

Filed
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20 July 1970
(11)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT
OF COLUMBIA

Civil Action No. 2159-70

* * * * *

WILLIAM D. CALLEY, JR., :
FIRST LIEUTENANT, UNITED :
STATES ARMY, () :
Battlepark, Fort Benning, Ga. 31905 :
Plaintiff, :

-vs-

MAJOR GENERAL ORWIN C. :
TALBOTT, United States Army, :
Commanding General United :
States Infantry Center, :
Ft. Benning, Georgia; :
SECRETARY OF THE ARMY, :
STANLEY M. RESOR: GENERAL :
WILLIAM C. WESTMORELAND, :
Chief of Staff, United States :
Army; REID W. KENNEDY, :
Colonel Military Judge, :
Ft. Benning, Georgia; :
AUBREY M. DANIELS, III :
Trial Counsel, and UNITED :
STATES OF AMERICA, :
Defendants. :

C O M P L A I N T

*Injunction
Mandamus
Dismissal*

* * * * *

The Petition of First Lieutenant William L. Calley, Jr., respectfully shows the following to the above entitled Court:

1. That he is a nonconsensual member of the United States Army and is commissioned as a First Lieutenant, Army of the United States (); that he brings this action against the United States of America and the above named personal defendants, and each of them, in their present Army assignments, pursuant to the provisions of Title 28, Sec. 2282; that the relief sought is to enjoin and prohibit

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enforcement and application by the defendants of an Act of Congress, (Title 10 Chap. 47 USCA), identified as the Uniform Code of Military Justice; and to compel the named defendants to perform the duties they owe to him for the reason that the Act is being applied against him in violation of and contrary to his rights and privileges under the Constitution of the United States of America.

2. That he is assigned to Headquarters Company Student Brigade, United States Army Infantry Center, Ft. Benning, Georgia, and is being held by the Army at that post solely for the purpose of being prosecuted for certain alleged capital offenses.

3. That on September 5, 1969, he was charged with four specifications alleging violations of Article 118 of the Uniform Code of Military Justice, specifically, murdering with premeditation, a large number of oriental human beings whose names, ages and sexes are, according to the allegations and specifications, unknown; that on September 12, 1969, two additional specifications charging premeditated murder in violation of Article 118, Uniform Code of Military Justice, with the same lack of specificity as averred above were filed; that the six specifications were referred for trial to a General Court-Martial by the defendant Major General Talbott; and, that all the offenses charged are capital crimes and conviction permits the Court-Martial to impose a death sentence on each specification.

4. That the defendant, Stanley M. Resor, is Secretary of the Army and either resides or is on duty in Washington, D. C.; that the defendant General William C. Westmoreland is Chief of Staff of the United States Army and either resides in or is detailed on duty in Washington, D. C.; that the defendant Major General Talbott resides at and is assigned to command

of the Headquarters United States Army Infantry Center, Ft. Benning, Georgia; that the defendant Col. Reid W. Kennedy resides at and has been detailed as Military Judge, Ft. Benning, Georgia, and particularly to preside as the Trial Judge in the case entitled United States, plaintiff, vs. 1st Lt. William L. Calley, Jr., defendant, Fifth Judicial Circuit; and, that the defendant Aubrey M. Daniels, III, has been detailed as trial counsel to represent the United States in the above mentioned action.

5. That the defendant, Major General Talbott, has designated and detailed some of the members of the General Court-Martial, will detail others who will sit in judgment on the plaintiff, and unless transferred to a new Post will review the record of Trial.

6. That the plaintiff at all times herein mentioned has been and now is a citizen of the United States, retained in the United States Army at Ft. Benning, Georgia, contrary to his desires and he brings this action against the defendants, and each of them, as they have responsibility to protect his service and Constitutional rights but so far in the litigation they have not legally done so; that if prosecution is not enjoined as herein requested and the defendants not compelled to perform their lawful duties and the General Court-Martial is permitted to continue on and render judgment in that case, his Constitutional rights as a citizen of the United States and an officer of the Army will be further violated; and, that he will suffer irreparable damage and injury for which he has no adequate remedy at law.

