CPT LANE

UNITED STATES ARMY COURT OF MILITARY REVIEW

En Banc

Colonel ORAN K. HENDERSON US Army Petitioner The Honorable STANLEY R. RESOR Secretary of the Army Respondent	Miscellaneous Docket No. 1970/7 MEMORANDUM OPINION AND ORDER

In a Petition for Writ of Mandamus, the petitioner has indicated that he has been charged with dereliction of duty and failure to obey a lawful regulation in violation of Article 92, Uniform Code of Military Justice, and that the charges have been indorsed for investigation pursuant to Article 32 of the Code. He seeks access to Volume I of a Report entitled "The Department of the Army Review of the Preliminary Investigations into the My Lai Incident (U)" submitted by a committee chaired by Lieutenant General William Peers. Three grounds are asserted in support of the application for relief: (1) the nonspecific and conclusionary nature of the charges; (2), the inability to rebut the report will prejudice the Petitioner before the convening authority; and (3), the fact that "no justification exists for Respondent's refusal to grant Petitioner access to Volume I."

In response to this Court's Order to show cause, if any there be, why the relief should not be granted, Respondent contend alternatively: that this Court lacks jurisdiction and that an adequate remedy exists in the normal judicial process.

The issue of jurisdiction will not detain us. Whether this is a question of the All Writs Act, 28 USC §1651 (1964) or a matter of necessary judicial arrogation is only academic. Compare

United States v. Draughon, ____CMR____ (1970); United States v. Pizor, ____CMR____, Misc. Docket 1970/2 (7 July 1970) with Marbury v. Madison, 5 US 137 (1803); Noyd v. Bond, 395 US 683, 686, 693 (1969). Under our obligation to oversee the administration of criminal justice within the US Army imposed upon us by the Constitution, the Congress, and the Commander-in-Chief, we will not hesitate to grant such relief as is necessary and proper to insure the fair and orderly administration of military justice if the other provisions of military law establish no specific remedy and where in justice, fairness and good Government there ought to be one. See Noyd v. Bond, supra.

Turning now to the merits of the controversy the relief sought is extraordinary in nature and petitioner is required to demonstrate that the ordinary course of the proceedings against him through trial and appellate channels is not adequate. Hallinan v. Lamont, 18 USCMA 652, 653 (1968); United States v. Hutson, ____CMR ____ (ACMR 1970). Article 32 investigations are not beyond pretrial examination by appellate courts in the military judicial system. MacDonald v. Hodson, 19 USCMA____, 42 CMR ____ (1970). The question is not whether the Respondent is entitled to review the document under controls appropriate to its classification and effect upon the rights of others. Our concern must be directed to the issues of irreparable harm and adequate remedy. We will in this context address the petitioner's three contentions:

First. The petitioner is entitled to be informed of the specific nature of the acts or omissions charged. If the charges fail to so inform him the petitioner may petition the convening

authority for a Bill of Particulars. If this is denied and the charges are referred to trial in a session conducted pursuant to Article 39(a) of the Code, 10 USC §839(a) or upon arraignment when the case is called for trial, the petitioner may renew his request. See United States v. Paulk, 13 USCMA 456, 32 CMR 456 (1963); United States v. Williams, 12 USCMA 683, 31 CMR 269 (1962).

Second. The Respondent denies and there is no allegation to the contrary that the convening authority has had access to the report. It cannot have therefore influenced him in any way. The reference for trial, the pretrial advice and other influences on the convening authority are subject to review by the military judge. Should these charges be referred to trial, he has authority adequate to his responsibility and may be expected to protect the petitioner's rights.

Third. The Article 32 investigation partakes of the nature both of a preliminary judicial hearing and of the proceedings of a grand jury. United States v. Tomaszewski, 8 USCMA 266, 24 CMR 76 (1957). Assuming, that the present refusal to grant access is without justification and if the charges are referred to trial, the military judge may if appropriate, order a new investigation in the event he finds that the failure to provide the document materially prejudiced the petitioner's substantial rights. United States v. Nichols, 8 USCMA 119, 23 CMR 343 (1957).

That which has thus far been said should not be taken as an indication that we believe that the respondent is justified in withholding the document from the petitioner. Our perusal of the document leads us to a contrary conclusion. However, since there

is an adequate remedy in the normal process of judicial administration, no basis for an issuance of a Writ of Mandamus or other Order for Extraordinary Relief appears. It is, by the Court, this 22nd day of September 1970,

ORDERED:

That said Petition for Writ of Mandamus be, and the same is, hereby denied.

FOR THE COURT:

Senior Judges CHALK and PORCELLA concur in denying the Petition. They express no opinion on the release of the document.

Judges COLLINS and NEMROW now absent.

Judges GHENT and TAYLOR not participating.

cc: CPT Brian B. McMenamin
LTC Frank J. Dorsey
Counsel for Petitioner
CPT Ronald L. Stefani
CPT Benjamin G. Porter
COL David T. Bryant
Counsel for Respondent
The Judge Advocate General (ARMY)

OFFICIAL:

William O. Morris

WILLIAM O. MORRIS
Captain, JAGC
Clerk of Court