PART I

PROFFER OF EVIDENCE

A. COMMAND INFLUENCE

1.

The statement of President Richard Nixon on December 8, 1969, at a nationally televised news conference as follows: "What appears was certainly a massacre and under no circumstances was it justified."

2.

Statement of Ronald L. Ziegler, White House Press Secretary, speaking on behalf of the President on November 26, 1969, as follows:

> "An incident such as that alleged in this case is in direct violation not only of United States military policy but is also abhorrent to the conscious of all American people. Appropriate action is and will be taken to assure that the illegal and immoral conduct as alleged will be dealt with in accordance with the strict rules of military justice."

3.

The statement of Melvin R. Laird, Secretary of Defense, in a letter to the Senate Foreign Relations Committee on November 25, 1969, stating: "how shocked and sick I was when these allegations first came to my attention."

4.

Stanley B. Resor, Secretary of the Army, stating on November 26, 1969, to the Congress:

> "It is difficult to convey to you the feelings of shock and dismay which I and other civilian and military leaders of the Army have experienced as the tragedy of My Lai has gradually unfolded before us. I know you share these emotions and fully appreciate the gravity of this incident...
>
> "In addition, it is estimated that besides 1LT Calley and SSG Mitchell there are at least 24 former members of

Company C, nine of whom are still on active duty, who must be deemed subjects of the continuing criminal investigation. The efforts of seven criminal investigators are currently focused upon the task of developing evidence concerning the actions of these men. It is estimated that several months may elapse before all of the allegations presently under investigation can be fully evaluated...

"I have reviewed what we know of the incident at My Lai with a number of officers who have served in Vietnam. It is their judgment ... a judgment which I personally endorse and share ... that what apparently occurred at My Lai is wholly unrepresentative of the manner in which our forces conduct military operations in Vietnam. Our men in Vietnam operate under detailed directives from MACV and other higher headquarters which prohibit in unambiguous terms the killing of civilian noncombatants under circumstances such as those at My Lai. During the last few years hundreds of thousands of American soldiers have participated in similar operations in Vietnam. I am convinced that their overall record is one of decency, consideration and restraint towards the unfortunate civilians who find themselves in a zone of military operations. Against this record, the events at My Lai are all the more difficult to understand.

"Unfortunately, details concerning the matter did not come to our attention until a year after the events in question. Once we learned of the allegations, the Army immediately commenced an investigation which has already resulted in the filing of criminal charges against two individuals. In pursuing this investigation, and in referring the reports of investigation to responsible court-martial convening authorities, we fully appreciated

that the disclosures which would inevitably follow would damage both the Army and the Government of the United States. Despite this, we pursued the only course of action which was consistent with our international obligations, our national policies, and the ethic of American military operations.

"I hope that the information which I have presented to you this morning has given each of you a greater understanding of this matter, and that it has renewed your confidence in the Army's willingness and ability to pursue the investigation and attendant prosecutions to a satisfactory conclusion. I assure you that however great may be your dismay and sense of outrage that such a thing could occur in our Armed Forces, it could be no greater than mine, nor than that experienced by the thousands of loyal and brave officers and men who have labored so long and sacrificed so magnificiently in search of the just peace we all seek in Vietnam."

5.

The statement of William P. Rogers, Secretary of State, in a taped educational television program prepared for release November 28, 1969, as follows: "If the allegations are true it is a shocking incident, and all we can do is to court-martial any responsible persons and to show the world that we don't condone this."

6.

The statement of Lt. Gen. William R. Peers at a press conference attended by Secretary of the Army Resor as follows:

"On several occasions I have been asked about what happened at Son My Village on 16 March 1968. I am not going to characterize what occurred there. I can say, however, and the public is entitled to know that our inquiry clearly established that a tragedy of major proportion occurred there on that day ... I am most hopeful

that our report, the reviews of it and the actions stemming from it, will prevent an incident such as this from ever occurring again."

7.

Command influence is also capable of proof by the circumstances whereby the Department of Army assumed responsibility for all investigation, and the Judge Advocate General of the Army, through Col. Chilcoat, Chief of Military Justice, assumed responsibility for the preparation of charges at Department of Army level. Attached at Annex I are copies of the official documents and communications used to accomplish these transfers (Exhibits A-F), demonstrating that the entire direction of prosecution in Plaintiff's and other cases are being governed contrary to normal practice and procedures within the military justice system, and as a part of the obvious intent of the defense establishment and the President to bring about the conviction of Plaintiff.