7. That to subject plaintiff to trial by General Court-Martial, under the general jurisdictional provisions of the Uniform Code of Military Justice, will contravene the Constitution of the United States of America and certain of its Amendments which will more fully hereinafter be shown; that

his trial by General Court-Martial has been directed, Pretrial Hearings have been held, the Charges have been forwarded for trial, the Court members have been detailed, and the Military Judge has overruled all Constitutional and other objections to the jurisdiction of Military Courts and has set a date certain for commencement of trial, so that as a matter of fact and law the unconstitutional denial of rights herein mentioned is threatened and imminent..

FIRST COUNT

8. That the alleged premeditated murder offenses which have been referred for trial by the defendant, Major General Talbott, are stated to have been committed in the Republic of Viet Nam and particularly in the area of My Lai, Village of Song My, Province of Quang Ngai which is outside the limits of the states and territories and possessions of the United States of America; that the prosecution of criminal offenses arising in that area raise grave international, national political and legal issues which are not within the jurisdiction of Military Court-Martial to decide.

9. That the charges as alleged, on their face, do not constitute crimes under Article 118, U.C.M.J. for the following reasons: Individual victims are not identified in the charges or specifications by either name or description, as required by the rules of pleadings and particularly by Paragraph 197 of the Manual for Courts-Martial, Revised Edition, 1969; that the description made in the charges and specifications, as aided by judicial notice, is, instead of a political group, a collection of persons who are adherents to a political ideology, which is abhorrent to the Constitution, Laws and Political Philosophy of the United States of America; that the containment of that political ideology is and has been the mission of the United States forces in Viet Nam, Korea and Southeast Asia and for that purpose search for and

destruction of groups adhering to such ideology, without regards to the means or method used in their destruction, and without regard to any consequences, except to block the spread of the ideology has been, since at least August 10, 1964, the policies and pattern of Military Forces of the United States of America and its Allies; that the underlying purpose of the charges and specifications in the criminal case against the plaintiff, and the trial contemplated thereby, is to use the plaintiff to shield others and to conceal for political ends the pattern and policy; that said pattern and policy leaves to the individual serviceman no moral choice, consistent with his assignment and military duty, to determine their validity; that the pattern and policy are dictated by the Executive and State Departments of the Government and they pose political issues which cannot be determined by Courts of limited jurisdiction which primarily consider good order and discipline in the Military service.

SECOND COUNT

10. Trial of this plaintiff by General Court-Martial will violate and offend against the provisions of the Fifth Amendment to the Constitution of the United States which provides "No person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger," that at the time of the alleged offenses a state of declared war as contemplated by the Constitution did not exist; and that public danger as used in the Fifth Amendment to the Constitution, did not exist within the continental limits of the United States or its territories or possessions.

THIRD COUNT

11. That to subject the plaintiff to trial by a Court-Martial will offend against and be in contravention of the Sixth Amendment to the Constitution of the United States which provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district where the crime shall have been committed", and, particularly is that Amendment controlling when the offenses are capital and a death penalty can be imposed.

FOURTH COUNT

12. That to subject the plaintiff to a trial by General Court-Martial will be in contravention of and offensive to Article III of the Constitution of the United States which provides, "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such trial shall be held in the State where the said Crimes shall have been committed; but when not committed in any State, trial shall be held at such Place or Places as the Congress may by Law have directed."

That Congress implemented the Constitutional provision by enacting paragraph 3238 Chapter 211, 18 USCA which provides: "The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia."

