

Lore of the Corps

Samuel W. Koster v. The United States: A Forgotten Legal Episode from the Massacre at My Lai

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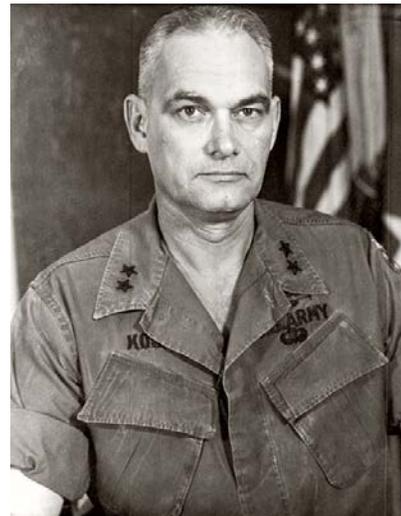
In March 1970, Lieutenant General William R. Peers completed his official investigation into the murders committed by Lieutenant William F. “Rusty” Calley and his platoon at the South Vietnamese sub-hamlet of My Lai 4 in March 1968.¹ On the basis of Peers’ scathing report about what has become known as the “My Lai Massacre,” Major General Samuel W. Koster, who was in command of the 23d Infantry “Americal” Division at the time, and to which Calley and his men had been assigned, was charged with failure to obey lawful regulations and dereliction of duty in covering up the massacre.² While Koster was never prosecuted at a court-martial,³ Secretary of the Army Stanley R. Resor took administrative action against him: Stanley vacated Koster’s temporary promotion as a major general, reducing him to his permanent rank of brigadier general, and he revoked the Distinguished Service Medal (DSM) that Koster had been awarded as Americal Division commander.⁴ He also directed the filing of a Letter of Censure in Koster’s official military personnel records.⁵

But Koster fought back in the courts, and what follows is the story of that struggle—*Samuel W. Koster v. The United States*—an episode in military legal history that today is mostly forgotten.⁶

Born in December 1919, Samuel William Koster graduated from the United States Military Academy in 1942 and was commissioned in the Infantry.⁷ He subsequently had a stellar career, which included substantial wartime experience. Koster served as a company and battalion commander in World War II (earning a Silver Star, two Bronze Stars, and the Purple Heart) and was the commanding officer of the Eighth Army’s guerilla warfare unit during the Korean War.⁸ He also had significant peacetime experience as an instructor at West Point, and in

various assignments at Fort Benning, Georgia, in the Pacific, and at the Pentagon.⁹

By late 1968, Koster held the permanent rank of brigadier general and the temporary rank of major general.¹⁰ While wearing two stars, Koster commanded the 23d Infantry Division in Vietnam. This was “a difficult assignment because of the conglomerate make-up of the Division and its very large area of operations.”¹¹ After returning from Vietnam, while still holding the temporary two-star rank, Koster served as the Superintendent of the United States Military Academy, a high honor and an assignment that indicated that Koster had not yet reached the end of this career as an Army general officer.¹²



Major General Samuel W. Koster circa 1968

¹ WILLIAM R. PEERS, THE MY LAI INQUIRY 213 (1979).

² *Koster v. United States*, 685 F.2d 407, 409 (Cl. Ct. 1982).

³ *Id.* Charges against Koster were dismissed on January 28, 1971. *Id.*

⁴ *Id.* at 409-10.

⁵ RICHARD HAMMER, THE COURT-MARTIAL OF LT. CALLEY 35, 43 (1971).

⁶ *Koster*, 685 F.2d at 408.

⁷ David Stout, *Gen. S.W. Koster, 86, Who Was Demoted After My Lai, Dies*, NEW YORK TIMES, Feb. 11, 2006.

⁸ *Koster*, 685 F.2d at 408-09.

⁹ Stout, *supra* note 7.

¹⁰ Prior to the enactment of the Defense Personnel Management Act in 1980, commissioned officers in the Regular Army (RA) had both permanent and temporary ranks. Title 10, United States Code, Section 3442, provided that a regular commissioned officer might hold, in addition to his “regular” or permanent grade, a temporary grade in the Army of the United States (AUS). 10 U.S.C. § 3442 (1956) (repealed 1980). Consequently, an officer might hold an RA appointment as a captain and an AUS appointment as a lieutenant colonel. The appointments in the RA and AUS were independent of each other and selections for promotion to higher grades in each status were also independent of each other. *Id.* As a practical matter, almost every RA officer in the Army during Koster’s era had a more senior temporary rank.

¹¹ *Koster*, 685 F.2d at 408. The 23d Division was created in Vietnam in September 1967 by combining three separate brigades that were already “in country.” Consequently, it was a unique unit in that it was the only combat division formed outside the United States. The division was deactivated after its withdrawal from Vietnam in November 1971.

