Department of Justice
Washington 20530

April 1 1970

Honorable Stanley R. Resor
Secretary of the Army
Washington, D. C.

Dear Mr. Secretary:

In addition to your letter of December 20, 1969 concerning the pretrial publicity in the pending court-martial proceedings against First Lieutenant William L. Calley, Jr., we have received the direct inquiry from the Trial Counsel in the case, of which you say you have a copy, and also a letter dated December 24, 1969 from the Chief, Litigation Division, Office of The Judge Advocate General, Department of the Army. The Attorney General has referred these letters to this Division for consideration and reply. In the interest of orderly disposition of such matters, we address this single reply to you.

Under the well established procedures in existence between our respective Departments, inquiries from your Department which cannot be handled by direct reference to a United States Attorney are acceptable to us only upon reference from your office or the Office of The Judge Advocate General. We see no reason why we should make exception for inquiry at the instance of a military judge. The procedures represent the manner in which the Attorney General discharges his duties with respect to litigation on behalf of the United States. 28 U.S.C. 516 and see id 513, 514, 519. In our view, the military judge has fully exercised his discretion and discharged his duty when he forwards an inquiry pertaining to litigation, through the established channels. Whether we should receive such an inquiry depends upon whether the matter is one for which there is a reporting requirement or, if not, whether your Department views our consideration of the matter useful to the Government. While 10 U.S.C. 837 prohibits certain interference with court-martial proceedings, we do not regard the foregoing application of 28 U.S.C. 519 as conflicting in any way with the operation of the Uniform Code of Military Justice (UCMJ).

Turning from general procedural questions to the substance of the problem of publicity concerning the subject trial, we note that the United States Court of Military Appeals has concluded that ". . . the measures heretofore directed by the Military Judge and those available to the accused at trial appear sufficient to insulate the court members from outside influence and to guarantee Lieutenant Calley a fair trial. . . ." United States v. Calley, No. 69-71, USCMA, December 2, 1969. Neither the events related in the letter from the Trial Counsel nor the transcript of proceedings in the case on December 16, 1969, furnish reason to doubt the soundness of the court's conclusion. Nor would we presume to initiate some form of litigation on the matter until after presentation of any new developments to the court for its reconsideration of the necessity for action and determination of its power to afford a remedy.

The Litigation Division suggested that one remedy might be for the court to issue orders governing the conduct of witnesses not subject to the UCMJ, under the authority of 28 U.S.C. 1651. We doubt that violation of such an order would fall within the contempt powers recited in 18 U.S.C. 401. Nothing indicates that upon transfer of that section from Title 28, U.S.C., any departure was intended from the definition of the term "court of the United States," which definition (28 U.S.C. 451) does not include the United States Court of Military Appeals. See United States v. Frischholz, 16 USCMA 150 (1966).

The Litigation Division also suggests the need to evolve a procedure for control over civilian witnesses involved in court-martial proceedings. While 10 U.S.C. 847 (Refusal to appear or testify) remedies the "serious defect" in R. S. Sec. 1202, noted in Winthrop's Military Law and Precedents, p. 202 (1920 (Rep.) and his discussion at p. 309 indicates the amenability of military personnel to orders of a court-martial, it is plain that neither 10 U.S.C. 847 nor 848 (Contempts) reach the problem of a civilian who disregards orders not to discuss his testimony. Perhaps a finding by the Court of Military Appeals that enforcement of such an order is necessary and that it has no power to afford any remedy, might suffice as a basis for invoking the equitable powers of a Federal district court. But until such reconsideration and findings, resort to such action would be premature.

In our view, the evolvement of a procedure for securing the enforcement of ancillary orders of a court-martial should be by way of legislation, rather than by litigation. Following the pattern of 10 U.S.C. 846 and 847, such legislation might well consist of conferring upon military judges the same authority judges of courts

of the United States have to issue orders governing the conduct of persons with respect to pending proceedings, subject perhaps to limitation of that authority pursuant to 10 U.S.C. 836. In addition to provision for trial of civilian violators in district courts, clarification of the applicability of 10 U.S.C. 892 to such orders would be helpful.

Disposition of alleged violations of the Military Judge's orders in this case by Herbert L. Carter and Ronald L. Haeberle, referred to in the Trial Counsel's letter, appears covered by the foregoing discussion. The alleged conduct of David Dubois in attempting to persuade Corporal Anthony E. Broussard to discuss his expected testimony remains for consideration. We have examined Broussard's statement in the light of 18 U.S.C. 201 (Bribery), and 1505 (Obstruction of proceedings).

