

D R A F T

UNITED STATES

V.

GERALD A. SMITH
PRIVATE, U. S. ARMY

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MOTION TO DISMISS

Comes now the accused through counsel and moves the Court-Martial to dismiss all charges and specifications alleged against him for the following reasons:

I

The accused cannot be accorded a fair and impartial trial in any United States Military Court for the reasons hereafter set out.

II

To subject the accused to trial by General Court-Martial would contravene the provisions of the due process clause of the Fifth Amendment to the United States Constitution, upon the following considerations:

The background and sequence of events leading up to the public disclosure of the circumstances of the My Lai incident; the widespread public notoriety attendant thereto; the incessant publicity generated thereby -- much in the nature of shock and outrage, as evidenced by the large volume of widely-circulated books and articles and radio and television broadcasts; the conduct of high-ranking officers in the U. S. Army in first keeping secret reports concerning the My Lai incident, then making public statements concerning the incident which were adverse to the accused and other individuals allegedly involved in the My Lai incident; the transferring of the accused and other individuals allegedly involved in the My Lai incident to Fort McPherson, Georgia to facilitate the prosecution of the cases against whom charges were preferred -- all combine to place the entire U. S. Army establishment in the posture of an accused, and to place it in the defensive, from which position it is inevitable that the U. S. Army will attempt to extricate and exculpate itself from severe public censure by seeking to place blame on one or more scapegoats. Under these circumstances, it is impossible for the accused to receive a fair and impartial trial at the hands of the U. S. Army, whereby he is deprived of due process of law.

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This state of affairs becomes even more prejudicial because of the vested interest that certain senior Army officers have in the outcome of the trial of the accused and other individuals charged with misconduct at My Lai (4). The Commanding General of all United States Armed Forces in the Republic of South Vietnam at the time of the incident was Chief of Staff of the Army at the time the incident was called to the attention of civilian officials and the public, and still holds that position. Every participant in these proceedings up to and including court members, the military judge and prosecution, the Court of Military Review, will be appointed by officers under his command and control; and to initiate and maintain this prosecution, the Army, through officers subordinate to the Chief of Staff, has selected personnel to interrogate, investigate and build a case for the prosecution. It is obvious that this vested interest of the Chief of Staff and other senior Army officers affects the fairness of any proceedings involving the accused; therefore, it is impossible for the accused to receive a fair and impartial trial by any Army Court-Martial, and to permit these proceedings to continue will deprive the accused of his right to due process of law.

To subject the accused to trial by General Court-Martial will contravene the provisions of the Sixth Amendment to the Constitution providing that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. This amendment is supplemented by Article 37 of the Uniform Code of Military Justice which prohibits the influencing of a Court-Martial or the Reviewing Authorities. In this case the directions and desires of those occupying high offices in the government have been released to the public through the press. The President of the United States is the Commander in Chief of the Armed Forces, and his words, suggestions, and proposed actions are influential and coercive on all military officers including those who have been ordered to sit as members of the General Court-Martial selected to try the accused. On 8 December 1970, in a press conference given nationwide television and radio coverage, the President stated in response to a question concerning the My Lai incident:

"Well, trying to answer all of these questions and sorting it out, I would start first with this statement: What 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 smeared and slurred 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 smear the decent men that have gone to Vietnam in a very, in my opinion, important cause."

This well-publicized statement has inflamed the public against the accused, and will have the same effect on the officers who have been selected to determine the innocence or guilt of the accused.

IV

Secretary of State William P. Rodgers released to the press statement:

"Those responsible will be Court-Martialed to show the world we do not condone this."

This statement was likewise given wide coverage by the news media, and it implies that the trial of the accused and others allegedly involved in the My Lai incident is a vehicle being used by the Government to influence world opinion to reach a result in this case favorable to the prosecution. Should the Court-Martial return a verdict of "not guilty," the hoped for result would be frustrated and certainly consideration by Court members would be given to that effect.

V

The Secretary of the Army appeared before a Congressional Committee and displayed color pictures of the alleged atrocities which were then described by a member of the Committee as appalling "acts of brutality" that cannot have been exceeded in Hitler's time. This appearance by the Secretary of the Army was given press coverage throughout the world and this performance and the statements flowing therefrom have inflamed the public against the accused, and will have the same impact on the members of the military who, if the prosecution continues, will decide the guilt or innocence of the accused.

VI

Other high ranking officials including the Chief of Staff of the Army, General William C. Westmoreland, and Lieutenant General William Peers have made statements which would further prejudice the right of the accused to have his fate decided by a jury of open-minded and impartial individuals.

VII

The effect of the statements of these high officials has been to make it impossible for the accused to be tried by an impartial jury. These statements have been damaging and prejudicial to the accused and they will have a direct and harmful impact on any Court member, selected by the Army, and upon the Reviewing Agencies who would review the case if the accused is convicted. Accordingly, those officials who have spoken through the Press have influenced the outcome of the present charges to the substantial prejudice of the accused.

Because of the inflammatory and accusatory articles and pictures circulated worldwide in press, television and radio releases which have aroused the public against the accused, trial by General Court-Martial will deprive the accused of his right to trial by an impartial jury as guaranteed by the Sixth Amendment and of his right to due process of law as guaranteed by the Fifth Amendment. Part of this worldwide coverage has consisted of shocking, gruesome and extremely prejudicial pictures of dead oriental men, women and children. The coverage has included the statements of a number of witnesses supposedly familiar with the incident. Much of it is heresay and rumor. The witnesses have not been subjected to confrontation by the accused or cross-examined in a judicial proceeding but, nevertheless, their ex parte and unsworn statements have discredited and convicted him of the alleged offenses in the eyes of the public before he has had his day in court. Several of these witnesses who have given statements, which have been viewed and considered by the American public as evidence, include Charles A. West, Ronald L. Haeberle, and Jay Roberts, all of whom are key government witnesses against the accused. Time, Life and Newsweek and most daily newspapers published in the principal cities of the United States of America have joined in the pretrial crucifixion. Furthermore, books containing details of the event of the incident and other material prejudicial to the rights of the accused have been written, published and sold all across the United States. The passion induced by this vast amount of publicity led to the recording of a record album containing a song about the incident of My Lai (4). The cover for this album showed the pictures of dead men, women and children at My Lai (4). The prejudicial effect of this publicity is highlighted by the following statement made by Colonel Oran H. Henderson, the Commanding Officer of the 11th Infantry Brigade at the time of the My Lai incident:

"Up until two weeks ago I would have sworn that it could not have happened without my knowing about it, but when I started seeing broadcasts and having soldiers speak about this subject who were eye witnesses, I began to wonder."

It takes little imagination to conclude that the publicity has had the same effect on millions of Americans including individuals who will serve as court members.

The accused has been denied his right to have potential government witnesses excluded from hearing the testimony of other potential government witnesses. Since many potential witnesses have previewed their testimony by making statements that were given wide coverage by the news media, testimony of other witnesses might be tainted by what they have heard from these individuals. Since each witness will be attempting to remember what they saw at My Lai (4) over two years ago, their memories could be aided by the public testimony of other witnesses. Regardless of the attempts of these witnesses to disregard what they have heard over the past year, the possibility of "tainted" testimony is prejudicial to the accused and it will be impossible for him to receive a fair trial under these circumstances.

The accused has no other remedy but dismissal of the charges in this case. It is obvious that a voir dire of the Court would be futile and fruitless exercise. An Army officer cannot help but have been exposed to the uncontrolled and widespread publicity that has been presented by the nation's news media. Furthermore, these officers are well aware of the sentiments expressed by those individuals in high government positions. Since a good officer or noncommissioned officer is trained and conditioned to avoid prejudice and to form opinions based on facts, it becomes most difficult for such a person to admit, in the presence of his peers, that he harbors any preconceived opinion on any issued. Military jurors are malleable humans who are affected by opinions of others just as a civilian juror would be affected by a deluge of inflammatory publicity. Likewise, a challenge of a military court-member on the ground of bias or prejudice will be considered by that member to be an attack on his integrity. For this reason, a challenge by the defense would serve to alienate the court member while failing to eliminate those affected by the exposure to the prejudicial publicity.

To try the accused by General Court-Martial will violate the accused's right to due process and equal protection of the law in that the prosecution of the accused by the United States constitutes an intentional, purposeful, discriminatory, and unequal application of the law and a bad faith prosecution. The United States Government has pursued, ordered and condoned a policy of destruction of persons in South Vietnam who are adherents to a political ideology which is abhorrent to the Constitution, Laws and Political Philosophy of the United States, without concern for the means of their destruction. To accomplish this objective, the United States Government has overtly as well as subtly trained and ordered its forces, both Vietnamese and American, to accomplish the summary execution, without regard to civilian status, age, or sex, or state of apprehension, of such members of the populace of the Republic of South Vietnam, as was unilaterally determined to be in the interests of the United States. Such orders have originated solely within the Executive Branch of the United States Government and its agencies, to wit; the Central Intelligence Agency and the United States Army, without any measure of judicial determination. The United States Army received the accused and others similarly situated either by enlistment or involuntary induction, and assigned them to the infantry and training camps where it taught them to use rifles, machine guns and mechanized crew-served weapons for the purpose of killing people, and shipped the soldiers to the Republic of South Vietnam and ordered them into strongholds of Viet Cong sympathizers and supporters with orders to kill, search and destroy. The members of the accused's company were commanded for the success of the operation at My Lai (4) until some twelve months later when the operation was exposed to public scrutiny at which time the United States Government began an investigation which lead to charges being preferred against the accused and several other individuals in an effort to shield the agents and officers of the United States and to conceal for political ends the patterns and policy of war tactics employed by the United States Government. To prosecute the accused and other individuals who were acting as agents of the United States Government at the time of their alleged misconduct while officially condoning and sanctioning

such conduct by other agents of the Government offends against the concepts of a fair and just trial and the rights to due process and equal protection guaranteed by the Constitution.