

UNITED STATES

v

CHARLES E. HUTTO
Sergeant, U. S. Army

MOTION TO DISMISS
COMMAND INFLUENCE AND
PREJUDICIAL PRE-TRIAL PUBLICITY

IN the above-styled case a General Court-Martial convened by Court-Martial Convening Order Number 37, Headquarters, Third United States Army, Fort McPherson, Georgia 30330, dated 17 September 1970, the defendant, Charles E. Hutto, moves the Court to dismiss all charges and specifications alleged against him on the following grounds:

1. He can not be accorded a fair and impartial trial in any Court-Martial composed of members of any of the Armed Services of the United States.
2. His rights and privileges as guaranteed by the Constitution of the United States and the Uniform Code of Military Justice have been prejudicially and substantially impaired, and the injury to him can not be cured by any subsequent action of military authorities.
3. Command influence and prejudicial pre-trial publicity have so interfered with the military judicial process as to offend against the Constitution of the United States and the Uniform Code of Military Justice, causing irreparable damage to the defendant.
4. The defendant is one of several soldiers presently charged with violations of the Uniform Code of Military Justice arising out of the so-called "My Lai" incident. Specifically, the defendant is charged with one charge and one specification of assault with intent to murder, and one charge and one specification of false swearing.
5. To subject the accused to trial by General Court-Martial will contravene the Sixth Amendment right to a "...speedy and public trial by an impartial jury." Article 37 of the Uniform Code of Military Justice supplements this amendment and specifically prohibits the influencing of a Court-Martial or the Reviewing Authorities. In this case the unlawful influence has been disseminated through various Government officials use of all forms

of news media. The President of the United States and the Secretary of State have made public statements of a highly prejudicial and inflammatory nature concerning those accused of incidents arising out of the operation at My Lai. Such statements, suggestions and proposed actions have had a detrimental effect on all military personnel insofar as this accused is concerned, including those who have been ordered to be members of the General Court-Martial selected to try this case. President Nixon's statement on 3 December 1969, in a press conference given nationwide television and radio coverage is clearly demonstrative of the exercise of such prohibited influence. He stated in response to a question:

...that appears was certainly a massacre and under no circumstances was it justified. One of the goals we are fighting for in Vietnam is to keep the people from South Vietnam from having imposed upon them a government which has atrocity against civilians as one of its policies. We cannot ever condone or use atrocities against civilians in order to accomplish that goal. Now this record of generosity, of decency, must not be allowed to be smudged and blurred because of this kind of incident. That is why I am going to do everything I possibly can to see that all of the facts in this incident are brought to light and that those who are charged, if they are found guilty, are punished. Because if it is 'isolated,' it is against our policy and we shall see to it that what these men did, if they did it, does not cover the decent men that have gone to Vietnam in a very, in my opinion, important cause." (emphasis added)

Secretary of State, Rogers, released to the press the following statement:

Those responsible will be court-martialed to show the world we do not condone this.

These well-publicized statements have inflamed the public throughout the world against the defendant, and will have an even greater effect on the Court members who have been selected to serve in this because they emanate from their ultimate superior in the chain of command.

6. The Secretary of the Army has appeared before a Congressional Committee and displayed color photographs of the alleged atrocities which were then described by members of the Committee as appalling "acts of brutality" that could not have been committed in Hitler's time. Such impudent actions by

the Secretary influenced certain members of Congress against the defendant and in favor of the prosecution. This presentation was persuasive enough to cause certain Congressmen to make public statements extremely detrimental to the defendant and his fellow soldiers; all of which were circulated generally in the news media. This Congressional appearance and the generalized reaction and comments flowing therefrom have inflamed the general public against the defendant and certainly have had the same impact on the Court members chosen to determine the guilt or innocence of the defendant.

7. General William C. Westmoreland and Lieutenant General William Peers have made statements which have further prejudiced the rights of the defendant to be tried by a Court composed of open-minded and impartial triers of fact. General Peers' statement at the conclusion of his official Army Investigation that a "tragedy of major proportions did occur" has influenced those Army officers who will sit as Court members at the defendant's trial. General Westmoreland's interest is apparent in that he was the Commanding General of all United States Armed Forces in the Republic of South Vietnam at the time of the incident and, ironically, commanded the defendant, *inter alia*, for his participation therein. He also was Chief of Staff of the Army at the time the incident was called to the public's attention. All participants in these proceedings up to and including the Cowering Authority, Court members, the Military Judge and Prosecution, and the Court of Military Review, are officers under his command and control. It is obvious that the Chief of Staff and other senior Army Officers' interest in seeing that this so-called "massacre" was an "isolated incident" and certainly not "to be condoned" by the Army affects the fairness of any prosecution involving this defendant.

