

## Lore of the Corps

### An Army Lawyer Tried and Convicted by Court-Martial: *United States v. Joseph I. McMullen*

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While there have been a handful of courts-martial in which an Army lawyer was the accused, including one involving a former Judge Advocate General,<sup>1</sup> the high-profile trial of Colonel Joseph I. McMullen in February 1936 has long been forgotten. But the case is worth remembering for two reasons: First, McMullen was well-known as one of the prosecutors in the court-martial of Colonel William “Billy” Mitchell in the 1920s, and so the story of his trial was carried in the newspaper of the day.<sup>2</sup> Second, the misconduct for which McMullen was convicted was a classic violation of professional ethics: engaging in the private practice of law and accepting money and other gratuities from civilian corporations that were doing business with the government. What follows is the story of Joseph I. McMullen’s place in military legal history.

Joseph Irving McMullen began his military career in April 1896, when he enlisted in the 6th Cavalry at the age of 22.<sup>3</sup> Five year later, he obtained a commission as a Second Lieutenant (2LT).<sup>4</sup> McMullen then remained on active duty until 1906, when he “was retired on account of physical disability in line of duty.”<sup>5</sup>

Ten years later, 2LT McMullen was recalled to active duty, and after America’s entry into World War I, he was quickly promoted to first lieutenant, captain, then major.<sup>6</sup> In August 1921, now Lieutenant Colonel McMullen transferred to the Judge Advocate General’s Department; he apparently had been admitted to the bar in Idaho and California sometime prior to World War I and so was well-qualified to serve as an Army lawyer.<sup>7</sup> Additionally, McMullen seems to have been an expert in patent law, which would explain why he was the Chief of the Patents Section, Judge Advocate General’s Office, from 1921 until 1935.<sup>8</sup>

In this important legal assignment, McMullen had much contact with businessmen and corporations doing business with the Army. By all accounts, he was a superb attorney “who discharged his duties in an excellent manner and did nothing . . . to impair . . . the rights of the War Department in patent matters.”<sup>9</sup> But, perhaps believing that his good work entitled him to more than his military pay and allowances, McMullen engaged in “gravely unethical conduct.”<sup>10</sup>



Judge Advocate Colonel Joseph I. McMullen (center) stands with his son, Bruce McMullen (left), and defense counsel, William Leahy (right), after his conviction by general court-martial for dishonorable conduct on February 20, 1936.

A 1935 investigation conducted by the Army Inspector General (IG) revealed that in 1932, newly-promoted Colonel (COL) McMullen had received \$3,000 from the Cuban-

<sup>1</sup> In 1884, Brigadier General David D. Swaim, who had been serving as Judge Advocate General since 1881, was tried for “improprieties” arising out of “his conduct of a business transaction,” including fraud and conduct unbecoming an officer. U.S. ARMY JUDGE ADVOCATE GENERAL’S CORPS, THE ARMY LAWYER 79-82 (1975). After an unprecedented fifty-two days of trial time, Swaim was found guilty and sentenced to be suspended from rank, duty, and pay for three years. *Id.* Unhappy with this result, however, President Chester A. Arthur returned the case to the court for “revision,” which was permitted under the Articles of War at that time. *Id.* As a result, the members “adjusted” Swaim’s sentence to suspension from rank for twelve years and to forfeiture of one half of his monthly pay for every month for twelve years. *Id.*

<sup>2</sup> *Colonel McMullen on Trial before Court Martial, Charged with Accepting Railroad Tickets as Reward for Advice*, LEWISTON DAILY SUN, Feb. 15, 1936, at 12; DOUGLAS WALLER, A QUESTION OF LOYALTY 51 (2004). For more on the legal aspects of the Mitchell court-martial, see Fred L. Borch, *The Trial by Court-Martial of Colonel William “Billy” Mitchell*, ARMY LAW., Jan. 2012, at 1.

<sup>3</sup> *McMullen v. United States*, 100 Ct. Cl. 323, 324 (1943).

<sup>4</sup> *Id.*

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

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 325. See also WALLER, *supra* note 2, at 51.

<sup>8</sup> JUDGE ADVOCATE GENERAL’S DEPARTMENT, BOARD OF REVIEW CM 204639, UNITED STATES V. MCMULLEN 26 (1936) [hereinafter OPINION, BOARD OF REVIEW].

<sup>9</sup> Memorandum from Major General J. F. Preston, Inspector Gen., for Sec’y of War, subject: Investigation of Colonel Joseph I. McMullen, JAGD, Judge Advocate General’s Office, at 1 (13 April 1935).

<sup>10</sup> *Id.*

American Manganese Corporation. At the time, Congress was considering legislation that would impose a one-cent tax on manganese imports from Cuba, and such a tax would have a substantial and adverse impact on the company's profits given that manganese ore coming from Cuba was free of duty at the time.<sup>11</sup>

The Cuban-American Manganese Corporation approached McMullen and asked him to help the company stop this import tax, and in May 1932, Congress in fact rejected the proposed one-cent tax. This was a victory for the company, and because McMullen had "led the company to believe that he had favorably influenced high government officials" to prevent the tax from being imposed, the Cuban-American Manganese Corporation wanted to reward McMullen for his good work.<sup>12</sup> According to the IG, McMullen had in fact "accomplished no such . . . results" for the company, but he collected \$3,000 from the Cuban-American Manganese Corporation because the company's officers believed that he had successfully lobbied for them.<sup>13</sup> At that time, \$3,000 was nearly twice the income of the average American family, and considering that the United States was in the middle of the Great Depression, this was a sizeable gratuity.<sup>14</sup>

This same IG investigation also disclosed that in January 1934, while acting as a legal advisor to the Assistant Secretary of War, COL McMullen had accepted two round-trip railroad tickets from Joseph Silverman Jr.<sup>15</sup> Silverman was a second-hand clothing dealer in New York City who operated "under a number of different firm names" and who sought to buy "surplus [clothing] goods" from the War Department.<sup>16</sup> In any event, Silverman had "continuing business dealings with the War Department," and at the time McMullen took the tickets from Silverman, he had been giving legal advice on the latter's clothing contracts with the War Department.<sup>17</sup>

As a result of his ethical lapses, McMullen was tried by general court-martial at Walter Reed General Hospital in January and February 1936. He was charged with violating the 96th Article of War, which was the equivalent of today's

Article 134 of Uniform Code of Military Justice.<sup>18</sup> As it was concerned that much of McMullen's criminal behavior was outside the statute of limitations, the War Department decided only to court-martial McMullen for having "wrongfully and dishonorably" accepted the two round-trip railroad tickets from Mr. Silverman given "with the intent to have [McMullen's] decision and action on [Silverman's] contract . . . influenced thereby."<sup>19</sup>

Colonel McMullen pleaded not guilty but was convicted. He was sentenced "to be reduced in rank to the foot of the list of officers of his grade," to be reprimanded, and to forfeit \$150 per month for twenty-four months.<sup>20</sup>

When McMullen's record of trial was reviewed by the Board of Review, the forerunner of today's Army Court of Criminal Appeals, he got lucky: The three-judge appellate body determined there was "reasonable doubt" in McMullen's case.<sup>21</sup> According to the Board members, there was "a doubt as to whether the [train] tickets were a gift" from Mr. Silverman. Consequently, the Board recommended to The Judge Advocate General that he advise the convening authority that the evidence was "legally insufficient" and that the findings of guilty and the sentence be set aside.<sup>22</sup>

Based on this recommendation, Major General Arthur W. Brown, then serving as The Judge Advocate General, advised the convening authority to take no action in McMullen's case, and so his court-martial—as a practical matter—had no legal effect.<sup>23</sup> But this was not the end of the story because McMullen had been indicted in U.S. District Court for the District of Columbia for his unethical dealings with the Cuban-American Manganese Company in 1932. This was because the three-year statute of limitations applicable to courts-martial did not apply to Title 18 offenses prosecuted in Federal civilian court, and so McMullen could be indicted for taking \$3,000 from the Cuban-American Manganese Corporation.<sup>24</sup>

<sup>11</sup> McMullen v. United States, 96 F.2d 574 (D.C. Cir. 1938).

