IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF GEORGIA

Civil Action, File No. 13895

ESEQUIEL TORRES, SERGEANT, U. S. ARMY Plaintiff v. ALBERT O. CONNOR, LT. GENERAL, U. S. ARMY, AS COMMANDING GENERAL, THIRD UNITED STATES ARMY Defendant	PLAINTIFF'S MEMORANDUM OF AUTHORITIES

PART I

STATEMENT OF FACT

Plaintiff is a soldier in the United States Army. He is charged with two counts of murder, and one count of assault with intent to murder - charges growing out of the "My Lai (4) Incident" of March 1968. He stands to be tried by a General Court-Martial appointed by Defendant, as Plaintiff's superior officer and, if convicted, sentenced to imprisonment for life at hard labor.

On June 24, 1970, Plaintiff made application for a Three Judge Court pursuant to Tit. 28, U.S.C., Sec. 2282, and for a temporary restraining order to prohibit his trial by Court-Martial pending hearing. On that date, a restraining order was issued, along with a rule nisi, and on July 2, 1970, a temporary injunction issued, prohibiting Defendant from placing Plaintiff on trial as to his guilt or innocence until further order.

A District Court of three judges is now convened for July 15, 1970, for which hearing this Memorandum is submitted.

PART II

ARGUMENT AND CITATION OF AUTHORITY

Factual Considerations

To try Plaintiff by General Court-Martial upon the charges against him, and under all the circumstances thereof, would be repugnant to the

Constitution. Plaintiff's application sets our fifteen grounds of violation and deprivation of his Constitutional rights. Each of these is to be considered separately and upon their respective contentions. But in this case, the whole is greater than the sum of its parts, and the aggregate of denials and deprivations to which the U. S. Army is about to subject this Plaintiff is, indeed, a long train of usurpations and abuses, plainly destructive of his Constitutional rights.

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The whole body of the law of criminal justice is based upon a plain and simple concept - fairness. To assure fairness, criminal processes have been subjected to the closest scrutiny, and in instances, elaborated upon to the minutest detail. But all hangs upon fairness. Due process, in its basest and most fundamental concept, is the assurance, or at the very minimum, the possibility of fair trial. And fair trial, under whatever tribunal, must include, at the very minimum, triers of fact who are impartial.

No part of this is available to Esequiel Torres - in this case, and under those circumstances.

Consider the following enumerations:

1. The President and Commander in Chief of all of the Court-Martial members who are to try him has already announced on nationwide television with regard to the My Lai incident: "What appears was certainly a massacre and under no circumstances was it justified" - thereby directing his subordinates within the military establishment to convict and punish Plaintiff.

2. He is charged with two counts of murder, not upon presentment of a grand jury, but upon the single act of Defendant, as "convening authority", an officer of the U. S. Army, who is subordinate to the President.

3. The charges against him were preferred by an officer of the U.S. Army, who is subordinate to the President.

4. The charges against him were formally investigated by an officer of the U. S. Army, who is subordinate to the President.

5. The factual basis for the formal investigation was a criminal investigation performed by members of the U. S. Army, who are subordinate to the President.

6. The recommendation of the investigating officer was reviewed by the Staff Judge Advocate of Third U. S. Army, an officer of the U. S. Army, who is subordinate to the President.

7. The charges were referred to a General Court-Martial by Defendant, an officer of the U. S. Army, who is subordinate to the President.

8. The members of the Court Martial were appointed by Defendant, an officer of the U. S. Army, who is subordinate to the President.

9. The Military Judge who will preside over Plaintiff's Court-Martial is an officer of the U. S. Army, who is subordinate to the President.

10. The trial counsel who will prosecute Plaintiff are officers of the U. S. Army, who are subordinate to the President.

11. The military defense counsel assigned to defend Plaintiff are officers of the U. S. Army, who are subordinate to the President.

12. The Defendant, who ordered Plaintiff tried for murder and appointed the officers to try him, will "review" the record of his trial.

13. The Military Court of Review, who might review Plaintiff's conviction, are all officers of the U. S. Army, who are subordinate to the President.