8.

It will be proved that the conduct of the investigation itself, as performed by the United States Army CID Agency is indicative of the responsiveness of members of the Armed Services to the directions given by the Defense Department and the President to procure the conviction of Plaintiff and others. Attached is a letter (Exhibit G) of February 12, 1970, by the Commanding Officer of the Army CID Agency directing a "re-orientation" of My Lai (4) investigation. Paragraph 2(a) thereof anticipitates "immediate interest" by the White House, Department of State, Justice Department, DOD, the Chief of Staff,and Army General Counsels.

9.

It will be established through a noted expert in military justice affairs, Col. Luther West (Ret) of Baltimore, Maryland, that based upon an exhaustive study of the question of command influence as raised within the military justice system, that there is no way to assure the absence of command influence within the military justice system. That conclusion will be based upon exhaustive and extensive legal research conducted by Col. West, documented by reference to military justice cases, such documentation being a historical

review of the question of command influence over a period of 195 years, together with his conclusions based upon his own participation in numerous individual cases.

B. PRE-TRIAL PUBLICITY

1.

The statement of Secretary of the Army Stanley R. Resor to the Congress on November 26, 1969, as follows:

> "As you know, it is not normally the policy of the Executive Branch to disclose information pertaining to on-going criminal investigations ... especially when, as is the case here, new and perhaps conflicting evidence may come to light as the investigation continues. In addition, there has already been far too much comment in the press on matters of an evidentiary nature, and we are very concerned that prejudicial ... pretrial publicity may make it difficult to accord the accused in any prosecution a fair trial ..."

2.

The statement of Secretary General U Thant, speaking at a United Nations briefing concerning the My Lai Incident, on November 27, 1969: "The war in Vietnam is one of the most barbarous in history." And that he "deplores these atrocities", particularly "wanton attacks upon innocent civilians."

3.

It will be established that since November of 1969 there has been a vast out-flowing of broadcasts and printed matter concerning the My Lai Incident. The most significant of the printed materials (enclosed herewith for examination) consist of My Lai 4, A Report on the Massacre and Its Aftermath, by Seymour M. Hersh; One Morning in the War, by Richard Hammer; Anatomy of a Massacre, by Frank Frosch, published in Playboy Magazine; My Lai 4, an extract of the Hersh book, published in Harper's Magazine.

4.

Submitted for examination are copies of other publications appearing in periodicals, as catalogued in Exhibit H.

5.

There is attached as Exhibit I, a reference to approximately 367 newspaper articles relating to the My Lai Incident, the same being but a partial list of newspaper publications.

6.

It is anticipated that by the time a court-martial trial might be convened in this matter, there would be a substantial number of additional periodicals and newspaper publications. Further, continued television and radio commentary on the My Lai Incident will add to the extent of pre-trial publicity.

7.

Attached as Exhibit J is the Report of the Armed Services Investigating Subcommittee of the Committee on Armed Services - House of Representatives. Attention is respectfully invited to the final paragraph thereof:

> "Those men who stand accused for their actions at My Lai have, in the minds of many, already been 'convicted' without trial. By the same token, the U. S. also stands 'convicted' in the eyes of many around the world. These two tragic consequences might have been avoided had the My Lai incident been promptly and adequately investigated and reported by the Army."

Further, the effect of publicity upon prospective witnesses in this case is apparent from the testimony of a certain Lt. Thompson, who appears prominently in the Report, who states:

> "I cannot actually make a statement to the question that you are asking, after reading so much in the newspapers and the magazines, and wondering whether what I would be saying actually came from memory of two years, sir, or whether I had been picking up parts of it out of what I have read, sir." (p.17).

8.

It should be observed that few of these publications mention Plaintiff by name. However, there are but nine enlisted men presently referred to trial.

The fact that the name Torres is not so easily recognized as the names Medina and Calley will be established as immaterial, once Plaintiff is associated with the "My Lai Incident", and identified as a member of C Company.

9.

It will be proved that the very term "My Lai" has acquired a meaning in the public mind of wholesale slaughter, as evidenced by a statement of Senator Edward M. Kennedy on July 15, 1970, in which he compared the death of students at Kent State University to the killing of "defenseless Vietnamese civilians" at My Lai. (Headline, New York Daily News, July 15, 1970: "Ted Compares Killings on Campuses to My Lai.").

10.

It can be established that persons within the offices of the Inspector General granted to Seymour M. Hersch, at sometime prior to February 25, 1970, access to transcripts of interrogations of witnesses, and statements thereof pertaining to the My Lai Incident, thus further contributing directly thereby to the release of information to the public having an inflamatory and prejudicial effect upon Plaintiff. It can further be established that similar information was denied by Secretary Resor to members of the United States Congress investigating the My Lai Incident on the basis that "it would be inappropriate to release this information at this time. (Resor)."

C. THE DENIAL OF EFFECTIVE RIGHT OF COUNSEL

Reference is made to the Memorandum of Authorities filed on July 10, 1970, by Plaintiff, setting forth thirty-six specific circumstances establishing the consolidation of any total power over the Plaintiff within the hands of the military establishment. Many of these circumstances pertain to every court-martial case. However, the course of conduct of the military authorities in this case is unique, upon the following evidentiary considerations, each of which is capable of proof.

1.

Plaintiff was interrogated by Col. William Wilson of the Inspector General's Office in the Pentagon, Col. Wilson having been assigned to make the preliminary investigation. We anticipate being able to prove that Plaintiff

asked for counsel in the person of Capt. Ernest L. Medina, and was advised that he was not available, whereupon Col. Wilson proceeded to interrogate Plaintiff without Plaintiff having any counsel whatsoever.

2.

It will be established that Col. Wilson admitted that potential witnesses, including Plaintiff were not fully briefed on their rights, Col. Wilson having stated to Seymour Hersh: "I was told not to, everything was completely thought out."

3.

In the case of charges pending (but not referred to trial), against field-grade officers involved in the My Lai Incident, at least two officers, of higher rank and greater experience, have been assigned as full time defense counsel. Further, such defense counsel are permitted to travel at Government expense wherever they might desire for the purpose of preparing the defense on charges which are presently only in the investigative stage.

4.

It will be established that Plaintiff has been assigned dramatically lesser resources for his defense. His defense counsel, Capt. Cooper, in addition to his normal duties as trial counsel in Special Courts-Martial cases also has been assigned to represent two other suspects, Capt. Katouc and Specialist Doherty. Capt. Heintz, assistant defense counsel, serves also as Chief of the Defense Branch,having responsibility over all General and Special Courts-Martial conducted at Third U. S. Army Headquarters.

5.

It can be established that requests for permission to travel in connection with the defense of Plaintiff have been submitted by his military counsel, and denied.

6.

Requests for the summary and conclusions of the Peers investigation have been made by Plaintiff's defense counsel, and denied.

7.

Requests for the assignment of the defense of criminal investigators have been made by Plaintiff's defense counsel, and denied. (This should be

compared to the investigation made available to the prosecution, which includes the Peers investigation, which traveled to Vietnam in December 1969. Gen. Peers stated at a press conference in Vietnam on December 28, 1969:

> "This is the first trip to Vietnam for both Mr. Walsh and for me; we look forward to what's to be done here--the furthering of the investigation--and with the benefit from the advance work that has already been done, we feel that we can do a very effective job in the development of further testimony and information that would not be available back in the United States."

It will be established that the Army had assigned at least nine special investigators for a period of many months by the Army CID Agency at the Pentagon, and an undeterminate number of additional investigators at lower levels).

8.

It will further be proved that, compared to the part time military representation afforded to Plaintiff, there has been created at Ft. McPherson an entire section within the Judge Advocate's Office known as the"My Lai Section", consisting of twelve officers and fifteen enlisted men whose responsibility is directed to the development of the prosecution of Plaintiff and three other persons who have been referred to trial.

9.

There is attached as Exhibit K a copy of a letter from Secretary Resor to Congressman Robert V. Denney who had inquired of him in regard to legal representation on behalf of Capt. Katouc, the letter stating that Capt. Katouc has as his full time defense counsel Capt. Cooper (Plaintiff's assigned defense counsel) - the letter being written at a time when Plaintiff was undergoing the Article 32 investigation, and had requested additional assistance of military counsel.

10.

As evidence of the general intent and purpose of the United States Army to bring about conviction of Plaintiff and other My Lai defendants, there is attached as Exhibit L a "Memorandum for the Record", dated March 23, 1970, relating to a conversation of Major Raby, military counsel for Lt. Calley, the

information being obviously obtained by eavesdropping (by electronic or other means), of defense counsel's conversation by an unidentified member of the Staff of the Information Officer of Ft. Benning, Georgia.

(Note: The material sought concerning the Central Intelligence Agency's documents and activities in Quang Ngai Province are of critical importance and essential if Plaintiff is to prepare adequately for his defense at time of trial. It will be proved that on June 2, 1970, his military counsel requested from the Central Intelligence Agency all information, reports, etc., concerning Operation Phoenix. On June 15, 1970, that Agency responded in a letter advising as follows:

> "As a matter of policy, this Agency does not comment on inquiries or allegations concerning its activities. In the event a judicial proceeding should result in a subpoena, appropriate response will be made at that time."

A copy of said letter is attached as Exhibit M. Given adequate discovery, Plaintiff will be able to prove at his trial that "Operation Phoenix" was an on-going program in Quang Ngai Province, including My Lai, to "eliminate" Vietnamese civilians who were suspected of Viet Cong activity. The identification and actual destruction of such civilians were performed by paid Vietnamese agents under the supervision and direction of Central Intelligence Agency officials. It is anticipated that it can be established from Central Intelligence Agency records that many, if not all, of the adult civilians who died in My Lai on March 16, 1968, were, either before or after My Lai, placed upon "black lists" prepared by the Central Intelligence Agency, meaning lists of persons scheduled for assassination. It is further anticipated that the Qunag Ngai intelligence report, prepared by the Central Intelligence Agency was imparted in some way to officers of Task Force Barker, and resulted in the issuance of instructions or strong indications to personnel of C Company, including Plaintiff, that the entire adult population of My Lai, and some adolescents, were Viet Cong).

D. THE DEMONSTRATED INABILITY TO OBTAIN RELIEF WITHIN THE MILITARY SYSTEM

1.

It will be proved that in the case of U.S. v. Calley, pending before

a General Court-Martial convened at Ft. Benning, Georgia, relief was sought on the ground of pre-trial publicity and command influence. Additionally, a Motion for Discovery was filed seeking to obtain certain documents and State Department and CIA documents. Further, efforts were made within the military system to obtain subpoenas to acquire the testimony of Secretaries Laird and Resor, General Westmoreland, and the Chief of the Trial Judiciary, in addition to certain other civilian witnesses who had figured prominently in initial disclosures concerning the My Lai Incident. Each and every one of these Motions were denied by the military judge.

2.

In the case of U.S. v. Hudson, a "My Lai" case pending at Ft. McPherson, Georgia, that Defendant sought investigative assistance during the pre-trial investigation, and upon its denial petitioned the Court of Military Appeals for relief. The Court of Military Appeals denied his petition. All of these actions will, of course, be established by copies of the rulings.

3.

It is a matter of law that the United States Court of Military Appeals reviews only errors of law, and will not disturb factual findings of guilt, so long as they are "supported" by the evidence.

E. THE DENIAL OF EQUAL PROTECTION IN PROSECUTING PLAINTIFF

Plaintiff's Complaint alleged that it is cruel and unusual punishment for the United States to try him for the alleged destruction of "not less than three" human lives, and at the same time pursue a policy which has resulted in the destruction of almost one million lives, American and Vietnamese, in the course of the war in Vietnam; that to prosecute thus far only him, a handful of enlisted men, and one officer, at the same time freeing high ranking officers, and failing to refer to General Court-Martial the charges pending against Gen. Koster, Commanding General of the Americal Division, is cruel and unusual punishment; that to promote to General Col. George S. Patton, as example, who has consistently displayed a wanton disregard for human lives and a perverse pleasure in its destruction, at the same time prosecuting Plaintiff, is cruel and unusual punishment; that to

implement as official policy "free fire zones", "harassment and interdiction", "saturation bombing", "killer teams", "search and destroy missions", and "body counts", at the same time prosecuting him, is curel and unusual punishment; that to conduct a system of assassination of civilians in the My Lai area through the Central Intelligence Agency's "Operation Phoenix" program, resulting in the death of an indeterminate number of civilians, at the same time prosecuting Plaintiff, is cruel and unusual punishment.

The existence, nature, and scope of each of these activities, tactics, and policies can be fully established through competent testimony and official Government reports. Additionally, attention is invited to page 49, House Committee Report (supra), as follows:

> "The Subcommittee was particularly interested in whether the Inspector General's team endeavored to determine whether the February 21, 1968 message of Maj. Gen. Kerwin, Chief of Staff, MACV, concerning mistreatment of detainees and prisoners of war, was being observed. That message stated, in pertinent part:
>
> > Extensive press coverage of recent combat operations in Vietnam has afforded a fertile field for sensational photographs and war stories. Reports and photographs show flagrant disregard for human life, inhumane treatment and brutality in handling of detainees and PW. These press stories have served to focus unfavorable world attention on the treatment of detainees and prisoners of war by both ARVN and FWMAF.
> >
> > These actions will not be condoned."

F. CONTINUING INVESTIGATION OF CIVILIANS

Although the case of U.S. ex rel. Toth v. Quarles, 350 U.S. 11, 76 S.Ct. 1, prohibits prosecution by court-martial of former servicemen, it can be proved that the Army is still conducting investigations into the activities of several discharged servicemen at My Lai 4. It will also be established that

there are strong indications that immunity has been offered or promised to several military personnel and civilians. Inasmuch as over 50% of the C Company of My Lai has been discharged, and are beyond prosecution, it is submitted as manifestly unfair to subject to court-martial Plaintiff, who re-enclised in a desire to continue to serve his country.

> "Those individuals appear to be free from prosecution in any jurisdiction, while their associates who remained in military service may be brought to trial by courts-martial. This is manifestly unjust." (House Committee Report (supra), p. 48).

PART II

ADDITIONAL ARGUMENT AND CITATION OF AUTHORITIES

A. FUNDAMENTAL FAIRNESS

The denial to Plaintiff of traditional and constitutional safeguards available to every civilian defendant, accepted as fundamental to the American system of justice, as those denials exist in the Uniform Code of Military Justice, is not a consideration of fact but of law. Hence, detailed consideration thereof is not strictly appropriate to a proffer of matters evidentiary. However, when the factual considerations hereinabove are superimposed upon the military court-martial system - with all its wants, faults and failings, as recognized by the Supreme Court in Reid v. Covert, 354 U.S. 11, 77 S.Ct. 1222, and O'Callahan v. Parker, 395 U.S. 258, the magnitude of unfairness becomes such as no enlightened system of justice should be willing to bear.

In the case of Beets v. Hunter, 75 F.Supp. 825, the District Court of Kansas granted relief upon the question of fundamental fairness, which is raised here in the composite of all of the considerations urged upon the Court. The facts of that case reflected only a question of inadequacy of counsel. Yet, it called from the Court this language:

> "The trial of this case in the eyes of both the prosecution and the defense was wholly obnoxious and repulsive to their fundamental sense of justice, and that is the test by which this Court should judge it.
>
> "The Court has no difficulty in finding that the court which tried this man was saturated with

tyranny; the compliance with the Articles of War and with military justice was an empty and farcical compliance only, and the Court so finds from the facts and so holds as a matter of law.

"He could not have received due process of law in a trial on a court before men whose judgments did not belong to them, who had not the will nor the power to pass freely upon the guilt or innocence of the petitioner's offense, the offense for which he was charged. It cannot stand the test of fundamental justice. It may have been prompted by the exigencies of war, but it can't stand in the light of cold reason and justice as we love it and for which this petitioner was fighting when he was arrested."

(Reversed upon the ground of exhaustion of remedies, 180 F.2d 101, such ground being considered in this Circuit one of comity only and not of jurisdiction. See In Re Kelly, 401 F.2d 211 (1968)).

B. COMITY

While considerations of comity, judiciously perceived, are helpful to the existence of a duel system of justice, they should not be interposed in a case where patent injustice is likely to occur. Particularly is this the case where the military authorities, in the prosecution of a serviceman, have violated the laws governing their own conduct. Article 37, UCMJ (10 U.S.C., Sec. 837(a), prohibits the intimation of attempt to influence the court-martial in its findings or sentence. Part I of this submission contains perhaps the most unmistakable and undeniable exercise of command influence in any court-martial case in history - a direct violation of the Uniform Code of Military Justice. Where an agency has violated its own rules, Federal courts have not been reluctant to intervene long before the exhaustion of administrative remedies. For a discussion of this observation, see Smith v. Resor, (CA 2), 406 F.2d 141:

"Our reluctance, however, to review discretionary military orders does not imply that any action by the

Army, even one violative of its own regulations is beyond the reach of the courts. See Hammond v. Lenfest, 398 F.2d 705, 710 (2d Cir. 1968). Although the courts have declined to review the merits of decisions made within the area of discretion delegated to administrative agencies they have insisted that where the agencies have laid down their own procedures and regulations, those procedures and regulations cannot be ignored by the agencies themselves even where discretionary decisions are involved.

"For example, in United States ex rel. Accardi v. Shaughnessy, 374 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954) the Supreme Court declared habeas corpus would lie if the Board of Immigration Appeals did not exercise its independent judgment as required, on a request for suspension of an admittedly valid deportation order since the Board had been influenced in its decision on the suspension by the Attorney General. The Immigration Act had given the Attorney General complete discretion over such suspensions, but he had in turn delegated his authority by valid regulations to the Board. The Court required the procedures specified by the regulations to be carried out, although concededly had the Attorney General not delegated his authority, he could have refused the suspension himself and his decision would not have been reviewable.

"Again, in Yellin v. United States, 374 U.S. 109, 83 S.Ct. 1828, 10 L. Ed.2d 778 (1963) the Supreme Court reversed a conviction for contempt of Congress because the House Un-American Activities Committee had failed to follow its own rules. And in Service v. Dulles, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d. 1403 (1957) the Court invalidated the discharge of a State Department employee

as a security risk because the Secretary of State violated Department regulations in ordering the discharge, although an act of Congress authorized the Secretary 'in his absolute discretion' to terminate the employment of any Foreign Service officer when he deemed it necessary. This clear precept, that an agency must follow the regulations it promulgates, has been applied to the Army as well. United States ex rel. Mankiewicz v. Ray, 399 F.2d 900 (2d Cir. 1968); Hamlin v. United States, 391 F.2d 941, 943 (Ct. Cl. 1968); Coleman v. Brucker, 103 U.S. App. D.C. 283, 257 F.2d 661 (1958)."

Additionally, Article 46 (10 U.S.C., Sec. 846) provides that:

"The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions. Aug. 10, 1956, c. 1041, 70A Stat. 53."

Manifestly, in this case, the Army has violated the law, inasmuch as trial counsel is given the effective assistance of the entire investigative apparatus of the United States Government while even one single investigator is denied to the defense.

C. THE IMPORTANCE OF INFORMATION WITHHELD

The CIA material is of critical importance to Plaintiff's defense at trial, not only to show his understanding and the basis therefor of the situation, but to indicate the conditions under which both military and civilian personnel of the United States were operating in that area. Further,

were he to raise as a defense the absence of mens rea, or the inability to distinguish right and wrong, proof of the widespread and extensive black lists and assassination procedures would strongly support the likelihood and probability of such contention.

Without the "Operation Phoenix" material being made available to him by the Government, notwithstanding his prosecution for murder by the Government, he would not be extended compulsory process to obtain evidence for his defense in accordance with the Constitution's demand.

Further, a major ground for defense is that of systematic discrimination in the enforcement of the law, in violation of the Fifth Amendment. In U.S. v. Robinson, 311 F.Supp. 1063 (D.C. Mo.) a defendant was prosecuted by the United States for illegal wiretapping. He defended on the ground that the United States, through its law enforcement agents, regularly engaged in the same illegal wiretapping, yet failed to prosecute its own agents. The Court held:

> "The necessary conclusion from this evidence is that there has been systematic discrimination in the enforcement of the act against the defendant in this case, which renders the prosecution invalid." (1065).
>
> "Therefore, the application of the statutes here involved to the defendant in the case at bar represented a systematic fixed and continuous policy of unjust discrimination in their enforcement in violation of the Fifth Amendment to the Constitution of the United States." (1066).

The Court relied upon the authority of Yick Wo v. Hopkins, 118 U.S. 356 (1885), which holds:

> "Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances,

material to their rights, the denial of equal justice is still within the prohibition of the Constitution." (374).

Thus, the failure of the United States to prosecute others in similar circumstances, notably, Central Intelligence Agency personnel, and other military personnel who have engaged in similar activities, is the legal basis for voiding Plaintiff's prosecution. Hence, permanent injunction should issue.

PART III

CONCLUSION

Plaintiff respectfully submits that considerations of fact and law, as outlined herein and in his Memorandum establish his factual and legal entitlement to the relief sought, to-wit, the permanent injunction to prohibit the United States Army from prosecuting him by court-martial, and renews his prayer for that relief.