<sup>12</sup> Memorandum from Major General J. F. Preston, *supra* note 10, at 5.

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

<sup>14</sup> The average U.S. family income between 1934 and 1936 was \$1,574. *100 Years of U.S. Consumer Spending*, U.S. BUREAU OF LAB. STAT. 35 (2006), <http://www.bls.gov/opub/uscs/1934-36.pdf>.

<sup>15</sup> Memorandum from Major General J. F. Preston, *supra* note 9.

<sup>16</sup> GEORGE P. PERROS, RECORDS OF THE MILITARY AFFAIRS COMMITTEE OF THE HOUSE OF REPRESENTATIVES RELATING TO AN INVESTIGATION OF THE WAR DEPARTMENT (1934-1936), at 4 (1955).

<sup>17</sup> Memorandum from Major General J. F. Preston, *supra* note 9, at 5.

<sup>18</sup> OPINION, BOARD OF REVIEW, *supra* note 8, at 1.

<sup>19</sup> *Id.* at 2.

<sup>20</sup> *Id.* at 4. In the Army of the 1930s, a loss of seniority by date-of-rank was a lawful punishment at a court-martial, and for McMullen, this meant he would be the junior ranking colonel in the Regular Army. MANUAL FOR COURTS-MARTIAL, U.S. ARMY ch. XXIII, para. 103h. (1928) ("Loss of rank is accomplished by a sentence directing that the accused . . . be reduced in rank to the foot of the list of officers of his grade."). As for the \$3,600 forfeiture of pay, this was significant: In the 1930s, an Army colonel with twenty-four years of service earned \$408.00 a month; a colonel with thirty years of service earned \$500 a month. Military Pay Chart 1922-1942, NAVY CYBER SPACE, <https://www.navy.mil/portals/1345678/1922-officer-pay-chart.html> (last visited Feb. 18, 2016).

<sup>21</sup> OPINION, BOARD OF REVIEW, *supra* note 8, at 26.

<sup>22</sup> *Id.*

<sup>23</sup> McMullen v. United States, 100 Ct. Cl. 323, 332 (1943).

<sup>24</sup> ARTICLES OF WAR, 41 stat. 787 art. 39 (1920); letter from George H. Dern, Secretary of War, to John J. McSwain, Chairman, Military Affairs Division, April 16, 1935 (on file with author).

On April 26, 1936, a civilian jury convicted him of receiving (in violation of a Federal statute<sup>25</sup>) “compensation for services rendered by him while still an officer of the United States in behalf of one of his clients in relation to a proceeding in which the United States was interested,” i.e. lobbying against the proposed tax on manganese imported into the United States by the Cuban-American Manganese Company.<sup>26</sup> McMullen was sentenced to six months in jail and fined \$1,000.<sup>27</sup>

McMullen appealed his conviction. He argued that it should be set aside because the trial court denied his motion for a bill of particulars in the case.<sup>28</sup> According to McMullen, the indictment was legally insufficient to support his conviction because it did not clearly state whether McMullen had received “a thing of value” or “money.” As a result, he had been deprived of a fair trial because in denying his motion for a bill of particulars, the jury had been “in doubt” as to what McMullen had actually received from the Cuban-American Manganese Corporation.<sup>29</sup>

On March 21, 1938, the U.S. Court of Appeals for the District of Columbia agreed. It reversed McMullen’s conviction and “remanded for a new trial.”<sup>30</sup> Lest any lawyer reading its opinion be mistaken, the court wrote that “forms and procedure still have their place and purpose in the administration of the law; without them we would have chaos.”<sup>31</sup> The court continued: “Much impatience is being shown with the technicalities of the law . . . [but] the requirement that an indictment . . . must state the crime with which a defendant is charged, and the particular act constituting the crime is more than a mere technicality; it is a fundamental, a basic principle of justice . . . .”<sup>32</sup>