14. The Court of Military Appeals, the Court of last resort within the court-martial system, do not have lifetime tenure, but are appointed by the President for terms of years.

15. The members of the Court-Martial may convict him not upon unanimous vote, but upon only three-fourths of their votes.

16. The prosecution is empowered to present evidence against him by deposition, subjecting him to jeopardy of his freedom for life upon written documents, without confrontation.

17. Punishment upon conviction by Court-Martial is determined, not by the Congress, but by the President, under Executive Order, he having by Executive Order No. 11476 prescribed death or life imprisonment for murder and twenty years imprisonment for assault with intent to murder.

18. He is to be placed on trial at Ft. McPherson, Georgia, where he was ordered to report from the Canal Zone, Panama, for the sole purpose of standing trial - a place far removed from the situs of the alleged charges,

19. He is to be placed on trial almost two and a half years following the time of the My Lai incident, when all the facts of My Lai were immediately known to the Commander of Task Force Barker, and to General Koster, the Commanding General of Americal Division.

20. He is to be tried without a jury.

21. He is given only one peremptory strike of the panel of officers assigned to try him.

22. He was interrogated by a Colonel of the Inspector General's Office about the charges, and denied the counsel of his choice.

23. He was interrogated by a Colonel of the Inspector General's Office about the charges, and denied any counsel at all.

24. He was ordered by a Colonel of the Inspector General's Office not to discuss the questions or answers of the investigation.

25. During the preliminary phases of the investigation, up to the time Defendant ordered Plaintiff tried by Court-Martial, he was denied full time counsel, and denied counsel having adequate time to prepare his defense.

26. His chief military counsel is assigned other duties by Defendant, of a time-consuming nature, and hence prevented from devoting adequate time for his defense.

27. He has requested full time military counsel, and was denied it.

28. He has requested assistance in the form of investigation, and was denied it.

29. He has requested information necessary to his defense from the Central Intelligence Agency and was denied it.

30. He has requested copies of the investigation conducted by General Peers, which are necessary to his defense, and was denied them.

31. He has requested that his military counsel be given temporary duty assignment permitting travel for investigative purposes, and was denied it.

32. There is arrayed against him, a Sergeant, a vast array of officers, non-commissioned officers, and enlisted men, from the Department of Defense down to Defendant's command, comprised of investigators, interrogatories, prosecutors, lawyers, and technicians - all of whom are under the

command of the President, who by his pronouncements has judged Plaintiff guilty.

33. Defendant, and those ordered by the President to prosecute Plaintiff, have the unlimited resources of the United States Government, to pursue his prosecution. He has only his military pay as a Sergeant to develop his defense.

34. The U. S. Army has already "held court" on the My Lai incident in the form of the Peers Investigation, and drawn therefrom official conclusions, adverse to Plaintiff, without his being present or represented, thus denying to him the presumption of innocence.

35. The power of pardon for any conviction he might suffer rests within the President, who has already denounced the My Lai incident as a "massacre".

36. In this case, at this time, the U. S. Army is lawgiver, accuser, Accused, interrogator, investigator, indicter, prosecutor, defender, judge and jury, jailer and pardoner.

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The major item in this catalog is yet unmentioned: the complicity of the accuser - the United States Army - in the My Lai incident; the pursuit by the accuser of policies leading to wholesale and indiscriminate destruction of human life in Vietnam; and the absolution by the accuser of many high ranking officers charged with related or similar offenses.

Esequiel Torres is not to be court-martialed because some officer signed charges against him. It is because some near-anonymous ex-soldier wrote letters about My Lai to the President, the Department of Defense, and to twenty Congressmen. It is because an enterprising newsman published an account of the incident and won a Pulitizer prize; it is because the U. S. Army, driven to the wall by public outrage over its denials and evasion, seeks now to find a scapegoat lowly enough to bear its own guilt - the field grade and general officers involved being for the most part exonerated.

The aggregate of these acts and omissions, upon the most basic considerations of justice and impartiality is such to assure the impossibility of a fair trial, and to rob him of the presumption of innocence.

What the Army is trying to do to Esequiel Torres is simply not fair.

In no way is it fair.