13. That to try the plaintiff by General Court-Martial will offend against and be in violation of the Fourteenth Amendment as duly incorporated in the Fifth Amendment of the Constitution of the United States and particularly that portion which in substance provides that all citizens are entitled to equal protection of the law. The event which is involved in the prosecution of the plaintiff arose as the result of a combat mission carried on by a Platoon of American soldiers ordered on a search and destroy mission in the My Lai Province. The Province was populated by orientals sympathetic to the enemy and this information was furnished to members of the Unit. There were approximately 30 soldiers from plaintiff's Platoon involved in the ground fighting and of the members who participated some have been charged with offenses not capital, soldiers from other Platoons and the plaintiff have been ordered tried for committing capital offenses; and, others, specifically former servicemen of the same Unit, have not been charged at all although some have publicly confessed to killing oriental civilians while on the same mission and at the same time and place and with individual weapons.

The alleged reason for this unequal application of the law is that the United States Army does not seek to try those individuals who were discharged from the service before charges were preferred; that competent legal counsel both within and without the Service believe that the holding of the United States Supreme Court in Toth vs. Quarles, 350 U.S. 11, (1955) 100 L. Ed. 8, does not prevent prosecution, except by Courts-Martial, and that there are other legal methods available to the Army which would permit ultimate equality of treatment of all alleged offenders; that the adamant refusal of the Department of the Army to treat all suspected United

States citizens and soldiers, who served formerly in the same company, on the same mission and in the same manner, results in a process of selectivity and in the unequal enforcement of the law. In addition the process of selection now being used permits those persons who have not been charged to be compelled by the Army to be witnesses against the individuals who elected to remain in the Service and make it a part of their career -- notwithstanding the fact that the United States has entered into binding treaty obligations creating a duty to prosecute all persons located within its sovereign territory suspected of committing grave breaches of the Geneva Convention Articles.

FIFTH COUNT

14. That the trial of the plaintiff by a General Courts-Martial will permit the defendants to deny the plaintiff due process of law and to act in an unconstitutional manner and, contrary to the laws of the United States of America. The basic fact underlying this Count is that the Army received the individual soldiers involved in the My Lai incident either by enlistment or involuntary induction; that it assigned them to the infantry and the training camps and areas where it taught them how the rifles, machine guns and mechanized crew served weapons should be used for the purpose of killing people; that it shipped the soldiers overseas to Viet Nam, ordered them into strongholds of Viet Cong sympathizers with orders to kill, search and destroy; that the alleged offenses would not have been committed without the plaintiff and the soldiers serving under him having been ensnared and entrapped by officers senior to them; that at that time the Unit involved was commended for the success of its operations but some twelve months later and after some publicizing of the event, the Army Command took a contrary approach and this is the

procedure which offends against the concepts of a fair and just trial and the demands of the Constitution.

The General in command of the Army troops in Viet Nam at the time of the alleged tragedy was the Chief of Staff of the Army at the time the incident was called to the attention of the civilian officials and still is. He and other senior officers on duty at that time and in any way connected in the chain of command, have a direct and critical interest in the outcome of this litigation and every participant in this prosecution up to and including the Court of Military Review will be appointed by officers under his control and command. To initiate and carry on this prosecution the Army, through officers junior to the Chief of Staff, has selected personnel to interrogate, investigate and build a case for the prosecution; it designated the officer to conduct the Article 32 Investigation and to recommend the action to be taken; his recommendation for trial was based on hearsay statements obtained by military personnel trained in the art of leading witnesses to state impressions favorable to the Army; it selected the officer to review the Article 32 Investigation and his military advisor who ordered or recommended trial by a General Court-Martial; when the Inspector General's investigation was deemed insufficient the Army used the personnel of the Criminal Investigating Department and members of the Judge Advocate General Corp to procure further evidence to strengthen the case for the prosecution; since the case was referred for trial, the Chief of Staff appointed a special committee to collect additional evidence to aid the Government and neutralize information favorable to plaintiff; the Army detailed the Judge to hear the case and the members of the Court-Martial to decide the facts and impose the sentence; it will designate the Convening Authority to review the record of trial of the

