—and directed further briefing.[65] When counsel advised that they could provide no additional authorities, however, the Law Officer denied the motion challenging present jurisdiction.[66]

The out-of-court hearing on the jurisdictional issues concluded with the Law Officer taking judicial notice

> to the effect that there [was] no agreement or treaty between the United States and the Republic of Korea conferring upon the Republic of Korea jurisdiction over the military, the members of the United States military establishment or civilians serving with the military or accompanying the United States military establishment while stationed in Korea.[67]

This, of course, was in stark contrast to the situation in Japan, where I had helped to administer a SOFA that, among other things, provided for such jurisdiction.

---

[61] *See* Record App. Ex. 12, *supra* note 21, at 28–33.

[62] *See id.* at 33–38.

[63] *See id.* at 38.

[64] *See id.* at 40.

[65] *Id.*

[66] *See id.* at 41.

[67] Record App. Ex. 12, *supra* note 21, at 42.

C. *A Question of Regulation*

Mountz was charged with violating an Army regulation—a "Circular" designated 756-1 (Circular 756-1 or the Regulation).[68] With respect to all persons in the command, the Regulation prohibited, inter alia:

> a. The transfer of a restricted item or dollar instrument to other than an authorized person, or transferring said item or instruments to authorized person(s) having knowledge or having reasonable cause to believe that they will be transferred directly or indirectly to other than authorized person(s).
>
> . . .
>
> c. Acquiring Korean currency from other than United States Finance Disbursing Officers, their agents, or other authorized sources.
>
> d. Transportation of dollar instruments and restricted items[, including:]
>
> (1) Transporting or causing to be transported restricted items or dollar instruments knowing or having reasonable cause to believe that such items or instruments will be transferred directly or indirectly to other than authorized person(s).[69]

The Regulation was promulgated on August 21, 1956 (and was amended in respects not pertinent to the case on June 27, 1957).[70] On June 30, 1957, a Circular designated 310-1 (Circular 310-1) was promulgated by Headquarters, U.S. Army Forces, Far East and Eighth U.S. Army (REAR)—the same authority that had promulgated Circular 756-1.[71] Circular 310-1 provided as follows: "Publications bearing a date prior to 1 July 1957 and not listed in this index are obsolete and herewith rescinded."[72] Although a Circular designated 756-1, but entitled "Operation of Quartermaster Sales Outlets for Petroleum Products" and dated September 7, 1955, was listed in

---

[68] *See* Headquarters I Corps (Group), APO 358, United States Army, General Court Martial Order No. 27 1 (Oct. 3, 1958), *in* Record, *supra* note 1 [hereinafter Court Martial Order].

[69] Headquarters United States Army Forces, Far East and Eighth United States Army, APO 301, Circular No. 756-1 § (4)(a), (c)–(d) (Aug. 21, 1956), *in* Record, *supra* note 1, Prosecution Ex. 1 [hereinafter Circular 756-1].

[70] *See* Headquarters I Corps (Group), APO 358, Review of the Staff Judge Advocate 2 para. 4(b)(1) (Oct. 2, 1958), *in* Record, *supra* note 1 [hereinafter SJA Review].

[71] Headquarters United States Army Forces, Far East and Eighth United States Army (REAR), APO 343, Circular No. 310-1 (June 30, 1957), *in* Record, *supra* note 1, Defense Ex. B [hereinafter Circular 310-1].

[72] *Id.*

the 30 June 1957–dated index of 8th Army publications, the at-issue Circular 756-1 (i.e., the one dated August 21, 1956, and pertaining to prohibited transactions) was not listed.[73] My contention simply was this: The Circular under which Mountz was charged—that is, the Regulation—had been repealed (albeit probably inadvertently) and was no longer operative at the time of Mountz's alleged offense.[74]