¹² Stout, *supra* note 7.

On March 16, 1968, Lieutenant William F. “Rusty” Calley and his platoon, members of Major General Koster’s command, murdered at least 300 Vietnamese civilians near the village of My Lai.¹³ Shortly after this massacre of non-combatant civilians, Koster “came to know of at least four irregularities that should have spurred him to call for a fuller investigation and for a report of the results to be made to higher authority”¹⁴ as required by regulations promulgated by the Military Assistance Command, Vietnam (MACV).¹⁵ First, Koster learned that there were “unusual” body count figures for the day, in that 128 enemy soldiers were reported killed yet only two friendly soldiers killed and eleven wounded. Second, he learned that “an unusually large number” of Vietnamese civilians had been killed by artillery fire. Third, Koster “received personally a watered-down version of the report by a U.S. helicopter pilot who tried to stop the killing at My Lai.”¹⁶ Finally, a month later, Major General Koster learned about a Viet Cong leaflet claiming that U.S. troops had massacred “some 500 civilians” near the hamlet of My Lai.¹⁷



Lieutenant Calley at trial, Fort Benning, Georgia

While the subsequent investigation into the My Lai Massacre done by Lieutenant General William R. Peers revealed that Koster did make some inquiries, Peers ultimately concluded that Major General Koster had not done enough. As Peers put it, Koster was one of thirty persons who had knowledge of the war crimes committed at My Lai “but had not made official reports, had suppressed relevant information, had failed to order investigations, or had not followed up on the investigations that were made.”¹⁸

As a result of these failures, while serving as division commander, charges were preferred against Koster in March 1970.¹⁹ The charges, which had been drafted by Colonel Hubert Miller,²⁰ then a judge advocate assigned to the Office of the Judge Advocate General, alleged that Koster had failed to obey orders and regulations and had been derelict in the performance of his duty, a violation of Article 92, Uniform Code of Military Justice (UCMJ).²¹

An investigation conducted pursuant to Article 32, UCMJ, “acknowledged” that Koster “may have been remiss” in not ordering a proper investigation into the alleged war crimes, but recommended dismissal of the court-martial charges against him.²² The result was that charges were dismissed by Lieutenant General Jonathan O. Seaman in January 1971.²³

In May 1971, on the recommendation of General William C. Westmoreland, then serving as Army Chief of Staff, Secretary of the Army Resor took the following administrative actions against Major General Koster. First, he vacated Koster’s appointment as a temporary major general, so that Koster reverted to his permanent rank of brigadier general.²⁴ Second, he directed that a Letter of Censure, which criticized Koster’s failure to report known civilian casualties to higher headquarters and his failure to insure that a proper investigation was conducted into killings

¹³ HARRY G. SUMMERS, JR., HISTORICAL ATLAS OF THE VIETNAM WAR 140 (1995). In addition to the killings at My Lai, Calley and his men “raped and sodomized” women and children, set houses on fire, and bayoneted the inhabitants of the village as they attempted to escape. *Id.*

¹⁴ *Koster*, 685 F.2d at 409.

¹⁵ MILITARY ASSISTANCE COMMAND, VIETNAM (MACV) DIR. 20-4, INSPECTIONS AND INVESTIGATIONS, WAR CRIMES (18 May 1968) reprinted in GEORGE F. PRUGH, LAW AT WAR (1975), Appendix F (requiring the reporting of all war crimes committed by or against U.S. forces). For more on the evolution of the policy requiring the reporting of war crimes, see FRED L. BORCH, JUDGE ADVOCATES IN VIETNAM (2004), 34-36.

¹⁶ *Koster*, 685 F.2d at 409. The helicopter pilot was Warrant Office Hugh C. Thompson who, while piloting a Hiller OH-23 Raven observation helicopter, witnessed the killings at My Lai. Thompson landed his OH-23 and then directed Bell UH-1 Iroquois utility helicopter gunships under his command to land and evacuate some of the civilians facing death at My Lai. WILLIAM R. PEERS, THE MY LAI INQUIRY 66-76 (1979).

¹⁷ *Koster*, 685 F.2d at 409.

¹⁸ PEERS, *supra* note 1, at 212.

¹⁹ *Koster*, 685 F.2d at 409.

²⁰ PEERS, *supra* note 1, at 214. For more on Hubert Miller, see Fred L. Borch, *A Remarkable Judge Advocate by Any Measure: Colonel Hubert Miller (1918-2000)*, ARMY LAW., Mar. 2011, at 2.

²¹ PEERS, *supra* note 1, at 212.

²² *Id.* at 223.