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Court-Martial and it will appoint the officers to the Court of Military Review which is the first appellate agency in the appellate process. In that framework, the picture shows that the Army and its officers not only aided and abetted the commission of the alleged crimes but it has been a Grand Jury hostile to the accused and it will be the prosecutor, Judge, triers of fact and deciders of the life and liberty of this plaintiff who was ordered to carry out its political and military missions. In addition, through the use of investigative techniques and leading questions and by informing prospective witnesses of the testimony of others, the Department of the Army, aided by the American news media has so shaped and molded testimony that potential witnesses are now "brain-washed" about the true facts and plaintiff cannot under any circumstance receive a fair trial. In addition, the Commander-in-Chief and others in the chain of command have announced through the news media and at public gatherings that action must be taken to protect the image of the Army; and to effectuate that and other purposes these proceedings are being pursued by the very individuals whose image may be tarnished. So considered, they are indeed a prejudiced and unfair proceedings for this petitioner. Therefore, to allow them to continue will permit the carrying out of a trial and appeal proceeding which collectively will be no more than a hollow ritual, unfair and unjust to plaintiff, with a concomitant deprivation of due process of law and other Constitutional rights and privileges granted to other citizens of the United States of America.

SIXTH COUNT

15. That every nationally recognized newspaper, magazine, radio station and TV station in the United States of America and many overseas outlets have carried the news of the

My Lai tragedy to all citizens capable of seeing, hearing, or reading and they have supplemented the articles with horrifying and inflammatory pictures; the coverage has emphasized that the plaintiff and members of the Platoon were suspected of having committed a massacre, and that under no circumstances was it justified; that pictures of plaintiff and his participation in the asserted massacre have been published worldwide and with such effect that his name is synonymous with My Lai; that various media have claimed the sources of information were the President of the United States, the Secretary of Defense, the Secretary of the Army, the Chief of Staff of the United States Army, the Secretary of State, and many others in the military hierarchy who were in positions of responsibility; that the structure of the Army is such that the statements and views of the Commanders who control ratings, promotions, and assignments have a measurable impact on officers serving under them and the publicized statements of those in higher commands rob the petitioner of the presumption of innocence and the guarantee of the Fifth Amendment to the Constitution which provides that he shall not be deprived of life, liberty or property without due process of law. But in addition, to permit the trial of plaintiff would constitute a specific violation of Article 37 U.C.M.J. (10 USC Sections 837(a)) which provides that no authority convening a General Court-Martial nor any other Commanding Officer shall attempt by any unauthorized means to influence the action of the Court-Martial or any member thereof in reaching the findings or sentence of a case. The public announcements of High Ranking Officers superior to the petitioner, up to and including Commander-in-Chief, have indicated their belief that the actions at My Lai were unjustifiable and such public comments will influence all officers of the United States Army on the action to be desired by the

Army in this case.

SEVENTH COUNT

16. That plaintiff in support of this Count asserts that Article 118, Uniform Code of Military Justice, (Title 10, United States Code, Section 918) is in violation of the Constitutional rights of the plaintiff in that it provides for and authorizes the imposition of the death penalty as a permissible punishment by Courts-Martial. The death penalty constitutes cruel and unusual punishment prohibited by the Eighth Amendment of the Constitution of the United States.

That the possibility of death penalty enforcement is real and imminent against plaintiff as reflected by the action of defendant, Major General Talbott, in referring plaintiff to trial by General Court-Martial without limiting the death penalty power of the Court members. It is apparent that the military judicial system of the Armed Services, because of its interest and limited jurisdiction, will not determine that the death penalty is unconstitutional. Article 55, Uniform Code of Military Justice (Title 10, United States Code, Section 855), though in existence since enactment of the Uniform Code of Military Justice, has never been applied to prevent the ultimate in cruel and unusual punishment, namely death; and that since enactment of the Code the death sentence has been executed.