In the alternative, however, and in accordance with that prayer in his Complaint seeking other and further relief, Plaintiff respectfully suggests that, short of permanent injunction issuing at this time, temporary injunction should as a minimum protection be issued upon the following circumstances and conditions:

(a) Defendant should be temporarily enjoined until such time as the Department of Army has concluded all investigations into the My Lai Incident, and has finally determined against which persons subject to the Court of Military Justice charges will be filed, and has referred for trial by court-martial all persons who will be tried by court-martial. Specifically, Plaintiff should not be subjected to trial before such time as it is known whether or not General Samuel Koster, as example, will be tried, and upon what charges. Additionally, Plaintiff should not be subjected to trial until all grants of immunity as are to be made shall have been made, inasmuch as he, of necessity, might be deprived of witnesses in his behalf who may appear initially to be subject to self-incrimination, but may subsequently be granted immunity.

(b) Temporary injunction should issue until such time as it shall be determined by the Department of Army and the Department of Justice as to

what disposition is to be made against former servicemen who are now civilians - that is, whether they are to be tried by military commission, or by Federal court. The same consideration of availability of witnesses pertains, and the same question as to "selective prosecution" or unfair discrimination apply as in the case of other military suspects.

(c) Temporary injunction should issue until such time as Plaintiff is afforded effective right of counsel - that is, until such time as he is assigned full time military counsel relieved of other duties who shall be permitted to travel in a duty status for the purpose of developing evidence on his behalf and who shall be afforded the documents heretofore sought which are essential to his defense, which are the summary and conclusions of the Peers investigation, and the information concerning the Central Intelligence Agency and its activities in Quang Ngai Province during and prior to March 1968.

(d) Temporary injunction should issue until such time as the military and diplomatic situation in Vietnam and Quang Ngai Province is such that there can be no withholding of information or documents deemed essential to Plaintiff's defense on the ground that the same might in some way compromise or affect national security or state secrets.

(e) Temporary injunction should issue until such time as the tide of adverse publicity shall have run its course, and it might be reasonably ascertained that Plaintiff might enjoy the presumption of innocence to which all defendants are entitled.

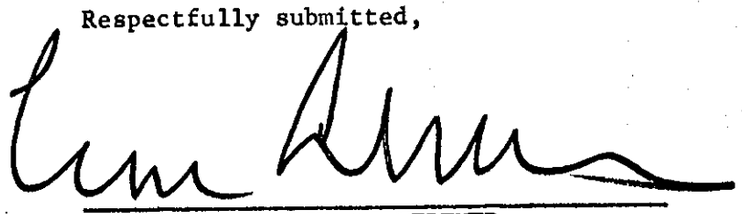
(f) Temporary injunction should issue until such time as steps are taken by military and civilian leaders to counter-act the effect of command influence evident in the statements of the President and others, so that members of a court-martial will no longer effectively be under instructions to convict and punish Plaintiff.

(g) Temporary injunction should issue until such time as American soldiers are no longer engaged in hostile action in Vietnam in order that members of the Court will labor under no inclination or compulsion to convict Plaintiff from a sense of loyalty or commitment to the involvement of the United States in the Vietnam war; or, from a sense of concern over the possible

implication of Plaintiff's conviction or acquittal upon American-South Vietnamese relations; or from a sense of the necessity of imposing punishment for disciplinary purposes during times of hostilities; or upon the possible adverse propaganda effect of an acquittal, as the same might be exploited by powers hostile to the United States.

(h) Temporary injunction should issue until such time as the Army shall have concluded appropriate action with regard to Army personnel who have engaged in efforts to hide, deny, or cover up the My Lai Incident, and subsequently to exculpate themselves and the Army from all improprieties pertaining thereto, to remove from the proceedings against Plaintiff the taint of "over re-action", in an effort to choose and punish plaintiff.

Respectfully submitted,



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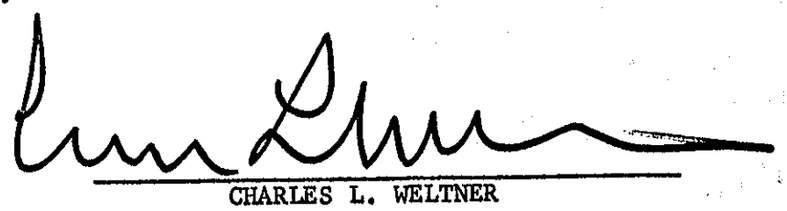
Atlanta, Georgia

I certify as Counsel for Plaintiff that the substance of evidentiary matters heretofore set forth, given adequate discovery is adducible by competent testimony, according to my best information and belief.



CHARLES L. WELTNER