²³ *Koster*, 685 F.2d at 409. Lieutenant General Jonathan O. Seaman was the Commander, First Army. He was the General Court-Martial Convening Authority for twelve of the fourteen individuals against whom charges were preferred as a result of their involvement in the My Lai Massacre. *Id.* at 221. Born in 1911, Seaman was a graduate of the U.S. Military Academy (Class of 1934). *Lt. Gen. Jonathan Seaman, 74, Dies; Commanded Army Troops in Vietnam*, WASH. POST, Feb. 26, 1986, at B6. He had a distinguished career as a combat Soldier, including command of the 1st Infantry Division in Vietnam. *Id.* After 37 years of active duty, Seaman retired as a lieutenant general. *Id.* He died in South Carolina in 1986. *Id.*

²⁴ *Koster*, 685 F.2d at 409-10.

at My Lai, be placed in Koster's military personnel file.²⁵ Finally, Secretary Resor directed the withdrawal of the Distinguished Service Medal awarded to Koster for his service as Americal Division commander.²⁶

Instead of leaving the Army after his loss of a star, Koster became deputy commander of the Army's Test and Evaluation Command at Aberdeen Proving Ground, Maryland.²⁷ He hoped to be promoted to the permanent grade of major general, but adverse information in his Officer Efficiency Reports apparently prevented any such promotion. Additionally, when Koster retired from active duty in 1973, Secretary of the Army Callaway, who had succeeded Secretary Resor, refused to find that Koster had performed satisfactorily in the grade of major general.²⁸ Under the law as it then existed, Koster could have received retired pay as a major general if Callaway had determined that he had served satisfactorily as a two star for six months.²⁹ When Callaway declined to make this determination, Koster's retired pay was computed based on his permanent rank as a one-star.³⁰

For the next ten years, Brigadier General Koster fought to clear his name. He insisted that the Army's censure of him was "unfair and unjust" and based on "faulty conclusions."³¹ He admitted that he had been "under the impression that only about 20 civilians had been 'inadvertently killed' by artillery, helicopter guns and 'some small-arms fire'" at My Lai but insisted that this was an insufficient basis to impose administrative "punishments" upon him.³²

In January 1974, Koster filed a petition with the Army Board for Correction of Military Records (ABCMR).³³ He alleged that he was improperly retired as a brigadier general and that his records should be corrected to reflect retirement as a two-star.³⁴ Koster also requested removal of the Letter of Censure from his military personnel records and the restoration of his Distinguished Service Medal.³⁵ Three years later, in January 1977, Brigadier General Koster also

filed a petition in the U.S. Court of Claims.³⁶ Since his petition with ABCMR was still pending, Koster apparently filed his petition with the Court of Claims so as to avoid the running of the statute of limitations in his case. This also explains why Koster concurrently petitioned the Court to suspend proceedings until the ABCMR had acted in his case.³⁷

For reasons that are not clear from the legal records in the proceedings, it took Brigadier General Koster more than five years to submit a 415-page brief with seventy-five exhibits to the ABCMR.³⁸ This explains why it was not until March 1980 that the ABCMR was able to act upon Koster's January 1974 petition. In an "extensive memorandum," the Board ruled against Brigadier General Koster, concluding that the administrative sanctions imposed by the Secretary of the Army—the Letter of Censure, termination of his temporary appointment as a major general, and withdrawal of his DSM—were "justified on the record of evidence and were not arbitrary or capricious."³⁹

With the ABCMR decision now final, it was time for the Court of Claims to examine Koster's petition. The Civil Division of the Department of Justice (DOJ), representing the government, filed a motion for summary judgment on July 7, 1981.⁴⁰ While DOJ attorneys filed the 100-page brief with the court, it was authored by then MAJ Michael J. Nardotti, Jr., a relatively young judge advocate assigned to the Litigation Division, Office of the Judge Advocate General.⁴¹

Nardotti presented a number of reasons in support of the motion for summary judgment. First, he argued that plaintiff Koster's failure to submit a brief to the ABCMR for more than five years after filing his original petition meant that Koster's claim had "excessive and inexcusable delay." The government was prejudiced by this delay and the court, argued Nardotti, should dismiss Koster's petition as barred by the doctrine of laches.⁴²

Alternatively, argued MAJ Nardotti, as the Court of Claims had jurisdiction over only money claims against the government, it had no jurisdiction to review the Secretary of

²⁵ *Id.*

²⁶ *Id.* at 411. See also Defendant's Motion for Summary Judgment at 32, *Koster v. United States* 685 F.2d 407 (Cl. Ct. 1982) (No. 65-77) (historian files, TJAGLCS).

²⁷ Stout, *supra* note 7; see also *Koster*, 685 F.2d at 412.

²⁸ *Koster*, 685 F.2d at 410.

²⁹ *Id.*

³⁰ Stout, *supra* note 7.