The rights accorded to every rapist and murderer and narcotics peddler are denied to him. Criminal conspirators, caught in the very act of treasonable attempts to destroy their country, have as a matter of course, all of the panoply of rights and protections which are to be denied Esequiel Torres - Torres, wounded in action in a strange land to which his country sent him in the name of protecting the rights and liberties of others.

In no way is it fair.

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The Jurisdiction of the Court

Tit. 28 U.S.C., Sec. 2282, vests injunctive power in a three judge court wherein the execution of Acts of Congress - here, the Uniform Code of Military Justice - is repugnant to the Constitution. Jurisdiction is thus grounded upon Plaintiff's fifteen grounds of Constitutional deprivation, severally, and in sum.

His plea is that a fair and impartial trial by the U. S. Army is for him an impossibility, under all the attendant circumstances. The lack of traditional Constitutional safeguards within the military system (such as trial by jury and presentment by grand jury) is conjoined with the accusation made against his unit (and therefore against him) by the President and Commander in Chief, which is coupled with the unparalled publicity given to the My Lai incident, which is aggravated by the conduct of high military officials in first ignoring the incident, then covering up the incident, then, as an escape for the Army itself, charging this Plaintiff - all the while exonerating high ranking military officers.

It would be strange perversion of the American idea of justice to hold that any tribunal, however constituted, might lawfully convict and condemn an accused when the tribunal itself is so infected with bias or interest as to establish it other than fair and impartial, and to proceed against him under a presumption of guilt rather than innocence.

"That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is, of course, the general rule." Tumey v. Ohio, 273 U.S. 510, p. 522.

"But it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." Tumey v. Ohio, id., p. 523.

"The necessary factors in a fair trial are an adequate hearing and an impartial tribunal, free from any interest, bias, or prejudice. Tumey v. Ohio, 273 U.S. 510." The Reno, 61 F.2d 966, 968.

This Court has jurisdiction over all issues raised by Plaintiff, as appears in Burns v. Wilson, 346 U.S. 137, 73 S.Ct. 1045.

"We have held before that this (the existence of military remedies)does not displace the civil courts' jurisdiction over an application for habeas corpus from the military prisoner. Gusik v. Schilder, 1950, 340 U.S. 128, 71 S.Ct. 149, 95 L.Ed. 146. But these provisions do mean that when a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence. Whelchel v. McDonald, 1950, 340 U.S. 122, 71 S.Ct. 146, 95 L.Ed. 141.

"We turn, then, to this case.

"Petitioners' applications, as has been noted, set forth serious charges - allegations which, in their cumulative effect, were sufficient to depict fundamental unfairness in the process whereby their guilt was determined and their death sentences rendered. Had the

military courts manifestly refused to consider those claims, the District Court was empowered to review them de novo."

There follows this most significant language:

"For the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers - as well as civilians - from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts."

The situation contemplated in Burns exists in reality here. The gravamen of Plaintiff's complaint is that he is to be subjected to "the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness."

The Fifth Circuit has recognized its jurisdiction to grant relief in court martial cases. In Re Kelly, 401 F.2d 211 (1968) involved an application by a serviceman for a stay of general court martial. The Court reasoned:

"A petitioner's application for discharge as a conscientious objector under the regulations could be facially so convincing, and the factual allegations of withholding or frustration of the right to seek discharge could so clearly present constitutional issues crying out for judicial scrutiny, that the military should, as a minimum, be required to show cause why a writ should not be issued."

True, the Court withheld relief. But that is a matter of comity not jurisdiction, as considered infra.

The Exhaustion of Remedies

Plaintiff brought this application on the day following the referral to a general court-martial of the charges against him. Manifestly, he has

not pursued the remedies theoretically available to him within the military system.

He has not done so because his basic contention is that the same would be futile, in view of all of the factors set out in his application. There is no remedy from a tribunal which is under orders, in effect, to convict and punish him, and the law does not require a vain or futile thing. It is true that civil courts have on occasion withheld the granting of relief, pending exhaustion of remedies. This evinces not lack of judicial power over court-martial cases, but self-imposed restraint. See Gusik v. Schilder, 340 U.S. 128, 71 S.Ct. 149, wherein the Supreme Court directed the Court of Appeals to hold the case pending resort to a new remedy under then Article 53; Whelchel v. McDonald, 340 U.S. 122, 71 S.Ct. 146, approving similar disposition; Noyd v. Bond, 395 U.S. 683, 89 S.Ct. 1876, retaining civil jurisdiction pending military review.