That Article 118, Uniform Code of Military Justice, (Title 10, United States Code, Section 918) is further in violation of the Constitutional rights of plaintiff in that Congress in promulgating that Article violated Article I, Section 8, Constitution of the United States of America when it authorized Courts-Martial to impose the death penalty for premeditated murder. The death penalty for Courts-Martial offenses of a civilian nature neither is "necessary and proper"

not required as a rule "for the Government and Regulation of the land and naval forces". A Court-Martial death penalty was last ordered into execution on or about 13 April 1961 and this isolated incident clearly reflects that it is not a "necessary and proper" punitive tool of the Military Court-Martial system. Due the absence of a clear and present necessity, within the framework of Article I, Section 8, Constitution of the United States, for a Court-Martial to exercise death penalty power over civilian type offenses of premeditated murder of civilians, such unconstitutional granting of power further violates plaintiff's Eighth Amendment rights to be free from the infliction of cruel and unusual punishment and his Fifth Amendment right not to be deprived of life without due process of law.

That, as applied to plaintiff, Article 52, Uniform Code of Military Justice (Title 10, United States Code, Section 852) "Votings and Rulings" is unconstitutional for it arbitrarily deprives plaintiff of the equal right and protection of law granted to other persons subject to trial by Court-Martial for offenses where the death penalty can be imposed by law. Persons tried by Court-Martial for mandatory death penalty offenses can be convicted only by the concurrence of all Court-Martial members present at voting time. Plaintiff, however, can be convicted of premeditated murder, which requires a mandatory sentence of death or life, only on a two-thirds vote of the Court-Martial members present at voting time. Such arbitrary discrimination violates plaintiff's right to equal protection of Federal law and his right to a fair trial under the Fifth Amendment and Eighth Amendment of the Constitution of the United States. Such threat is real and imminent for the reasons heretofore alleged.

EIGHTH COUNT

17. That plaintiff was appointed as a commissioned Reserve Officer under the provisions of Title 10, United States Code, Section 591 and 593 on the 7th day of September, 1967. Such appointments statutorily are stated as being "for an indefinite term and are held during the pleasure of the President." Department of Army (Implementing) Regulation 135-90, dated 9 May 1962, as changed, merely indicates that plaintiff's service obligation would be equivalent to the term contracted for by plaintiff. Another conflicting regulation purports to establish a two year military obligation, however, plaintiff has not signed a service obligation contract. Accordingly, plaintiff does not now, nor did he ever, consent or contract to being retained in the United States Army solely for purposes of trial by General Court-Martial -- for a capital offense or any other -- and defendants have illegally retained him in servitude in the United States Army to keep him subject to criminal prosecution and not for the legitimate purposes of using his services in defense of this Nation. In support of this contention it is specifically alleged that Article 2, Uniform Code of Military Justice (Title 10 United States Code, Section 802) is unconstitutional and unenforceable for vagueness, and if defendants rely on said provision to confer statutory authority to hold plaintiff beyond his obligated period of appointment, solely for purposes of trial, at best, they are relying on a broken reed. While that provision allows the holding of those Armed Forces personnel awaiting discharge after expiration of their terms of "enlistment" -- officers are appointed and are not enlisted in the United States Army. Moreover, any Act of Congress purporting to grant the Army authority to hold an American citizen in the Army solely to subject him to criminal prosecution for civilian

