

## Lore of the Corps

### Mexican Soldiers in Texas Courts in 1916: Murder or Combat Immunity?

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The Mexican Revolution began in 1910 and, in the bloody decade that followed, violence occasionally spilled over the border onto U.S. soil. One violent episode occurred on 15 June 1916, two months after Brigadier General (BG) John J. Pershing and his 5,000-man Punitive Expedition entered Mexico to chase the Mexican revolutionary fighter Francisco “Pancho” Villa and his *Villistas* (Villa’s men). On that Thursday in June, under cover of darkness, Mexican government troops crossed the Rio Grande and attacked U.S. cavalry troops guarding the border at San Ygnacio, a small Texas town located about forty miles south of Laredo. In the thirty-minute firefight, the Americans drove off their attackers, but at the cost of three U.S. soldiers killed and six more wounded. Six Mexican soldiers were also killed and more than a few wounded.<sup>1</sup> At least six Mexicans were captured, including Jose Antonio Arce, Vicente Lira, Pablino Sanchez, and Jesus Serda.

The Army handed its Mexican captives over to civilian law enforcement authorities in Webb County, Texas. Shortly thereafter, a grand jury indicted Arce, Lira, Sanchez, and Serda for the murder of Corporal William Oberlies, who had died of his wounds after the attack on San Ygnacio. A Webb County District Court jury convicted the four accused of homicide and sentenced them to death. On appeal to the Court of Criminal Appeals of Texas, the four condemned soldiers insisted that their convictions must be reversed because they were members of the Mexican armed forces and, as soldiers participating in a war between Mexico and the United States, could not be convicted of murder. What follows is the story of *Arce v. State*,<sup>2</sup> and how the legal opinion of the Army Judge Advocate General helped determine the outcome of this most unusual state criminal case.

At the time of the attack, there had been no declaration of war by either Mexico or the United States. The widespread revolutionary violence in Mexico made a declaration of war by that country unlikely. As for the United States, it was just as unlikely that Congress would declare war on its southern neighbor; with the possibility of being drawn into the ongoing war between the Allied and

Central Powers in Europe, President Woodrow Wilson was reluctant to get involved in a conflict with Mexico.<sup>3</sup>

But the Mexican Revolution—which was transformed “from a revolt against the established order into a multisided civil war”<sup>4</sup> by 1915—greatly affected American security: between July 1915 and June 1916, there were thirty-eight cross-border raids in which eleven American civilians and twenty-six Soldiers were killed.<sup>5</sup> This explains why, after Pancho Villa and at least 300 *Villistas* raided Columbus, New Mexico, on 9 March 1916, President Wilson ordered BG Pershing and his troops into Mexico to capture or kill Villa—but not to wage war against the de facto Mexican government led by Venustiano Carranza.<sup>6</sup>

Regardless of what Wilson may have wanted, the presence of six U.S. Army regiments (four cavalry and two infantry), along with two field artillery batteries and various support units, naturally provoked a response from Mexican forces. The most serious incident—prior to the attack on San Ygnacio—occurred just after noon on 12 April 1916, when Mexican soldiers began firing on 13th U.S. Cavalry troopers outside the town of Parral. A “running battle, during which two Americans were killed and six wounded,” lasted late into the afternoon and “developed into a standoff between U.S. and Mexican forces that threatened to propel the nations to the verge of war.”<sup>7</sup> Since Parral was 516 miles inside Mexican territory, it should have been no surprise to Pershing and his American troopers that the Mexican government did not look favorably on their military operations deep inside Mexico—even if the Mexicans considered Pancho Villa to be their enemy too. There is every reason to conclude that the Mexican attack on San Ygnacio two months later was a signal from the Mexicans to

<sup>1</sup> *Mexican Raiders Kill Three in Texas*, N.Y. TIMES, June 15, 1916, at 15.

<sup>2</sup> 202 S.W. 951 (Tex. Crim. App. 1918).

<sup>3</sup> Wilson’s decision to avoid an all-out war with Mexico was prudent, since the United States ultimately did enter the war on the Allied side in April 1917, ten months after the fight at San Ygnacio.

<sup>4</sup> ALEJANDRO DE QUESADA, *THE HUNT FOR PANCHO VILLA* 5 (2012).

<sup>5</sup> *Id.* at 23.

<sup>6</sup> For more on President Wilson’s decision to send Pershing to Mexico, see HERBERT M. MASON JR., *THE GREAT PURSUIT* 65–73 (1970). Most scholars believe Wilson’s dispatch of Pershing’s expedition was lawful as “extra-territorial law enforcement in self defense,” as Mexican authorities were “powerless” to stop raids by bandits across the U.S.-Mexican border, and there was no other available remedy. YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 218 (3d ed. 2001).

<sup>7</sup> DE QUESADA, *supra* note 4, at 48.

Washington, D.C., that there were consequences for the Americans if Pershing persisted in his pursuit of Villa.

After the trial and conviction of Jose Antonio Arce and his fellow soldiers, their defense counsel appealed to the Texas Court of Criminal Appeals. Although the defense raised a number of appellate issues, the court focused on a single question, which it saw would be dispositive: whether “a state of warfare” existed between Mexico and the United States. If so, reasoned the court, the question of any punishment for the defendants would be “within the jurisdiction of the United States and not the courts of Texas.”<sup>8</sup>

Under customary international law and the 1907 Hague Convention III at the time, two nations would not commence hostilities until there had been a declaration of war. As stated before, there had been no such pronouncement between Mexico and the United States. Nevertheless, the Texas court looked to the facts of the case to determine if there was a state of war between the two nations. The court noted that the Mexican soldiers who attacked U.S. cavalrymen at San Ygnacio were commanded by Carranza officers and that one of these officers, a lieutenant colonel, was killed in the fight. The four defendants had testified at their trial in Webb County that they “belonged to the Constitutionalist Army of Mexico; that the band that attacked San Ygnacio consisted of 75 men; and that they were publicly organized and equipped in Monterey and Jarita, with the full knowledge of the de facto government of Mexico.”<sup>9</sup>

The Texas court then examined the issue of whether a state of war existed and cited the “official opinion” of BG Enoch H. Crowder, the Judge Advocate General of the Army, in its discussion of the question.<sup>10</sup> Crowder had written:

It is thus apparent that under the law there need be no formal declaration of war, but that under the definition of Vattel a state of war exists so far as concerns the operations of the United States troops in Mexico by reason of the fact that the United States is prosecuting its rights by force of arms and in a manner in which warfare is usually conducted. . . I am therefore of the opinion that the actual conditions under which the field operations in Mexico are being conducted

<sup>8</sup> Arce v. State, 202 S.W. 951, 952 (Tex. Crim. App. 1918).

<sup>9</sup> *Id.*

<sup>10</sup> For more on Crowder, see DAVID A. LOCKMILLER, ENOCH H. CROWDER: SOLDIER, LAWYER AND STATESMAN 21 (1955). See also Fred L. Borch, *The Greatest Judge Advocate in History? The Extraordinary Life of Major General Enoch H. Crowder (1859–1932)*, ARMY LAW., May 2012, at 1.

are those of actual war. That within the field of operations of the expeditionary force in Mexico, it is a time of war within the meaning of the fifty-eighth article of war.<sup>11</sup>

After concluding that the defendants had participated in military operations at the behest of the Mexican government, and that a state of war existed between Mexico and the United States, the court reversed the convictions for murder. Judge P.J. Davidson, who wrote the opinion for the Texas Court of Criminal Appeals, did not rule that the defendants were lawful combatants entitled to combat immunity for their lawful acts on the battlefield. On the contrary, his stated rationale for reversing the conviction was simply that the Texas courts had no jurisdiction over Mexican soldiers participating in a war with the United States and that legal proceedings against the Mexican defendants, if appropriate, must be brought in federal court. Wrote Davidson:

[U]nder the general rules with reference to warfare, the Mexican column that attacked the troops at San Ygnacio came within those rules, and that, if they were to be dealt with for crossing the river and fighting our troops, it should be done by the United States government and not by the Texas courts. Texas has no authority to declare war against Mexico nor create a state of war.<sup>12</sup>

Judge Davidson most likely did not know about the principle of combat immunity. If he had known about it, his opinion could have discussed how the Mexican defendants, participating in an otherwise lawful attack on U.S. Soldiers, had an absolute defense to a charge of murder. But Davidson did understand that, because wars occur between nation-states, the issue of whether Mexican soldiers could be charged with murder (or any criminal offense) was a question for the United States, and not Texas authorities.

<sup>11</sup> LOCKMILLER, *supra* note 10, at 952. Crowder had written this opinion in response to the question of whether Article 58 of the Articles of War applied to Pershing’s operations in Mexico. Under the Articles of War as existed in 1916, a court-martial had no subject-matter jurisdiction over common law crimes such as murder, rape, or robbery unless the offense occurred “in time of war.” Crowder’s reasoning was entirely logical, and gave Pershing the expanded jurisdiction granted by Article 58. His official opinion also followed earlier case law enunciated in Winthrop’s *Military Law and Precedents* (2d ed. 1920) (“a declaration of war by Congress is not absolutely necessary to the legal existence of a status of foreign war”). WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 668 (2d ed. 1920). Despite its logic, and longstanding precedent, Crowder’s reasoning was rejected during the Vietnam era by the Court of Military Appeals in *United States v. Averette*, 41 C.M.R. 363 (1970) (holding that “time of war” means declared war). Crowder’s reference to “Vattel” was a nod to Swiss jurist Emmerich de Vattel, whose 1758 *Le Droit de Gens ou Principe de la Loi Naturelle* was considered to be an authoritative text by lawyers of Crowder’s era.

<sup>12</sup> Arce, 202 S.W. at 953.

While Davidson did not discuss combat immunity, he did appreciate that the mens rea required for murder might have been affected by the fact that Jose Antonio Arce and his fellow soldiers were acting under orders at San Ygnacio. Davidson wrote:

[S]oldiers must obey the orders of their superiors, and failure to do so would subject them to discipline which rates from minor punishment to death. . . . When a soldier is ordered to fight, it is his duty to do so, and he may forfeit his life on refusal to do so. . . . These Mexican soldiers were ordered by their officers, commanded by their officers, headed by their officers to make the fight; the officers led them into the battle, and they fought. Some were killed; others escaped and fled. Some were wounded, one of whom was captured is under sentence in this case. . . . One at least of the defendants claimed to have been forced to go into battle by his commanding officer. He did not desire to fight, but under the rules of warfare if he deserted he would be tried and would be shot, or if he disobeyed orders and failed to engage in the fight he might forfeit his life.<sup>13</sup>

Davidson also noted that in fighting between Pershing's Punitive Expedition and Mexican government troops in Mexico, U.S. Soldiers captured on the field of battle "were not tried by the Mexican courts, but were turned over to the United States."<sup>14</sup> His conclusion was that if these American Soldiers were not prosecuted in Mexican courts, Mexican soldiers in the case before the court deserved the same treatment. This is why Judge Davidson's final words in the opinion were that even "if the state courts had jurisdiction of these defendants, we are of the opinion the conviction is erroneous."<sup>15</sup> While reversing the conviction on jurisdictional grounds, the court also recognized that, *even if the state courts had jurisdiction*, a conviction would have been unsupported in law for the following reasons: the four Mexican soldiers were acting under orders; Mexico had not prosecuted the captured U.S. Soldiers; or both. In any event,

for the convicted Mexicans, the result was the same: they escaped the hangman's noose and returned to their homes in Mexico.

A final note. In August 1917, New Mexico state authorities prosecuted seventeen *Villistas* for the infamous 9 March 1916 raid on Columbus that had triggered Pershing's Punitive Expedition. The defendants pleaded guilty to second degree murder and "were sentenced to serve from 70 to 80 years in the [state] penitentiary."<sup>16</sup> In 1920, New Mexico Governor Octaviano A. Larrazolo pardoned fifteen of the seventeen convicted *Villistas*. He cited *Arce* as one basis for his decision.<sup>17</sup> More recently, attorneys representing John Phillip Walker Lindh, the infamous "American Taliban," cited *Arce* in a brief filed on their client's behalf in the Eastern District of Virginia in 2002. The relevance? That *Arce* was precedent for the proposition that the United States and Afghanistan were engaged in an international armed conflict and that Lindh consequently had combat immunity for his actions "as a foot soldier on behalf of the government of Afghanistan."<sup>18</sup> While Lindh's argument failed, that failure did not undercut the continued validity of *Arce*: that a de facto armed conflict between Mexico and the United States existed in 1916 and that combat immunity protected Mexican soldiers from a prosecution for murder in Texas state court.

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<sup>13</sup> *Id.*

<sup>14</sup> Davidson was almost certainly thinking of the 21 June 1916 "Battle of Carrizal," where an "impetuous" American officer, Captain Charles T. Boyd, violated orders to avoid a confrontation with Mexican government troops and instead attacked a detachment of Mexican soldiers in Carrizal. In the firefight that followed, Boyd was killed, his unit was routed, and at least twenty-three men were taken prisoners. ANDREW J. BIRTLE, U.S. ARMY COUNTERINSURGENCY AND CONTINGENCY OPERATIONS DOCTRINE 205 (1998). Ten days later, the Mexicans delivered these American prisoners to U.S. forces in El Paso, Texas. DE QUESADA, *supra* note 4, at 57.

<sup>15</sup> *Arce*, 202 S.W. at 953.

<sup>16</sup> DE QUESADA, *supra* note 4, at 65. They most likely entered pleas of guilty to avoid a death sentence; the seventeen men knew that four of their fellow *Villistas* had been convicted of murder and hanged in Deming, New Mexico, less than four months after the Columbus raid.

<sup>17</sup> *Id.* at 67. For more on Larrazolo's pardon, see Michael Miller, *Pardon of the Villistas—1917*, N.M. STATE RECORDS CTR. & ARCHIVES, <http://www.newmexicohistory.org/filedetails.php?fileID=22053> (last visited May 13, 2012).

<sup>18</sup> Memorandum of Points and Authorities in Support of Motion to Dismiss Count One of the Indictment for Failure to State a Violation of the Charging Statute (Combat Immunity), at 1, 7–8, United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002) (No. 02-37-A). For more on the legal status of Taliban fighters under the law of armed conflict, see GARY D. SOLIS, THE LAW OF ARMED CONFLICT 211–16 (2010).