The Fifth Circuit, in Kelly (supra), adopted the position that civil abstention in military matters is from conscious choice in selected instances, rather than from want of power.

> "398 F.2d p. 718. But we view the requirement of exhaustion as did the majority in Hammond. We consider it to be based on principles of comity and not as an imperative limitation of the scope of federal habeas corpus power."

At the same time, it recognized that, in a proper case, it might intervene at the outset, and grant relief before a petitioner had exhausted his remedies.

> "We are unwilling to presume in this case that the military courts will not fully and fairly consider the claims by petitioner of the violation of his constitutional rights and of failure of the Army to abide by its own regulations." (emphasis supplied).

Speaking to the question of exhaustion of remedies in Noyd (supra), the Supreme Court pointed out that in prior cases it had granted relief without requiring the exhaustion of remedies. See fn. 8, at p. 697, as follows:

"Petitioner contends that our decisions in United States ex rel. Toth v. Quarles, 350 U.S. 11, 76 S.Ct. 1, 100 L.Ed. 8 (1955); Reid v. Covert, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957); and McElroy v. United States ex rel. Guagliardo, 361 U.S. 281, 80 S.Ct. 305, 4 L.Ed.2d 282 (1960), justify his position that exhaustion of military remedies is not required in this case. The cited cases held that the Constitution barred the assertion of court-martial jurisdiction over various classes of civilians connected with the military, and it is true that this Court there vindicated complainants' claims without requiring exhaustion of military remedies. We did so, however, because we did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented. Moreover, it appeared especially unfair to require exhaustion of military remedies when the complainants raised substantial arguments denying the right of the military to try them at all. Neither of these factors is present in the case before us."

Plaintiff here raises grave Constitutional claims, which are most assuredly far beyond the expertise of military courts. Additionally, he raises substantial arguments denying the right of the military to try him at all - thus presenting the two express causes for initial intervention by the civil judiciary set out in Noyd.

Other cases involving exhaustion of remedy should be considered in the light of the specific issues raised.

Stanford v. U. S., 413 F.2d 1048, concerned a procedural insufficiency, and sought only to nullify a dishonorable discharge. The questions raised were only those of trial by jury and presentment by grand jury - which are but two of the fifteen grounds pleaded by Plaintiff. Nor was there any charge of denial of fundamental fairness, pre-judgement of guilt, or want of jurisdiction to try.

Levy v. Corcoran, 389 F.2d 929, concerned a Constitutional attack, upon the vagueness of Article 134, the "general article", and turned on whether a three judge court should be appointed. Even so, the majority drew a strong dissent.

Craycroft v. Ferrall, 408 F.2d 587, concerned not court-martial jeopardy but administrative regulation for the correction of errors in naval records.

U. S. ex rel Berry v. Commanding General, 411 F.2d 822, made no attack upon the validity of court-martial conviction, but only upon confinement ordered.

Pitcher v. Laird, 415 F.2d 743, involved the interpretation of Army Regulations on conscientious objectors, and did not concern itself with the Constitution of the United States.

The Nature and Limitations of the Court-Martial System

For most of one hundred and sixty-three years following the ratification of the Constitution, civil courts avoided any intervention in the military system. During that span, their inquiry was limited almost solely to jurisdiction. But in 1950, the Supreme Court undertook to deal substantively with the Uniform Code of Military Justice, and three cases now stand as landmarks: U. S. ex rel. Toth v. Quarles, 350 U.S. 11, 76 S.Ct. 1; Reid v. Covert, 354 U.S. 11, 77 S.Ct. 1222; and finally, O'Callahan v. Parker, 395 U.S. 258.

In Toth the Court held that the military had no jurisdiction to try a discharged serviceman for crimes committed while on active duty.