So what happened next? Despite the fact that the Court of Appeals had set aside McMullen’s conviction in the U.S. District Court, the Army “[a]s a result of the conviction” and relying on “an opinion from the Attorney General of the United States,” notified McMullen that he “was dropped from the rolls of the Army and . . . that he ceased to be an officer of the Army as of May 8, 1938.”<sup>33</sup> The Attorney General’s rationale was that, having been convicted of a crime involving

the acceptance of a gratuity, McMullen “became immediately incapable of holding any office of honor, trust, or profit under the Government of the United States,”<sup>34</sup> and so must be separated from the Army.

Shortly thereafter, the Department of Justice (DOJ) decided that it had had enough of the “McMullen affair”;<sup>35</sup> on June 30, 1939, DOJ declined to take any further criminal action against him.<sup>36</sup>

But while the Army and the Justice Department may have believed they were finished with COL Joseph I. McMullen, he was not finished with them. On September 11, 1940, McMullen filed a complaint in the U.S. Court of Claims. In his suit for money, he maintained that because his Federal conviction had been reversed (and the case *nolle prosequi* by DOJ), he “never was legally separated from the service” and consequently was entitled to recover as much as \$25,000 in back pay.<sup>37</sup>

What happened to McMullen’s suit in the U.S. Court of Claims? On December 6, 1943, that court ruled that the War Department had acted lawfully in permanently separating McMullen from the Regular Army after his 1935 conviction in U.S. District Court.<sup>38</sup> In their opinion, the three judges deciding McMullen’s claim acknowledged that his conviction at trial had been reversed.<sup>39</sup> They conceded that it might seem unfair that he was being penalized after this conviction was overturned. But, said the court, the Army had correctly dismissed McMullen because of the immediate “harm to the public service” resulting from his conviction, and his subsequent “vindication” was insufficient reason to award him any back pay.<sup>40</sup>

The Court of Claims expressly rejected McMullen’s argument that once the Court of Appeals had set aside his conviction in U.S. District Court, he should be treated as if he had never been convicted of any crime, and “be paid the salary and allowances” of an Army colonel.<sup>41</sup> The Court of Claims dismissed McMullen’s petition; he recovered nothing.<sup>42</sup>

<sup>25</sup> 18 U.S.C. § 203 (2015).

<sup>26</sup> McMullen v. United States, 96 F.2d 574, 575 (D.C. Cir. 1938).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 576.

<sup>29</sup> *Id.* at 575.

<sup>30</sup> *Id.* at 579.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Memorandum from Colonel James E. Morrisette, Chief, Military Justice Division, Office of The Judge Advocate General, to General Malin Craig, no subject, (8 Nov. 8 1942) (on file with author).

<sup>34</sup> Status of Army Officer Removed Because of Conviction, 39 Op. Att’y Gen. 437, 438 (1941).

<sup>35</sup> McMullen v. United States, 96 F.2d 574, 575 (D.C. Cir. 1938).

<sup>36</sup> Memorandum: Re: Colonel Joseph I. McMullen v. United States; Court of Claims No. 45242. Suit filed September 11, 1940; amount involved around \$25,000 counting interest, undated, at 1, (on file with author).

<sup>37</sup> *Id.*

<sup>38</sup> McMullen v. United States, 100 Ct. Cl. 323, 343 (1943).

<sup>39</sup> *Id.* at 323, 324.

<sup>40</sup> *Id.* at 343.

<sup>41</sup> *Id.* at 338.

<sup>42</sup> *Id.* at 343.

So ended the “McMullen affair”—a largely forgotten but fascinating piece of our military legal history.

*More historical information can be found at*

The Judge Advocate General’s Corps  
Regimental History Website  
<https://www.jagcnet.army.mil/8525736A005BE1BE>

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