³¹ *Id.*

³² *Id.*

³³ *Koster*, 685 F.2d at 410.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 408.

³⁷ *Id.* at 411.

³⁸ *Id.*

³⁹ *Id.* at 413.

⁴⁰ Defendant's Motion for Summary Judgment at 32, *Koster v. United States*, 685 F.2d 407 (Cl. Ct. 1982) (No. 65-77) (historians files, TJAGLCS).

⁴¹ Nardotti is identified as "of counsel" on the brief. *Id.*

⁴² Defendant's Motion for Summary Judgment at 57, *Koster v. United States*, 685 F.2d 407 (Cl. Ct. 1982) (No. 65-77) (historians files, TJAGLCS).

the Army's decision to vacate Koster's temporary appointment to major general or to review Koster's claim for retirement at two-star rank. It also had no jurisdiction over the Letter of Censure or the revocation of Koster's DSM.⁴³



Major General Michael J. Nardotti, Jr., The Judge Advocate General, U.S. Army, 1993-1997

The Court of Claims agreed that it lacked the power to resolve the issue of the letter and the decoration, but it found that the vacation of his temporary appointment to two-star rank and his reduced retirement pay as a brigadier general did "colorably involve money" and consequently gave the court jurisdiction over these issues.⁴⁴

But the court agreed with MAJ Nardotti's argument that the only issue was whether the ABCMR's decision in Koster's case was "arbitrary, capricious, unsupported by substantial evidence, in bad faith or contrary to law or regulation."⁴⁵ After carefully examining the administrative record created by the ABCMR and considering the written and oral arguments presented by both sides, the Court of Claims ruled against Koster.⁴⁶ On July 28, 1982, it held that it "was not able to conclude that the decision of the ABCMR should be overturned."⁴⁷ The court granted the government's motion for summary judgment and it denied Koster's cross-motion for summary judgment.⁴⁸

It is worth noting that the Court of Claims was "sensitive" to Brigadier General Koster's claim he was made "to suffer for the political and public pressures that were brought to bear on the Army as a result of the My Lai

incident."⁴⁹ The court, however, quoted from a memorandum written by Army Secretary Resor to the Secretary of Defense in March 1973. In the court's view, that memorandum best explained why the adverse administrative actions taken against Koster had been both lawful and fair:

There is no single area of administration of the Army in which strict concepts of command responsibility need more to be enforced than with respect of vigorous investigation of alleged misconduct. . . . General Koster may not have deliberately allowed an inadequate investigation to occur, but he did let it happen, and he had ample resources to prevent it from happening

. . . .

Doubtless there will be some, including military officers, who feel that General Koster is being treated harshly, or that he is being made a scapegoat. . . . [But] the job of maintaining necessary standards of responsibility of senior officials is too important to the Army and to the nation to be significantly influenced by the criticism of those who are inadequately informed⁵⁰

What became of two of the participants in this event in legal history? Brigadier General Koster died in January 2006 at his home in Annapolis, Maryland. He was 86 years old. Major Nardotti continued his career as an Army lawyer and, after serving as The Judge Advocate General from 1993 to 1997, retired as a major general. He continues to practice law at Squire Patton Boggs in Washington, D.C.⁵¹

More historical information can be found at

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

*Dedicated to the brave men and women who have served our
Corps with honor, dedication, and distinction.*

⁴³ *Id.* at 60-62.

⁴⁴ *Koster*, 685 F.2d at 413.

⁴⁵ *Id.* at 411.

⁴⁶ *Id.* at 409.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 414.

⁵⁰ *Id.* at 419.

⁵¹ For an excellent treatment of Major General Nardotti's place in military legal history, see George R. Smawley, *The Soldier-Lawyer: A Summary and Analysis of An Oral History of Major General Michael J. Nardotti, Jr., United States Army (Retired) (1969-1997)*, 168 MIL. L. REV. 1-39 (2001).

*World War II JAG School Scrapbooks on the Library of
Congress Website*

In 1942, the Judge Advocate General's School opened on the campus of the University of Michigan in Ann Arbor, Michigan. Initially, the School was under the leadership of Colonel Edward H. "Ham" Young, who determined the curriculum and put together the initial staff and faculty. When Young departed for a new assignment in late 1944, he was succeeded by Colonel Reginald C. Miller, who served as Commandant until the School closed in 1946. During its operation at the University of Michigan, the School transformed hundreds of civilian lawyers into Army judge advocates. These military lawyers ultimately served as uniformed attorneys in a variety of world-wide locations, including Australia, China, England, France, Germany, India, Japan, and Morocco. These scrapbooks contain photographs, newspaper articles, graduation programs, and other documents related to the operation of the School from 1943 to 1946.

See the scrapbooks here:

http://www.loc.gov/rr/frd/Military_Law/Scrapbooks.html