In Reid v. Covert the Court held that dependents of servicemen overseas were beyond the jurisdiction of courts-martial.

In O'Callahan the Court held that a serviceman could not be tried by court-martial for a civilian-type, off-duty, offense.

In each of these cases, substantial thought and expression is accorded to the military system itself. Certain passages of those opinions are profitable for an appreciation of all the soldier loses when he becomes subject to military trial. They are set out as follows:

Toth v. Quarles (supra):

"And conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts. For instance, the Constitution does not provide life tenure for those performing judicial functions in military trials. They are appointed by military commanders and may be removed at will. Nor does the Constitution protect their salaries as it does judicial salaries. Strides have been made toward making courts-martial less subject to the will of the executive department which appoints, supervises and ultimately controls them. But from the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals...

"None of the other reasons suggested by the Government are sufficient to justify a broad construction of the constitutional grant of power to Congress to regulate the armed forces. That provision itself does not empower Congress to deprive people of trials under Bill of Rights safeguards, and we are not willing to hold that power to circumvent those safeguards should be inferred through the Necessary and Proper Clause...

"Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to 'the least possible power adequate to the end proposed'."

Reid v. Covert (supra):

"The United States is entirely a creature of the Constitution. Its power and authority have no other

source. It can only act in accordance with all the limitations imposed by the Constitution...

"', . . the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law.'...

"Under these statutes consuls could and did make the criminal laws, initiate charges, arrest alleged offenders, try them, and after conviction take away their liberty or their life - sometimes at the American consulate. Such a blending of executive, legislative, and jusicial powers in one person or even in one branch of the government is ordinarily regarded as the very acme of absolutism...

"The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined...

"By way of contrast the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, Sec. 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections...

"The tradition of keeping the military subordinate to civilian authority may not be so strong in the minds of this generation as it was in the minds of those who wrote the Constitution. The idea that the relatives of soldiers could be denied a jury trial in a court of law and instead be tried by court-martial under the guise of

regulating the armed forces would have seemed incredible to those men, in whose lifetime the right of the military to try soldiers for any offenses in time of peace had only been grudgingly conceded. The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds...

"Traditionally, military justice has been a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties with a view to maintaining obedience and fighting fitness in the ranks. Because of its very nature and purpose the military must place great emphasis on discipline and efficiency. Correspondingly, there has always been less emphasis in the military on protecting the rights of the individual than in civilian society and in civilian courts.

"Courts-martial are typically ad hoc bodies appointed by a military officer from among his subordinates. They have always been subject to varying degrees of 'command influence.' In essence, these tribunals are simply executive tribunals whose personnel are in the executive chain of command. Frequently, the members of the court-martial must look to the appointing officer for promotions, advantageous assignments and efficiency ratings - in short, for their future progress in the service. Conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, the members of a court-martial, in the nature of things, do not and cannot have the independence of jurors drawn from the general public or of civilian judges...

"Moreover, it has not yet been definitely established to what extent the President, as Commander-in-Chief of the armed forces, or his delegates, can promulgate,

supplement or change substantive military law as well as the procedures of military courts in time of peace, or in time of war. In any event, Congress has given the President broad discretion to provide the rules governing military trials. . . .If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers."

O'Callahan v. Parker (supra):

"If the case does not arise 'in the land or naval forces,' then the accused gets first, the benefit of an indictment by a grand jury and second, a trial by jury before a civilian court as guaranteed by the Sixth Amendment and by Art. III, Sec. 2, of the Constitution ... .

"A court-martial is tried, not by a jury of the defendant's peers which must decide unanimously, but by a panel of officers empowered to act by a two-thirds vote. The presiding officer at a court-martial is not a judge whose objectivity and independence are protected by tenure and undiminishable salary and nurtured by the judicial tradition, but is a military law officer. Substantially different rules of evidence and procedure apply in military trials. Apart from those differences, the suggestion of the possibility of influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the danger.

"A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved.

"While the Court of Military Appeals takes cognizance of some constitutional rights of the accused who are court-martialed, courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law...

"A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice.