As to 18 U.S.C. 201, Dubois' reported offer to "get on the phone to New York and see about getting me my Vet or $7,000" in exchange for Broussard's cooperation appears, in the circumstances, to be of such an ephemeral nature as to invite a jury to acquit for failure to prove beyond a reasonable doubt the offer of "a thing of value." In addition, although Winthrop (p. 309) indicates that refusal of a military witness to testify would violate military law, it is arguable that status as a person subject to the UCMJ is not material to such person's duties as a witness. Thus disobedience of the order by Broussard would not have involved an "official duty."

With respect to 18 U.S.C. 1505, there is no element of officiality, but there must be a showing of intent corruptly to impede the due and proper administration of the law under which a proceeding is conducted. The section appears applicable to court-martial proceedings (See Rice v. United States, 356 F. 2d 709 (8th Cir., 1966) and cases cited therein), but nothing in Broussard's statement indicates that Dubois was aware of the purpose of the "no discussion of testimony" order given Broussard. Dubois was no doubt sufficiently aware of Broussard's relation to the proceedings to bring him within those provisions of section 1505 protecting witnesses (See Stein v. United States, 337 F. 2d 14 (9th Cir., 1964), cert. denied 380 U.S. 907). But there is nothing to indicate that Dubois had any intent to interfere with the content or scope of Broussard's testimony. Dubois' conduct must therefore be shown to relate to a conscious endeavor to impede the proceedings themselves. Dubois may well have assumed the order was a security or public relations measure and defend on the ground of lack of scienter.

Proof of Dubois' knowledge of the source and purpose of the order would not end the inquiry. Section 1505 was intended simply to make applicable to the proceedings of other governmental agencies the safeguards afforded by 18 U.S.C. 1503 to judicial proceedings. H. Rep. No. 1143, 76th Cong., 1st Sess. (1939). Examination of precedents on the question of intent under section 1503 indicates that motive of the defendant is important. United States v. Bradwell, 388 F. 2d 619 (1st Cir., 1968); Cole v. United States, 329 F. 2d 437 (9th Cir., 1964), cert. denied 377 U.S. 594. To be guilty, the defendant must specifically intend to do an act which he knows will tend to obstruct or impede. Knight v. United States, 310 F. 2d 305 (5th Cir., 1962); see also United States v. Kee, 39 F. 603 (D. S.C., 1889). While success or failure of an endeavor to obstruct is immaterial (United States v. Osborn, 350 F. 2d 497 (5th Cir., 1965), affirmed 385 U.S. 323 (1966), rehearing denied 386 U.S. 938), we believe Dubois might successfully defend on the ground that he honestly believed his "endeavor," even if successful, would not obstruct or impede. Compare United States v. Murdock, 290 U.S. 389 (1933), holding that unfounded but good faith claim of privilege precluded contempt action against a witness. The opinion of the Court of Military Appeals, supra, would indicate good basis for such belief on Dubois' part. "It is not enough that justice was in fact obstructed, a specific intent to violate the statute must exist." United States v. Pettibone, 148 U.S. 197 (1893).

Another factor for consideration is the wide license given activities of the press. In a contempt case, involving publication of matters relating to a trial, the Supreme Court held that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." Bridges v. California, 314 U.S. 252, 263 (1940). The Court refused to sustain contempt action against a publication, despite acceptance of findings that the publisher had willfully, wantonly, or recklessly withheld the truth of matters relating to a trial. Pennekamp v. Florida, 328 U.S. 331 (1946). These cases indicate great reluctance on the part of the Court to view activities of the press as obstructive of justice. "The particularly defined instances of violation of that section [1503] all relate to conduct designed to interfere with the process of arriving at an appropriate judgment in a particular case and which would disturb the ordinary and proper function of the court." Haiti v. United States, 260 F. 2d 744, 746 (9th Cir., 1958), citation omitted, emphasis supplied. We doubt that a judge, much less a jury, would find Dubois' conduct was so designed.

As the foregoing outline of factual and legal problems indicates so little likelihood of successful prosecution of Dubois, we do not believe the matter warrants further investigation.

Please advise if further developments in the current or related proceedings indicate a need and basis, short of legislation, for further assistance from this Department.

Sincerely,

Will Wilson

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Assistant Attorney General