Despite the foregoing, the Law Officer accepted my colleague's contention that the Regulation was still in effect. In denying my motion to dismiss and, thus, my contention that the Regulation was defunct,[75] the Law Officer relied upon General Order 76, issued by the same Headquarters that had issued the previously described Circulars.[76] Paragraph VI of General Order 76 was dated June 21, 1957, a date prior to the date of the repealing Circular. Paragraph VI provided that certain directives were to remain in effect until "specifically superseded or rescinded."[77] Since Circular 756-1 had not been rescinded specifically, the Law Officer held that Circular 310-1 fell "short of the specific supersession or rescission needed under the provisions of Section VI of General Order 76."[78] The Law Officer also noted that Circular 756-1 "ha[d] no date of automatic expiration or rescission as [was] frequently found in directives of this command."[79] The Law Officer's ruling was made in an out-of-court hearing on the second day of trial.[80]

---

[73] *See id.*

[74] *See* Record App. Ex. 12, *supra* note 21, at 43–44; *see also* Transcript, Out-of-Court Hearing in the Case of George E. Mountz, United States Civilian Accompanying the Armed Forces (U.S. Army) in Korea, Uijongbu, Korea 1–2 (Aug. 20, 1958), *in* Record, *supra* note 1, App. Ex. 18 [hereinafter Record App. Ex. 18].

[75] *See* Headquarters I Corps (Group), Office of the Staff Judge Advocate, APO 358, United States Army, Request for Termination of Restriction of George E. Mountz and Dismissal of the Charges Against Him 1–2 (July 22, 1958), *in* Record, *supra* note 1, App. Ex. 14.

[76] *See* Headquarters, United States Army Forces, Far East and Eighth United States Army (REAR), APO 343, General Order No. 76 (June 21, 1957), *in* Record, *supra* note 1, Defense Ex. C [hereinafter General Order 76]; *see also* Record App. Ex. 18, *supra* note 74, at 1.

[77] General Order 76, *supra* note 76, at § VI; *see* Record App. Ex. 18, *supra* note 74, at 1–2.

[78] Record App. Ex. 18, *supra* note 74, at 1; *see also* General Order 76, *supra* note 76, at § VI.

[79] Record App. Ex. 18, *supra* note 74, at 1.

[80] *See id.*

D. *Trial, Verdict, and Sentence*

For the prosecution, the court-martial heard testimony from Messrs. Broady and Kirk, the Vinnell project manager and office manager, respectively. They once again described the Vinnell operations and payroll procedures. They also described the part that Mountz had played in cashing the Vinnell checks.[81] The court-martial also heard the testimony of Akiyoshi Kazama, an enlisted soldier who acted as a cashier in the Disbursing Office at Camp Red Cloud. He identified certain currency-exchange records and testified to cashing one of the Vinnell checks presented by Mountz and exchanging MPCs for the checks, which were written in dollar amounts.[82] Another enlisted soldier who acted as a cashier in the Disbursing Office, Kenneth D. Estes, testified to his exchange of MPCs for the second Vinnell check presented by Mountz, and described the records made of that transaction.[83]

The next witness to testify for the prosecution was John W. Crawford, Chief Clerk and First Sergeant at the Disbursing Office. Although he had no connection with the accused, he identified the checks that Mountz had presented, and identified Lieutenant Allen as the officer who had approved the cashing of the checks at the Finance Office. This was the same Lieutenant Allen originally charged along with another officer and Mountz for the currency violations.[84] The final witness for the prosecution was Elmer E. Snyder, a criminal investigator in the Military Police assigned to the Office of the Provost Marshal of I Corps. Snyder testified to the taking of a purportedly incriminating statement made by Mountz that was introduced into evidence.[85] Snyder was subjected to extensive cross-examination, as he appeared to have little understanding of the currency regulation that Mountz was suspected of violating. In addition, the Law Officer examined Snyder concerning his understanding of the crime that he was supposed to be investigating. In the end, the Mountz "confession" was received in evidence.[86]

I later recalled Snyder to the stand for the defense's case and drew from him the admission that Mountz did not consent to the confiscation of his

---

[81] *See* Trial Record at 50–75.

[82] *See id.* at 75–81.

[83] *See id.* at 81–84.

[84] *See id.* at 84–87; *see also* Charge Sheet, *supra* note 13, at 1.

[85] *See* Trial Record, *supra* note 14, at 87–103; *see also* Statement of Mountz, George E. (July 11, 1958), *in* Record, *supra* note 1, Prosecution Ex. 7 [hereinafter Record Prosecution Ex. 7].

[86] *See* Trial Record, *supra* note 14, at 107–08; *see also* Record Prosecution Ex. 7, *supra* note 85.

briefcase or the removal of his passport therefrom. Snyder also testified that he had turned the passport over to Broady on instructions from Snyder's superior officer. I also put on the record a stipulation that Broady had been holding the passport since July 15, 1958.[87] That military authorities had expropriated the passport of an American civilian had bothered me since the inception of the case.

My only other witness was Chief Warrant Officer McSween, another criminal investigator in the Office of the Provost Marshal. Through him, I gained the admission of an exculpatory statement that Mountz had made and that Mountz and McSween both had signed.[88]

Exhibits received in evidence during the course of the trial included the regulations at issue, the Vinnell checks, the financial records of the Disbursing Office, a laminated card used by Snyder in reading Mountz his Article 31 (i.e., Miranda) rights, and the two statements given by Mountz to the criminal investigators.

After extensive summation by counsel, the Law Officer instructed the jury.[89] Although he had ruled in an out-of-court hearing that Circular 756-1 was in effect at the time of Mountz's alleged offenses, the Law Officer placed before the jury the question of the continuing validity of the Circular.[90] The Law Officer refused, however, to place the question of jurisdiction before the jury.[91] Nevertheless, at the conclusion of the instructions, the president of the court-martial asked the Law Officer the following question: "Are civilians who are employed by the Army, GS civilians, civil service workers, let's say, are they subject to the same privileges and penalties as members of the Armed Forces while serving in overseas theaters[?]"[92] The Law Officer responded: "This accused, although not within the capacity you mentioned, is subject to military rules, laws, and [the] regulations of this [court-martial] while in [the Korean] theater."[93]

A verdict of guilty was announced by the president approximately two-and-three-quarter hours later.[94] After a brief presentation of Mountz's personal data by the prosecution, and an argument by me urging a light sentence, the Law Officer gave a brief charge on the duties of the court-martial in respect to sentencing. After some inquiries by members of the

---

[87] *See* Trial Record, *supra* note 14, at 115–17.

[88] *See id.* at 117–19.

[89] *See id.* at 131–39.

[90] *See id.* at 134–35.

[91] *See id.* at 140.

[92] *Id.* at 139.

[93] Trial Record, *supra* note 14, at 140.

[94] *Id.* at 140–41.

court-martial to clarify the instructions, particularly on the question of a fine, the members retired to consider a sentence. About one half hour elapsed before they returned with the sentence—a fine of $1,500.00.[95] While I considered this something of a victory, I continued to maintain that there was no jurisdiction over Mountz and no extant regulation for him to have violated through his at-issue conduct.

VI. POST-TRIAL REVIEW AND VINDICATION

Although I was certain that my legal arguments would prevail once they got to an Army board of review (the intermediate appellate court) in Washington, D.C., vindication came even sooner than expected. By the time that Colonel Booth—the I Corps Judge Advocate—got around to filing his review on October 2, 1958, I had been reassigned to the Office of the Staff Judge Advocate, Headquarters, 1st U.S. Army, Governors Island, New York. This was a great assignment—it was close to home and presented many opportunities for trial experience. Mountz had already gone home to California when I received at Governors Island the news that Colonel Booth had recommended to the Commanding General that Mountz's sentence be "disapproved" (i.e., reversed). Colonel Booth wrote: "The [C]ircular prohibiting Hwan transactions of the type charged was rescinded before Mountz committed the acts alleged. Accordingly, his conviction cannot be sustained."[96]

Colonel Booth's review included a scholarly analysis of the law governing the compilation and rescission of laws and statutes, as applied to Army regulations. Colonel Booth wrote the following:

> When a group of laws or statutes are codified or collected in a compilation, all provisions of the former laws or statutes mentioned or retained in the new code or compilation are regarded as having been continued in full force and effect. On the other hand, when a statute is omitted from a new code or compilation, such omitted law is considered to be repealed or annulled when the new compilation expressly states that all statutes not included are repealed and that the listing in the new code or compilation covers the entire statutory law. When the legislature provides that a code or compilation of laws shall constitute the entire statutory law, all prior acts which are omitted from the code or compilation are repealed. It follows then, that AFFE/8A Circular 756-1, dated 21 August 1956, which was omitted from the compilation of directives and circulars promulgated in Circular Number

---

[95] *Id.* at 147.

[96] SJA Review, *supra* note 70, at 5.

> 310-1 on 30 June 1957, was legally and effectively rescinded on that date and was thereafter of no force or effect.[97]

He then reviewed whether a Circular designated 310-1 and dated November 30, 1957, which listed a "756-1 Unauthorized Transaction Circular" as being then in effect, served to revive and again make effective the Regulation.[98] This was a point not even seized upon by the prosecution during the trial. The Staff Judge Advocate disposed of it as follows:

> Normally, revocation or rescission of a regulation, by which a preceding regulation was revoked, will not revive the original regulation unless it is specifically provided that such a revival was intended. A special statute may provide that a prior general statute, which repealed another prior special statute, is repealed and the prior special statue is specifically revived. However, where one statute has been repealed by a failure to include it in a compilation covering the existing statutory law, such a statute cannot be revived by construction. The act of a clerical revisor or codifier in including in a codification or compilation, a statute which has been repealed, does not operate to revitalize it. This especially is true when a repealed statute appears in a compilation which does not specifically revive it, but is a mere compilation or republication of existing statutes. A FORTIORI, the mere listing of the rescinded Circular Nr. 756-1, dated 21 August 1956, in an index of publications promulgated by Eighth United States Army on 30 November 1957, did not have the legal effect of reviving or revitalizing the rescinded circular.[99]

Colonel Booth noted in his review that a new U.S. 8th Army Circular dealing with Hwan transactions in the black market was in the process of preparation, and concluded with this apologia for his original advice that the case be referred to trial:

> The pretrial advice in this case was prepared on the assumption that the AFFE/8A Circular Mountz was accused of violating was then in effect, and had been in effect at the time of acts alleged in the specifications. This assumption was buttressed by the fact of the circular's listing in the 30 November 1957 Index of Eighth Army Publications then in effect. Advice from Eighth Army Headquarters also indicated that the circular in question controlled black market activities in Korea. The rescinding circular was first brought to light in the course of Mountz' trial.[100]

---

[97] *Id.* at 4 (citations omitted).

[98] *See id.*

[99] *Id.* at 4–5 (citations omitted).

[100] *Id.* at 5.

On the basis of the advice of the Staff Judge Advocate, Lieutenant General Trapnell, Commander of I Corps, issued the following Order: "In the . . . case of George E. Mountz, . . . United States Civilian Accompanying the Armed Forces (U.S. Army) in Korea, the sentence is disapproved and the charges are dismissed."[101]

VII. EPILOGUE

A. *The Supreme Court Speaks*

On January 18, 1960, approximately one-and-a-half years after the Mountz case was concluded, the Supreme Court issued two opinions that finally put to rest the question of court-martial jurisdiction over civilians accompanying the Armed Forces. In *Kinsella v. United States ex rel. Singleton*,[102] the wife of a soldier assigned to a tank battalion in Baumholder, Germany, was charged, along with her husband, with the unpremeditated murder of one of their children.[103] Both parents offered to plead guilty to involuntary manslaughter, and new charges were lodged for trial before a general court-martial. The wife challenged the jurisdiction of the court-martial and pled guilty when the challenge was rejected. Her conviction was upheld by the Court of Military Appeals, and she was confined to the federal reformatory at Alderson, West Virginia, to serve her sentence. Thereafter, a writ of habeas corpus was issued, resulting in her being discharged from custody. The warden's appeal from the grant of the writ came before the Supreme Court on a petition for certiorari.[104]

Referring to *Reid II*,[105] the Court noted that the jurisdictional test was "one of *status*, namely, whether the accused in the court-martial proceeding [was] a person who [could] be regarded as falling within the term 'land and naval Forces.'"[106] The Court noted that "each opinion supporting the judgment struck down the [jurisdictional] article as it was applied to civilian dependents charged with capital crimes."[107] Although the concurring Justices in *Reid II* had supported the judgment because the crime was punishable by death,[108] the Court observed that "[t]he Justices joining in the opinion

---

[101] Court-Martial Order, *supra* note 68, at 2.

[102] Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960).

[103] *Id.* at 235–36.

[104] *Id.* at 236.

[105] *Reid II*, 354 U.S. 1 (1957).

[106] *Kinsella*, 361 U.S. at 241.

[107] *Id.*

[108] *See supra* note 49 and accompanying text.

announcing the judgment . . . did not join in this view, but held that the constitutional safeguards claimed applied in '*all* criminal trials' in Article III courts and applied outside of the States."[109]

The *Kinsella* Court adopted this view and rejected the Government's contention that courts-martial would have jurisdiction over civilian dependents charged with noncapital offenses.[110] With respect to the Government's claim that discipline in the military service would be critically impacted by not allowing jurisdiction in noncapital cases, the Court stated that it had

> heard no claim that the total failure to prosecute capital cases against civilian dependents since the [*Reid II*] decision in 1957 had affected in the least the discipline at armed services installations. We do know that in one case, *Wilson v. Girard*, . . . the Government insisted and we agreed that it had the power to turn over an American soldier to Japanese civil authorities for trial for an offense committed while on duty. We have no information as to the impact of that trial on civilian dependents. Strangely, this itself might prove to be quite an effective deterrent. Moreover, the immediate return to the United States permanently of such civilian dependents, or their subsequent prosecution in the United States for the more serious offenses when authorized by the Congress, might well be the answer to the disciplinary problem. Certainly such trials would not involve as much expense nor be as difficult of successful prosecution as capital offenses.[111]

The "Girard" mentioned in the foregoing was the same Girard referred to earlier in the discussion of my work at the U.S. Army Claim Service, Far East, in Japan.[112]

The Court saw no harm to our relationship with other countries in excluding noncapital cases, along with capital cases, from court-martial jurisdiction. The Court, rejecting the assertion that the Necessary and Proper Clause presented a basis for including civilian dependents within the term "land and naval forces," observed that this very notion had been rejected in the *Reid* case.[113] The Court concluded its opinion by holding that the dependent wife was "protected by the specific provisions of Article III and the Fifth and Sixth Amendments and that her prosecution and conviction by court-martial [were] not constitutionally permissible."[114]

---

[109] *Kinsella*, 361 U.S. at 241 (internal quotation marks omitted).

[110] *See id.* at 238–48.

[111] *Id.* at 245–46.

[112] *See supra* notes 6–8 and accompanying text.

[113] *Kinsella*, 361 U.S. at 247–48.

[114] *Id.* at 249.

In *Grisham v. Hagan*,[115] decided the same day as *Kinsella*, the Court was confronted with the case of a civilian employee of the U.S. Army who worked at an Army installation in France. Tried by general court-martial for the capital offense of premeditated murder as defined in the UCMJ, the employee, Albert Grisham, was found guilty of the offense of unpremeditated murder and sentenced to a term of life imprisonment.[116] While serving that sentence at the U.S. penitentiary in Lewisburg, Pennsylvania, he applied for a writ of habeas corpus. His claim was "that Article 2(11) was unconstitutional as applied to him, for the reason that Congress lacked the power to deprive him of a civil trial affording all of the protections of Article III and the Fifth and Sixth Amendments."[117]

Grisham's petition was dismissed in the district court, and that ruling was affirmed in the court of appeals.[118] The Supreme Court reversed, holding as follows:

> We are of the opinion that this case is controlled by *Reid v. Covert*. . . . It decided that the application of the [jurisdictional article] to civilian dependents charged with capital offenses while accompanying servicemen outside the United States was unconstitutional as violative of Article III and the Fifth and Sixth Amendments. We have carefully considered the Government's position as to the distinctions between civilian dependents and civilian employees, especially its voluminous historical materials relating to court-martial jurisdiction. However, the considerations pointed out in *Covert* have equal applicability here. . . . For the purposes of this decision, we cannot say that there are any valid distinctions between the two classes of persons. The judgment is therefore reversed.[119]

The *Grisham* and *Kinsella* cases sounded the death knell of court-martial jurisdiction over civilians accompanying the Armed Forces overseas in nonbattle areas in peacetime. It should have been apparent to the military lawyers and military courts that this result was inevitable. It certainly was apparent to the young JAGC officer who defended George Mountz in Korea in 1958.

---

[115] Grisham v. Hagan, 361 U.S. 278 (1960).
[116] *Id.* at 279.
[117] *Id.*
[118] *Id.*
[119] *Id.* at 280.

B. *Congress Responds*

Since 1957, Congress has given extraterritorial effect to certain specific provisions of the U.S. Code, thereby conferring jurisdiction on federal courts over U.S. civilians for certain specific types of misconduct overseas.[120] Nonetheless, until recently, jurisdiction was lacking over the vast majority of crimes that might be committed by civilians accompanying the Armed Forces in foreign lands.[121]

Noteworthy in this respect are the opinions of two appellate courts, each holding that overseas military bases, including leased houses and property, are included in the "special maritime and territorial jurisdiction of the United States"[122] and that civilians who commit federal offenses within that jurisdiction are amenable to prosecution in federal court.[123] Holding to the contrary, however, another court of appeals—my own, in fact—held that the federal courts had no jurisdiction to prosecute a crime that took place on property leased by the United States for military use in the Federal Republic of Germany.[124] The panel identified a "jurisdictional gap" and directed that a copy of its opinion be forwarded to Congress.[125]

Congress reacted by passing the Military Extraterritorial Jurisdiction Act of 2000 (the Act), which was signed into law on November 22, 2000.[126] The Act confers on Article III courts jurisdiction that, because of the constitutional constraints identified by the Supreme Court, could not be conferred upon courts-martial.[127] The Act provides for jurisdiction over civilians employed by, or accompanying, the Armed Forces overseas and over former members of the armed services who were separated from active duty and who attained civilian status without being prosecuted for offenses committed while on active duty and subject to court-martial.[128] The Act is limited to offenses punishable by imprisonment for more than one year.[129]

---

[120] *See* Yost & Anderson, *supra* note 4, at 448.

[121] *See id.* & nn. 15–16.

[122] 18 U.S.C. § 7(3) (2000).

[123] *See* United States v. Corey, 232 F.3d 1166, 1171 (9th Cir. 2000); United States v. Erdos, 474 F.2d 157, 160 (4th Cir. 1973); *see also* United States v. Wilson, 25 C.M.R. 322, 324 (1958).

[124] *See* United States v. Gatlin, 216 F.3d 207, 209 (2d Cir. 2000).

[125] *See id.* at 223.

[126] Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488 (2000) (codified at 18 U.S.C. §§ 3261–1367 (2000)) [hereinafter the Act].

[127] *See* 18 U.S.C. § 3261(a) (2000).

[128] *See id.*

[129] *Id.*

Persons "employed by the Armed Forces outside the United States" are defined to include U.S. Department of Defense (DOD) contractors as well as civilian employees of the DOD who are not nationals or ordinarily residents of the host nation.[130] The class of "persons accompanying the Armed Forces" includes dependents of members of the military, of civilian DOD employees, and of contractors; however, the dependent must reside with the member employee or contractor and cannot be a national of, or ordinarily a resident in, the host country.[131]

The Act itself makes no provision for venue, leaving in place the general venue provision for "[o]ffenses not committed in any district."[132] That provision allows for venue "in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought."[133] In the case of offenders not arrested or brought into any district, an information or indictment "may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders."[134] If the last residence is unknown, the information or indictment may be filed in the District of Columbia, which will then be the venue for prosecution in the district court.[135]

A person subject to the Act may be delivered for prosecution to the authorities of the host country, provided that such authorities request delivery of the person and provided that such procedure is authorized by treaty or international agreement.[136] As noted above, the United States is party to over 100 SOFAs governing our military forces in foreign countries.[137] Any of those countries may exercise its right to try persons accompanying the military, just as it may exercise its right to try members of the military as provided in the respective agreement, as did Japan in Girard's case.[138]

The Act provides that the removal to the United States of a person arrested overseas must be authorized by a federal magistrate judge.[139] Initial proceedings are also conducted before a magistrate judge. At the initial proceedings, the magistrate must determine whether there is probable cause to believe that an offense prosecutable under the Act has been committed and

---

130 *See* 18 U.S.C. § 3267(1) (2000).

131 *See id.*

132 *See* 18 U.S.C. § 3238 (2000).