8. Those officials who have spoken through the various news media have directly influenced the bringing of charges against the defendant and the ultimate disposition of the charges, thereby causing irreparable prejudice to the defendant.

9. The Fourteenth Amendment to the Constitution of the United States provides that no person shall be deprived of his life, liberty and property without due process of law. This Constitutional provision extends to members of the Armed Forces through Code Implementation and by decisions of the United States Court of Military Appeals. Trial of the defendant on the pending charges will offend against that privilege because of the unrepresented, private legal, uncontrolled, videotaped articles and pictures carried world-wide in press, television and radio releases, which have inflamed and aroused the general public against the accused for his participation in the My Lai operation.
- Some samples of this coverage are the publication of shooting, inflamatory, gruesome and extremely prejudicial pictures of dead Vietnamese men, women and children allegedly taken the day of the operation at My Lai by an eye-witness. These pictures were front page material all over the world and reproduced and shown on television. This coverage has also included numerous prejudicial statements made by witnesses alleging that they were familiar with the defendant. These extra judicial statements have served to discredit and convict the defendant without providing him with his absolute right to confront such witnesses in open Court. Literary works purportedly giving the facts of what happened at My Lai have been published and sold world-wide. One such book has won a Pulitzer Prize for International press reporting. Leading even more credence to the content. Presently, a three part series is appearing in *Newsweek* written by one of the principle defendants in the My Lai case. Other samples of unprecedent publicity is the circulation of a record album about atrocity in Vietnam focalizing on the alleged My Lai incident. Its cover is a picture of dead Vietnamese men, women and children, purportedly taken at My Lai the day of the operation.
10. By transferring the defendant to Fort Harrison for the purpose of consolidation of all My Lai cases, for the convenience of the government, has subjected the accused to even greater pre-trial publicity. By the Army's own action it has caused the accused to suffer from prejudicial

publicity by being grouped in one area where publicity, comments and quotes attributed to or made by other defendants or their counsel are credited equally to all defendants. By consolidation the Army has caused a constant and focalized coverage of all cases arising out of the My Lai incident. This coverage has saturated the Third U.S. Army area from which the Court, Judge and Prosecution have all been chosen. By this action, the Army has caused a highly prejudicial situation of which the defendant must suffer. The prejudicial effect of this type of continuous publicity is clearly illustrated by the recent statement of Colonel Oran K. Henderson, who was the Commanding Officer of the 11th Infantry Brigade at the time of the subject incident, which was as follows:

Up until two weeks ago I would have sworn that it could not happen without me knowing about it, but when I started seeing T.V. broadcasts and hearing soldiers speak about this subject who were eyewitnesses, I began to wonder.

11. This type of inflammatory publicity has no doubt had the same effect on millions of Americans including, *inter alia*, the officers chosen to be Court members in this case.
12. The prejudicial effect of this type of publicity is evident as pertains to the testimony of the witnesses who will testify at trial. Each witness against the accused will have his testimony influenced by the constant recounts of the incident as others remembered it. The incident of which the witness will testify to occurred over two and one-half years ago and is certainly subject to the psychological influence of hearing others state what happened. Under these circumstances it will be impossible for the accused to receive a fair and impartial trial free of prejudicial pre-trial publicity.
13. Dismissal is the only remedy in this case. *Voir Dire* examination of the Court will be an exercise in futility. A continuance until some undeterminable date when publicity has ceased will cause a continued extension of the defendant's KTS date and in no way undo the vast harm that has already been done to his opportunity to obtain a fair trial. A change of venue would only serve to emphasize the basic problem since it would single out this defendant's case and cause it to become even more publicized.

14. Evidentiary material in support of this motion will be furnished to the Court at the hearing on this motion.

WHEREFORE, the defendant moves the Court to enter its Order dismissing all charges and specifications alleged against him herein.

Respectfully submitted,

JAMES W. LANE
CPT, JAGC

and

STEPHENS, MAGILL & INGRAM,

By _____

EDWARD L. MAGILL
Counsel for Defendant