"As recently stated: 'None of the travesties of justice perpetrated under the USMJ is really very surprising, for military law has always been and continues to be primarily an instrument of discipline, not justice.' Glasser, Justice and Captain Levy, 12 Columbia Forum 46, 49 (1969).

"The mere fact that petitioner was at the time of his offense and of his court-martial on active duty in the Armed Forces does not automatically dispose of this case under our prior decisions....

"The fact that courts-martial have no jurisdiction over nonsoldiers, whatever their offense, does not necessarily imply that they have unlimited jurisdiction over soldiers, regardless of the nature of the offenses charges. Nor do the cases of this Court suggest any such interpretation. ...'Status' is necessary for jurisdiction; ...

"For it is assumed that an express grant of general power to Congress is to be exercised in harmony with express guarantees of the Bill of Rights."

* * * * * *

These expressions manifest the enlightened view of courts-martial - at best a poor substitute for and at worst a mockery of justice, - and in this case, not even an instrument of discipline, but of retribution, and exculpation of the Army itself.

> "God send me never to live under the Law of Convenience or Discretion. Shall the Souldier and Justice sit on one Bench, the Trumpet will not let the Cryer speak in Westminster Hall."
>
> Lord Coke

The Matter of Pre-Trial Publicity and Command Influence

To subject the Plaintiff to a trial by a General Court-Martial would contravene the provisions of the Fifth Amendment to the Constitution, providing that no citizen shall "be deprived of life, liberty or property without due process of law; ...", inasmuch as that fundamental fairness and impartiality, and the presumption of innocence required by the due process clause of necessity has been denied him. The My Lai incident has received massive publicity by the national press, the communication media, and political leaders at all levels of national life.

On December 16, 1969, shortly after the first disclosure of the My Lai incident, the President (and Commander-in-Chief of every member appointed to the court-martial) stated during a nationally televised press conference:

> ". . . I would start first with this statement: what appears was certainly a massacre and under no circumstances was it justified."

The statement of the President was reiterated in substance successively by the Secretary of the Department of Defense, the Secretary of the Army, the Chief of Staff of the United States Army, and others, all superior officers in the direct chain of command to the Defendant and to each member who might be appointed to serve on the General Court-Martial sitting in judgment upon the Plaintiff.

During the seven months since the President's statement the torrent of publicity concerning the incident at My Lai has not lessened.

Newspapers have made the My Lai incident an international cause celebre. Television has saturated the viewer with body counts, photographs of corpses, and daily interviews with officeholders, government officials, and military officers.

News-magazines have distributed throughout the nation pictures of some of the accuseds, complete with background biographies which purport to show abnormal tendencies toward violence.

Phonograph records are sold throughout the nation, chronicling the "Massacre", and jacketed in photographs of the bodies of women and children.

The cumulative effect of such massive media coverage, inescapable by the average citizen, has stripped the Plaintiff of his presumption of innocence. All this, evil enough in itself, when conjoined with the President's condemnation, is a pre-judgment as to his guilt and an unmistakable direction to convict and punish the Plaintiff. Pre-trial publicity in the recent cases of Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639 (1961); Estes v. The State of Texas, 381 U.S. 532, 85 S.Ct. 1628 (1965); and Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507 (1966), is mild in comparison.

In Chambers v. The State of Florida, 309 U.S. 227, 60 S.Ct. 472 (1940), the Supreme Court insisted that no one be punished for a crime without "a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power."

In Marshall v. The United States, 360 U.S. 310, 79 S.Ct. 1171 (1959), the Supreme Court set aside a federal conviction where the jurors were exposed, through news accounts, to information that was not admitted at trial. The Court held that the prejudice from such material "may indeed be greater" than when it is part of the prosecution's evidence, reasoning that "it is then not tempered by protective procedures."

In Irvin v. Dowd (supra), though each juror indicated that he could render an impartial verdict despite exposure to prejudicial newspaper articles, the Court set aside conviction.

"With his life at stake, it is not requiring too much that Petitioner be tried in an atmosphere undisturbed by so hugh a wave of public passion ..."

The "public passion" generated by the President and the military establishment and perpetuated and reinforced by the communications media has accordingly robbed Plaintiff of his presumption of innocence.

In In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623,625 (1955), Mr. Justice Black wrote "Our system of law has always endeavored to prevent even the probability of unfairness." How greater then the need for relief in this case, when circumstances have combined to create the certitude of unfairness.

It may be true that the procedures required by the Uniform Code of Military Justice will be followed. But as the Supreme Court observed in Estes (supra):

"In the words of Justice Holmes, even though 'every form (be) preserved,' the forms may amount to no 'more than an empty shell' when considered in the context or setting in which they were actually applied. ...Frank v. Mangum, 237 U.S. 309,346, 35 S.Ct. 582,594 (dissenting opinion)."

* * * * * *

Plaintiff has no real hope in pursuing this issue within the military system. There may be courts who might judge and find themselves wanting. Such are rare indeed within the civil judiciary. Within the military they are non-existent.

Delegation of Authority

Plaintiff contends that to be punished pursuant to presidential direction rather than legislative enactment is violative of the due process clause. 10 U.S.C., Sec. 856 provides that a person convicted by court-martial shall be punished as the court-martial shall direct within the limits prescribed by the President. 10 U.S.C., Sec. 918, under which Plaintiff is charged with murder, specifies a legislative punishment in only two of the instances therein defined as murder. Therefore, Plaintiff could be convicted

under such circumstances under Article 118, and of necessity under Article 134, as to be brought within the scope of executive rather than legislative punishment. This is unconstitutional.

> "The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." Schechter Poultry Corp. v. U. S., 295 U.S. 495, 55 S.Ct. 837.

The leading case of Field v. Clark, 143 U.S. 649, 12 S.Ct. 495, states:

> "That Congress cannot delegate legislative power to the president is a principle universally recognised as vital to the integrity and maintenance of the system of government ordained by the Constitution."

In Star-Kist Foods, Inc. v. U. S., 275 F.2d 472, the Court further enunciated this principle:

> "A constitutional delegation of powers requires that Congress enunciate a policy or objective or give reasons for seeking the aid of the President. In addition the act must specify when the powers conferred may be utilized by establishing a standard or 'intelligible principle' which is sufficient to make it clear when action is proper. And because Congress cannot abdicate its legislative function and confer carte blanche authority on the President, it must circumscribe that power in some manner. This means that Congress must tell the President what he can do by prescribing a standard which confines his discretion and which will guarantee that any authorized action he takes will tend to promote rather than flout the legislative purpose." (480).

If a man is to be deprived of his liberty through a sentence of confinement, it must be pursuant to Congressional enactment. U. S. v. Dettra Flag Co., 86 F.Supp. 84 (1949).

In order for Congress to fullfill its essential legislative functions, the laws it enacts must be complete. In order for a criminal statute to be complete, it is necessary for the statute to define clearly the acts which constitute the crime, as well as the punishment therefor. A criminal statute which does not fullfill both legislative functions is not complete. 10 U.S.C., Sec. 856 is, therefore, an incomplete enactment, in that the critically important matter of punishment is left to the undirected discretion of a court-martial, limited only by the undirected discretion of the President.

> "The legislature has exclusive power to determine the penological system, and it alone can prescribe the punishments to be meted out for crime." Commonwealth ex rel Green v. Court of Oyer and Terminer, etc., 106 A.2d 876 (1954). (emphasis supplied).
>
> "Subject to constitutional limitations, the legislature alone has power to declare what acts constitute a crime, to prescribe punishment therefor, and to set forth the form of the indictment or complaint by which an accused may be brought to trial." State v. Jorjorian, 107 A.2d 468 (1954). (emphasis supplied).
>
> The legislature may not in any degree abdicate its power; it may not make the effectiveness of a specific act dependent upon the will of another, and certainly it may not delegate to another the power to enact a law, whether in form or effect. Any attempt to abdicate legislative power in any particular field, although valid in form, is unconstitutional and void," 16 Am. Jur. 2d, Constitutional Law, Sec. 240, p.492. (emphasis supplied).

The language of Dettra Flag Co. (supra) is a persuasive summary of the principles here involved.

"Beginning with Field v. Clark, 143 U.S, 649, 12 S.Ct. 495, 36 L.Ed. 294, through to the present, the legal dogmas which control delegation of ministerial duties have been evolved. Congress must establish definite standards to be followed and policies to be effectuated, and in criminal statutes they must affix the penalty for violation thereof." (86)

"If the statute is sufficiently clear ... and if the penalty is fixed by the statute, . . .then violation of rules and regulations is made a crime not by the administrator but by Congress," (87)

Here again the prescription of punishment by the President is that combination of powers denounced as the "acme of absolutism", in Reid v. Covert (supra).

The President is not law maker, but executive,

"In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. (587),

"The Constitution does not neglect this lawmaking power of Congress to presidential or military supervision or control," (588), Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 96 L.Ed. 1153,

Cruel and Unusual Punishment

The circumstances of Plaintiff's pending trial constitute,in their entirety, cruel and unusual punishment. The Complaint contends that the Defendant's action in prosecuting Plaintiff - in this case, at this time, is in reality selective prosecution, and that any punishment which might follow would for that reason be cruel and unusual punishment,

Trop v. Dulles, 35 U.S. 86, is indicative of an emerging new consciousness of this ancient protection. The Chief Justice, acknowledging that "this Court has had little occasion to give precise content to the Eighth Amendment" specified that its extent is by no means static, but "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." The prosecution of Plaintiff, viewed in context with the national policy resulting in the indiscriminate destruction of lives in Vietnam, is certainly inconsistent with evolving standards of decency. To sentence this Plaintiff, and absolve all of the high ranking officers involved, would indeed "shock the moral sense of all reasonable men as to what is right and proper." State v. Nance, 438 P.2d 542.

No Central Intelligence Agency agents of Operation Phoenix are to be prosecuted. No discharged former member of Plaintiff's unit can be prosecuted. No field-grade officers (Major or above) have been ordered prosecuted. To the contrary, the United States Army has withdrawn charges against many high ranking officers, and has moved expeditiously only against Plaintiff, and possibly three other enlisted men.

Would punishment under such circumstances run afoul of the Eighth Amendment? The Supreme Court has noted jurisdiction of the issue of capital punishment under this Amendment. A proper evolution of content of the Eighth Amendment must surely proscribe Plaintiff's punishment in this case.

The Nature of the Conflict in Vietnam

Can the President wage a major war without a declaration of war by Congress?

The Congress has adopted no Declaration of War in Vietnam. Is a soldier, under such circumstances, part of "land and naval forces" within the meaning of the Legislative power to "make Rules for the Government and Regulation of the land and naval Forces" as granted in Article 1, Section 8, clause 14 of the Constitution? Is he subject, thereby, to be tried in the United States for a capital offense allegedly committed in a foreign combat zone?

The charges against Plaintiff relate to alleged murder of civilians, nationals of the Republic of Vietnam. The killing of civilian noncombatants

is a violation of the Laws of War, which is a part of the Law of Nations. It is proscribed by Chapter I, Articles 3 and 25 of Hague Convention No. IV (1907), to which the United States is signatory. How is the jurisdiction of a general court-martial then delineated from implementation by Congress of its grant to define and punish "offences against the Law of Nations", Article 1, Section 8, clause 10?

Quite plainly, these are issues of major proportion. They present novel questions of basic and fundamental importance. At a time of widening public division and dispute, matters of such magnitude need to be reviewed in that calm and deliberative forum which the judicial process alone can provide.

Remaining Contentions

Plaintiff brings his Complaint upon fifteen specific grounds. This Memorandum, in the nature of a trial brief, has not purported to treat each of these grounds exhaustively. It is anticipated that a major concern of the Court at the initial hearing may be the question of jurisdiction, to which the major effort here is directed. Also, it is hoped that more ample time might be provided for the fuller exploration of authorities.

PART III

CONCLUSION

The Court is vested with full jurisdiction of the cause, and has ample power to assure that the Constitutional rights of Plaintiff are protected. It is anticipated that the evidence to be offered by Plaintiff will substantiate fully the allegations of the Complaint, plainly establishing his entitlement to relief.

Respectfully submitted

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