133 *Id.*

134 *Id.*

135 *Id.*

136 *See* 18 U.S.C. § 3263(a) (2000).

137 *See* Eichelman, *supra* note 4, at 23 n.4; Yost & Anderson, *supra* note 4, at 451.

138 *See supra* note 7 and accompanying text.

139 *See* 18 U.S.C. § 3264(b) (2000).

that the person arrested has committed that offense.[140] Conditions of release or detention must be determined,[141] and the initial proceedings "may be carried out by telephony or such other means that enables voice communication among the participants, including any counsel representing the [accused]."[142] The magistrate judge is authorized to appoint a judge advocate—"certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member"[143]—to represent the person accused in the initial proceedings. The Act provides for the Secretary of Defense, in consultation with the Secretary of State and the U.S. Attorney General, to prescribe appropriate regulations respecting the implementation of the Act.[144]

The Act, which has filled the void that has existed since the trial of George Mountz, has already been invoked in the case of the wife of an Air Force Staff Sergeant who was accused of murdering the sergeant in Turkey.[145] Trial has been scheduled in federal court in Los Angeles.[146] The most important benefit of the Act, of course, is that it provides for the eventual trial of the accused offender in a United States District Court, with all the rights and privileges attendant thereto. George Mountz would have been tried by a jury of his peers rather than by a panel of military officers.

C. *Issues Remaining*

Despite the beneficial purposes served by the Act, however, some vexing issues remain. For one thing, the Act does not cover nonfelony offenses. For another, it does not apply to contractors, or their employees, hired by agencies other than the DOD. It is well known that civilians in the employ of firms under contract to the Central Intelligence Agency accompany the Armed Forces abroad and have even engaged in armed conflict. News stories abound, for example, regarding the use of such "operatives" accompanying the Armed Forces during the United States' invasion of Afghanistan.[147]

Reportedly, employees of CACI International Inc. of Arlington, Virginia, a company said to be under a contract managed by the U.S. Department of

---

[140] *See* 18 U.S.C. § 3265(a)(1)–(2) (2000).

[141] *See id.* at § 3265(a)(3).

[142] *Id.* at § 3265(a)(1)(B).

[143] *Id.* at § 3265(c)(1), (c)(2)(B).

[144] *See* 18 U.S.C. § 3266(a)–(b) (2000).

[145] Adam Liptak, *Who Would Try Civilians From U.S.? No One in Iraq*, N.Y. TIMES, May 26, 2004, at A11.

[146] *Id.*

[147] *See, e.g.*, Frederick W. Kagan, *Did We Fail in Afghanistan?*, COMMENT., Mar. 2003, at 39–45.

the Interior, were allegedly responsible for the abuse of prisoners at the Abu Ghraib prison in Iraq.[148] If no DOD contractor were involved in those abuses, however, then it would seem that those contract employees who were responsible are not subject to the Act.

Apparently, more and more government agencies are contracting with private entities to provide services to the military that traditionally were performed by the military.[149] This adds to the legion of those "accompanying" the Armed Forces.[150] There is no reason why those who are employed by contractors who contract with agencies other than the DOD should not be subject to the provisions of the Act, and an amendment to the Act has been introduced to accomplish that purpose.[151] The void remaining after the Supreme Court decision denying court-martial jurisdiction over civilians has not yet been fully filled.

VIII. MEMOIR POST SCRIPT

Separated from military service after my completion of nearly three-and-a-half-years of active duty in 1959, I continued service as a U.S. Army Reserve JAGC Officer for several years thereafter. During my reserve service, I was promoted from First Lieutenant to Captain, JAGC. When I was constrained by the press of other public service duties to withdraw from further service in the reserves, I still held that rank, never having been promoted to the next rank, which would have made me Major Miner.

---

[148] *See* Renae Merle & Ellen McCarthy, *6 Employees From CACI International, Titan Referred to Prosecution*, WASH. POST, Aug. 26, 2004, at A18.

[149] *Cf.* Yost & Anderson, *supra* note 4, at 448–49 & nn.18–21.

[150] *See id.* at 448–49 & nn.18, 20–21.

[151] *See, e.g.*, MEJA Clarification Act, H.R. 4390, 108th Cong. (2d Sess. 2004).