offenses is unconstitutional as such a statute is beyond the delegated authority of the Constitution which authorizes Congress only to enact these laws "To make Rules for the Government and Regulations of the land and naval forces" or "To make all laws which shall be necessary and proper" (Article I, Section 8, Constitution of the United States of America). In this instance, defendants do not desire to utilize plaintiff's services in any necessary and proper manner but merely desire to subject him to criminal prosecution -- a function which, in the absence of a clear and absolute necessity, was intended to be vested in the Article Three Courts and not the Executive Department of our Government. Subjection of plaintiff to criminal prosecution for a capital offense by any Military Court violates all of his above mentioned Constitutional rights and subjects plaintiff to irreparable harm which requires this Court to grant the extraordinary relief requested. Further, Article 36, Uniform Code of Military Justice (Title 10 United States Code, Section 836) constitutes an unconstitutional delegation of Legislative functions of government to the Executive Department to the extent said provision is used to authorize the enactment of Paragraph 11d, Manual for Court-Martial, United States, 1969, (Revised). The Executive retention of Court-Martial jurisdiction, not specifically and clearly conferred by Act of Congress in the Uniform Code of Military Justice, by fiat constitutes an unconstitutional attempt to fill a statutory void arising from the vague, indefinite and unconstitutional language of Article 2 of the Uniform Code of Military Justice.

NINTH COUNT

18. The provisions of the Geneva Convention of 1949 require each contracting party, including the United States, to bring before its own Courts any person regardless of

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Nationality, who is alleged to have committed, or to have ordered committed, grave breaches of the Articles of the Convention and these include premeditated murder. These provisions are self executing and Article III of the Constitution of the United States extends jurisdiction of the Federal District Courts of all cases in law arising under Treaties made, or to be made. The violations alleged in the specifications against the plaintiff fall in the category of offenses in violation of a Treaty and by the provisions of Article III civilian courts have jurisdiction to hear and dispose of the charges. Those Courts can grant the plaintiff all of his Constitutional rights and privileges while Military Courts will deny him many which belong to all citizens. Furthermore, under the facts of this case, to permit the latter Courts to try the plaintiff and not discharged American soldiers of the same military force, or citizens of Allies, or other foreign countries, would result in an unequal application of the Constitutional provisions prejudicial to the plaintiff.

That in addition to imposing a death penalty, the General Court-Martial may impose life imprisonment, a dismissal from the service and forfeiture of all pay and allowance. It is clear, therefore, that plaintiff's loss of pay, retirement benefits, rights to promotion and other emoluments establish that more than \$10,000.00 is in controversy in the case at bar.

WHEREFORE, plaintiff prays as follows:

1. That the Court accept this Complaint and Order it filed.
2. That the defendants, and each of them, their agents and subordinantes, be temporarily restrained, ex parte, from taking any further steps to continue with plaintiff's trial by General Court-Martial pending a hearing upon this Complaint.

3. That copies of the Complaint, together with the Temporary Restraining Order and appropriate Summons be served, as provided by law, upon the defendants, and each of them, and that the Attorney General of the United States and the United States Attorney for the District of Columbia be served for the defendant, the United States of America.

4. That pursuant to Title 28 Section 2282 a District Court of three Judges be empaneled, according to law, to hear this Complaint and grant the relief prayed for by the plaintiff.

5. That the District Court of three Judges grant an interlocutory and temporary injunction enjoining and restraining the defendants, and each of them, their agents and subordinates from prosecuting the plaintiff by a General Court-Martial.

6. That the defendants, and each of them, their agents and subordinates be permanently enjoined from prosecuting the plaintiff by a General Court-Martial; that they be compelled to dismiss the charges against him; that they be required to release him from further service in the Army and that he be discharged and freed.

7. That should the relief requested in paragraph 6 be denied then, in the alternative, that the District Court of three Judges order the charges transferred to an Article III District Court for the plaintiff to be tried by a Jury as required by the Constitution and implemented by law.

8. That the plaintiff have such other and further relief as justice and law require.

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Cleveland, Ohio

RICHARD B. KAY
Civilian Counsel for Accused

STATE OF GEORGIA

COUNTY OF _____

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On the _____ day of _____,

personally appeared before me the undersigned officer authorized to administer oaths, William L. Calley, Jr., Lt., United States Army, who after being duly sworn on oath says and deposes that the allegations of fact contained in the foregoing Complaint are true and correct.

WILLIAM L. CALLEY, JR.

Subscribed and sworn to before me this _____ day
of July, 1970.

NOTARY PUBLIC

My Commission Expires:
